HB 98-18
HC 1017/18
XREF HC 1015/18

TAWANDA MAWERE
versus
COMMISSIONER GENERAL OF POLICE N.O
and
SUPERINTENDENT NGIRAZI N.O

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 6 APRIL 2018 AND 12 APRIL 2018

Urgent Chamber Application

Applicant in person
L Musika with *L Dube* and *Ms N Ndlovu* for the respondents

MATHONSI J: This case centres on whether a police officer who has been or is being subjected to criminal prosecution arising out of conduct allegedly perpetrated by him or her can be subjected to a disciplinary trial under the Police Act [Chapter 11:10] in respect of the same conduct for which he or she has been or is being prosecuted. To a smaller extent, it calls upon the court to decide whether the disciplinary authority of the Police Service can be precluded from choosing the venue for the conduct of disciplinary proceedings. In other words can the court interdict the police from fixing a venue for the hearing of a disciplinary trial or choose such venue for the Police Service.

The late Pastor Charles Chiriseri was a Minister of Religion of note who led a well-known church, His Presence Ministries International. He died tragically in a road traffic accident at the 388 km peg along Harare-Bulawayo road on 15 September 2016. Among those who attended the scene of the accident was the applicant, a police constable, then based at ZRP Mbembesi. What transpired during the discharge of his duties at the scene has led to disciplinary action being taken against him wherein he has been summoned to appear before the court of a single officer, the second respondent, to answer a charge of contravening Paragraph 35 of the Schedule as read with section 29 of the Police Act [Chapter 11:10] (the Act), that is "acting in an

unbecoming manner or disorderly manner or in any manner prejudicial to good order or discipline or likely to bring discredit to the Police Service."

Apparently, prior to that charge under the Act being preferred against the applicant he was arraigned before a criminal court at Bulawayo on 4 May 2017 facing a charge of theft as defined in section 113 (1) (a) and (b) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. It was alleged that on 15 September 2016 at the 388 kilometre peg along Harare-Bulawayo Road, himself and two others, one of whom is now deceased, stole $200-00 which they had recovered from the body of the deceased cleric at the scene of the accident. Following a full trial they were, on 12 September 2017, found not guilty and acquitted by the criminal court.

As already stated, subsequent to the conclusion of the criminal prosecution, the police authorities have charged the applicant under the Act and the trial was set to commence before the second respondent at Harare on 4 April 2018. A day before that, the applicant launched this urgent application seeking the following interim relief:

> "INTERIM RELIEF GRANTED
> Pending the determination of this matter, interim relief is granted in the following terms:
>
> 1. 2nd respondent be and is hereby interdicted from proceeding with the hearing against the applicant until this matter is finalized.
> 2. The decision of the 1st respondent to charge the applicant be and is hereby stayed pending the finaliastion of this matter.
> 3. The 2nd applicant (*sic)* is interdicted from conducting the hearing in Harare until this court sanctions it."

The applicant states that he has filed a review application in this court in HC 1015/18 in which he is challenging the decision to bring further charges against him under the Act on the same set of facts upon which the charge of theft was brought against him in the criminal court wherein he was acquitted. According to him he has a right not to be tried twice on the same facts especially after being acquitted. He argues further that the police disciplinary tribunal is not a criminal court and can therefore not competently make a finding that he stole the money from the corpse when he has already been acquitted by the criminal court.

In addition, the disciplinary trial has been moved to Harare to accommodate a witness who is based there whom the authorities do not wish to inconvenience as she has had to fly to

Bulawayo to attend the hearings on a number of occasions to her prejudice. The decision to move the trial to Harare is an inconvenience to him because he has to meet travel and boarding expenses which he can scarcely afford. For that reason, the respondents should be stopped from moving the case to Harare. Instead, they should meet the expenses of the witness who should be the one coming to Bulawayo to testify. The witness in question is the wife of the late cleric, Petunia Chiriseri. I must state that Mr *Musika* who appeared for the respondents conceded that it was wrong to move the trial to Harare thereby prejudicing the applicant. He therefore agreed that a final order be made stopping the migration. Such an order will appear in the disposition part of this judgment.

Mr Mawere, who was self-acting submitted that it was incompetent to try him under the Act on the same set of facts because that violates the provisions of section 70 (1) (m) of the Constitution which provides:

> "(1) Any person accused of an offence has the following rights—
> ----
> (m) not to be tried for an offence in respect of an act or omission for which they have previously been pardoned or either acquitted or convicted on the merits."

He submitted that as the criminal court acquitted him of the charge of theft arising from the same facts, the respondents cannot lawfully rely on the same set of facts to found a charge of contravening paragraph 35 of the Schedule to the Act. Doing so offends against his constitutional rights enshrined in section 70 (1) (m) of the constitution.

