DETECTIVE CONSTABLE MLAMBO SG 070211Q
and
DETECTIVE CONSTABLE MATUBU
versus
THE TRIAL OFFICER N.O
(SUPERINTENDENT NYAGURA)
and
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MUZENDA J
HARARE, 13, 21 September 2018 & 10 October 2018

Opposed Application

N. Mugiya, for the applicants
N.M. Mabasa, for the respondents

MUZENDA J: This is an application for review where the two police detective constables are praying for the following relief.

IT IS ORDERED THAT:

1. The dismissal of the applicants' exception in terms of section 180 (2) and (4) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] be and is hereby set aside.
2. The prosecution of applicants' in terms of the Police Act and the obtaining allegations be and is hereby stayed permanently.
3. The respondents are ordered to pay costs of suit on client attorney scale, jointly and severally, one paying, the other to be absolved.

BACKGROUND

The two applicants' were charged under the Police Act [*Chapter 11:10*] for contravening para 35 of the Schedule of offences to the Police Act, as read with ss 29 and 34 of the said Act.

On count one, the state alleges as follows;

> "In that on 26 June 2017 and at or near C.I.D Chitungwiza offices, Chitungwiza, the defaulter, being a member of the Police Service, did wrongly and unlawfully acted in a manner reasonably likely to bring discredit to the Police Force, that is to say, the defaulter, after recovering a box containing 50 x 100ml bottles of bron cleer cough syrup from Rickson

> Ruzvidzo Mupamhanga converted 49 of the bottles to his own use. Thereafter the defaulter solicited and accepted $3 000 as bribe from Forward Office, in order to release Rickson Ruzvidzo Mupamhanga."

On the second count, the state further alleges!

> "Contravening paragraph 34 of offences to the Police Act, as read with sections 29 and 34 of the said Act (Omitting or neglecting to perform any duty or performing any duty in any improper manner."

In that on 26 June 2017 and at, or near CID Chitungwiza offices, Chitungwiza, defaulter being a member of the Police Service did wrongly and unlawfully performed duty in an improper manner, that is to say, the defaulter reacted to information without the knowledge and direction of the officer-in-charge as specifically laid down under order 21 of the Station Orders and Route instructions.

The charges are amplified in the state's precis as follows: both defaulters are duly attested constables in the Z.R.P and are currently stationed at C.I.D Chitungwiza. On 26 June 2017 the two reported for duty at their work place and around 1pm, they went to Unit L, where they arrested Mupamhanga for possessing of 50 x 100ml bottles of bron cleer cough syrup, after having entrapped him using Tawanda and Sibale. The two who were driving in a bluish-black motor vehicle took Rickson, Tawanda and Sibale, together with the recovered 50 x 100ml cough syrup to C.I.D Chitungwiza offices.

Upon arrival at the offices, the two parked their motor vehicle in the yard behind the ZRP building and proceeded upstairs and took 1 x 100ml bottle of the syrup leaving behind 49 bottles concealed in a black satchel in the two's motor vehicle. The defaulters detained Ruzvidzo Mupamhanga, in the holding cells, and later released him after having paid $20 fine for being found in possession of the cough syrup which they had booked in the exhibit book. After payment of the fine the two defaulters released Mupamhanga and they converted the remaining 49 bottles of the cough syrup to their own use. The following morning Mupamhanga and Moses Mutswiri made a number of recorded cellphone conversations with the two defaulters demanding for the 49 x 100ml bottles but the two defaulters would not budge prompting Moses Mutswiri to lodge a report with the Police General Headquarters Internal Investigations Department. The recorded cellphone conversations between Mupamhanga, Mutswiri and the defaulters can be produced in court as exhibit.

On 21 December 2017, the two defaulters appeared before the first respondent and pleaded not guilty to both charges. After the two pleaded, they excepted to the charges in terms of section 180 (2) (f) and 4 of the Criminal Procedure and Evidence Act. The applicants argued in their exception to the charges that the first respondent had no jurisdiction to deal with the disciplinary matter more particularly, in that in terms of the law no court has jurisdiction to deal with a matter where two or more accused persons are jointly charged with charges appearing on separate indictments. The applicants also averred that since they were facing criminal charges, they were not to be tried again for disciplinary offences under the Police Act. The defaulters further alleged that the two charges were vague and embarrassing and are not "pleadable". As a result the defaulters submitted that they ought to be acquitted. The first respondent dismissed the exception and ordered that the matter proceed to trial. The applicants then applied for the review of the proceedings and filed their application on 30 January 2018 and they outlined the grounds of review as follows:

> "1. The applicants seek to review proceedings presided over by the first respondent against him on the grounds of gross procedural irregularities in that:
> (a) the first respondent accorded himself jurisdiction which he is not provided for by the law;
> (b) the first respondent caused the applicants to plead to allegations which are vague and embarrassing and contrary to the provisions of s 70 (1) of the Constitution;
> (c) the first respondent tried the applicants on the allegations for which the applicants had already been charged in terms of the ordinary law."

The trial officer, the first respondent is opposing the application. In his opposing affidavit, he states that the applicants acted together in their performance of duty, they were facing identical offences, on preparing the indictments, the law allows the state to prepare separate charges but the same law can permit a joint trial where the defendants committed the offence jointly, and at the same time. First respondent adds that both charges pleaded to by the applicants are far from being vague and the defaulters, the applicants, were not compelled to plead to the charges but in full consultation with their legal advisor voluntarily tendered their pleas and then applied for an exception. They were able to comprehend and perceive what the state was alleging, where it was not clear, the state summary outline cured the hazy areas, the facts the allegations and the mischief committed by the applicants were clearly encapsulated and the criticism by the applicants on grounds of vagueness is misplaced.

The first respondent also explains that the fact that the applicants are facing criminal allegations does not bar the state or police to proceed with disciplinary proceedings regarding breach of provision of the Police Act. Such disciplinary proceedings can be instituted at any time before or after the commencement of such criminal proceedings. First respondent insists that he has jurisdiction to try the applicants. He explained why he dismissed the exceptions. The second respondent associates himself and aligns his averments with those of the first respondent and prays that the application for review be dismissed with costs as well.

The applicants in their heads of argument submitted that this court has inherent jurisdiction to entertain an application for review and cited s 27 of the High Court of Zimbabwe Act which outlines three grounds for review:

a) absence of jurisdiction on the part of the court
b) interest in the cause, bias, malice or corruption on the part of the presiding officer and;
c) gross irregularity in the proceedings or decision.

The applicants further submitted that the question to be determined by this court is whether or not proceedings presided over by the first respondent are in accordance with real and substantial justice. As can be noted this issue for determination raised by the applicants does not appear on the face of the application for review, nor is it related to any three grounds outlined in s 27 cited herein.

The applicants contend that the law does not allow an officer to try two separate accused on two indictments at one and at the same time. They aver that dual prosecution of the applicants was not procedural. They also allege that the charges were vague and improper. There is no reference nor description within the indictment, charge or synopsis of the duty which applicants are alleged to have performed improperly. The charges were meaningless and incapable of being pleaded upon as they are confused and not clear whether applicants performed or omitted to perform in an improper manner or disorderly manner or in any manner prejudicial to the good order a discipline or unreasonably likely to bring discredit to the police service.

The respondents in their heads contend that s 180 (2) (f) deals with pleas whereby the accused admits having been served with a copy of his charge sheet but alleges that the court has jurisdiction to hear the matter. They add that the applicants were being charged jointly in terms of s 190 of the Criminal Procedure and Evidence Act and hence the issue of separate charge sheets is

a mere administrative issue. The applicants were accomplices in the commission of the criminal offences and the state was relying on the same facts and evidence, there was thus no need for the state to unnecessarily split charges since the two acted in common purpose. Section 35 of the Police Act states that procedures during police disciplinary hearings shall be as near as may be as those prescribed in criminal cases as such the fact that two charge sheets based on same evidence and facts were adopted, does not in any way render the procedure irregular.

On 21 December 2017 the two applicants appeared before the first respondent in a joint trial and pleaded to the charges. They were legally represented by the current legal practitioner. They should have raised any objection with the court over the vagueness or otherwise of the charges and the charge sheet could have been amended, but that did not happen. The respondents aver that there was no prejudice suffered by the accused. They referred this court to the matter of *S* v *S Phambili* 1995 (2) ZLR 337 (s) where the court stated that any embarrassment which might have resulted from the defect in the charge sheet should have been raised before plea. They also submitted that an exception to the charge is dealt with under s 171, if the accused pleads first and the defence excepts thereafter to the charge, the court has a discretion whether to dispose of the plea or the exception.

On the aspect of dual prosecution of police details in criminal trial and police trials the respondents cited the matter of Sergeant *Khanyeza* v *The Trial Officer and Anor* HH 311/18 where s 35 (1) of the Police Act was dealt with, the court held that:

> "the interpretation of s 45 (3) of the Police Standing Orders Volume 1 and S 278 of the Criminal procedure and evidence act, hinges on the interpretation of s 193 (b) of the Constitution. In this case the counsel argued that interpreting s 193 (b) of the Constitution suggests that disciplinary processes are interchangeable with ordinary proceedings. The court did not agree with this assertion. Instead it suggested that disciplining and criminal proceedings had entirely different objectives and even on the ones Disciplinary trial were said to be meant for maintenance and enforcement of discipline in the Police Force whereas the criminal proceedings were assumed at maintaining law and order in general. It was also the court's view that disciplinary processes are not synonymous with criminal records but criminal trial; were synonymous with such records."