The arguments raised by the applicant have been the subject of previous judicial pronouncements by this court. See *Nkululeko* v *Commissioner General of Police and Others* HB 11-16; *Sangu* v *Commissioner General of Police* HB 149-17. The question which arises really is whether disciplinary proceedings under the Act, can be regarded as criminal proceedings to the extent that where a force member has been subjected to criminal prosecution before an appropriate criminal court, preferring fresh charges in terms of the Act can be said to amount to double jeopardy. The starting point is to state that if the proceedings under the Act were the same as those before the criminal court and the applicant has already been acquitted as happened in this case, he would be entitled at law to raise the defence of *autrefois acquit*, that is to say that he has already been tried and acquitted by a court of competent jurisdiction and cannot be tried

on the same set of facts again. Section 70 (1) (m) of the Constitution is an embodiment of that defence. However that is certainly not the case and *autrefois acquit* does not avail itself to the applicant at all.

Let me point out at this stage that the Act was enactment for the purpose:

> "--- to provide for the establishment, organization and control of the Police Force; to provide for the functions of the Police Service and the conditions of service of its members; and to provide for matters connected with or incidental to the foregoing."

Section 8 of the Act gives the Commissioner General of Police, who is the first respondent in this application, the command, superintendence and control of the Police Force. It is through the Act that the first respondent commands and regulates the Force. It is a disciplinary tool reposed upon the first respondent for the discharge of his administrative function in the command, superintendence and control of Force Members. The authority of the first respondent in administering discipline derives from the provisions of section 221 of the Constitution. I am stating those obvious facts in order to make it clear that proceedings under the Act, as much as most of the terminology used takes the form of a criminal nature, are, for all intents and purposes disciplinary proceedings as opposed to criminal proceedings. The argument that those proceedings amount to trying the applicant twice and therefore subjecting him to double jeopardy are fallacious.

In fact to underscore that position one needs only make reference to section 30 (5) and section 34 (9) of the Act. In terms of section 34 (9):

> "A member who is found guilty of contravention of this Act by an officer shall not be regarded as having been convicted of an offence for the purpose of any other law."

This section must be read in conjunction with section 193 (b) of the constitution which gives a court or tribunal that deals with cases under a disciplinary law criminal jurisdcition, to the extent that the jurisdiction is necessary for the enforcement of discipline in the disciplined force concerned. It is therefore a special type of jurisdiction but does not detract from the provisions of section 278 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] which provides:

> "(1) In this section—

‘disciplinary proceedings’ means any proceedings for misconduct or breach of discipline against a public officer or member of a disciplined force or a statutory professional body, or against any other person for the discipline of whom provision is made by or under any enactment;
‘disciplined force’ means—

(a) the Defence Forces; or
(b) the Police Force; or
(c) the Prison Service; or
(d) any other force organized by the State which has as its sole or main object the preservation of public security and of law and order in Zimbabwe;
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(2) A conviction or acquittal in respect of any crime shall not bar civil or disciplinary proceedings 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.
(3) Civil or disciplinary proceedings in relation to any conduct that constitutes a crime may, without prejudice to the prosecution of any criminal proceedings in respect of the same conduct, be instituted at any time before or after the commencement of such criminal proceedings.”
(The underlining is mine)

That is the position of our law at the moment. Clearly a police officer who has been prosecuted in the criminal court is still liable for disciplinary action in terms of the Act because the Act deals with enforcement of discipline and the first respondent has the administrative authority to arrest indiscipline within the force. The above legislative interventions were designed to make police officers liable under both criminal, civil and disciplinary law for the same conduct. The first respondent, like any other employer, is entitled to prefer disciplinary charges against a member whether the member has been convicted or acquitted by the criminal court, it being trite that the same conduct can give rise to both criminal and civil sanction.

Even looking at the charges themselves, it cannot be said that they are the same. In the criminal court the applicant was charged with theft as defined in section 113 (1) of the Criminal Law Code. In terms of that section any person who takes property capable of being stolen knowingly and intending to permanently deprive the owner of it, shall be guilty of theft. Clearly that is a different charge from that in terms of paragraph 35 of the Schedule which relates to

acting in an unbecoming manner or engages in conduct likely to bring the Police Service into disrepute.

What this means therefore is that the applicant is standing on sinking sand. He would like to interdict disciplinary proceedings against him on the basis of a nonexistent case he would like to pursue by way of a review application. In my view he has failed to establish a right of whatever nature, to an interdict on that score. The application for an interdict must therefore fail as what is lawful cannot be interdicted.

Regarding the question of costs I am of the view that the concession made by Mr *Musika* in respect of the migration of the case to Harare atones for the costs incurred by the respondents which ordinarily should have followed the result. For that reason, and in the exercise of my discretion, I will not award costs.

In the result, it is ordered that:

1. By consent, the disciplinary trial of the application shall take place at the original venue in Bulawayo and not Harare.

2. The application for an interdict against the disciplinary trial is hereby dismissed.

3. Each party shall bear its own costs.

Civil Division, Attorney General's Office, respondents' legal practitioners