The court in the above cited case concluded that the issue of criminal record makes the interpretation of s 193 (b) of the Constitution be limited to enforcement of discipline in the Police. The criminal jurisdiction given to disciplinary court and not otherwise for the enforcement of discipline only. It was also the court's view that the provision of the Police Standing Orders cannot

override the general provision of s 278 of the Criminal Procedure and Evidence Act and s 193 (b) of the constitution.

The respondents further submitted that the charges levelled against the applicants are not vague and embarrassing. In the matter of *ZFC Ltd* v *Kettex Holdings (Pvt) ltd and Others* HH 253/15 MATANDA-MOYO J held the test for a pleading that is vague and embarrassing involved a "two-fold consideration". The test involves lack of particularity and prejudice to the excipient. The resultant effect would be that the pleading is contradictory and not pleadable in the attendance. In any case, the respondents confirmed, any defects in the charge sheet in respect of any offence the defect can be cured by evidence at the trial (S 203 of the Criminal Procedure and Evidence Act).

In response to the applicant's reference to s 68 (2) of the Constitution, the respondent contend that the first respondent gave his ruling in an open court and the record of proceedings shows that the ruling and reasons were furnished to the applicants.

The following aspects are adjudged from the record to be common cause in the application:

(i) The applicants brought this application for review ensuing from, disciplinary proceedings which were incomplete.

(ii) The applicants had pleaded to both charges;

(iii) These proceedings are not brought in terms of s 14 of the High Court Act; that is the one for a declaratur.

MALABA J.A. (as he then was) in the matter of *Attorney General* v *Makamba*, 2005 (2) ZLR 54 (S) at 64 - C-E remarked as follows:-

> "The general rule is that a superior court should intervene in uncompleted proceedings of the lower courts only in exceptional, circumstances of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be redressed by any other means, or where the interlocutory decision is clearly wrong as to seriously prejudice the rights of the litigant"
> (See also *Ismail* v *Additional Magistrate Wynberg and Another*; 1963 (1) SA 1 (A) *per* STEYN CJ at p 4. *Ndlovu* v *Regional Magistrate Eastern Division & Anor* 1989 (1) ZLR 264 (H) at 269 C – 270 G. *Masedza & Ors* v *Magistrate Rusape & Anor* 1998 (1) ZLR 36 (H) at 41.C).

In *Masedza & Ors* v *Magistrate, Rusape & Anor* (*supra*) DEVITTIE J was confronted with a similar situation as obtaining in the present matter as the applicants had sought a stay on criminal proceedings which were not complete to enable them to pursue a review application against the

decision of the trial magistrate refusing an application for recusal. At p 37 F-G, the learned Judge had this to say:

> "In determining the power of a superior court to intervene in intermittent criminal proceedings, a distinction must be drawn between an appeal and a review. Herbestein & van Winsen *Civil Practice of the Supreme Court of South Africa*, 4 ed p 932 explain the distinction:
>
> > 'The reason for bringing proceedings under review or appeal is usually the same to have the judgment set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law the appropriate procedure is by way of appeal. Where however the real grievance is against the method of the trial, its proper to bring the case on review. The first distinction depends therefore on whether it is the result only or rather the method of the trial which is to be attacked. Naturally, the method of trial will be attacked on review only when the result of the trial is regarded as unsatisfactory as well. The giving of a judgment not justified by the evidence would be a matter of appeal and not a review, upon this test. The essential question in review proceedings is not the correctness of the decision under review but its validity.
> >
> > Where in unterminated proceedings an interlocutory decision is sought to be set aside on grounds that the court has made a wrong decision in the discharge of its functions, the appropriate procedure is by way of appeal. The general principle is that an appeal will be entertained only after.'"

This court entirely agrees with the above sentiments and will only exercise its review jurisdiction to intervene in unterminated criminal proceedings where the irregularity is gross or where it is such that an injustice might result or where justice might not be attained by other means.

After the first respondent had dismissed the exception the applicants should have opted to proceed with the hearing until the matter was finalized. I agree with the respondents' counsel that section 171 (2) of the Criminal Procedure and Evidence Act provides an option to an accused, who pleads and excepts together, but it shall be in the discretion of the hearing officer whether the plea or exception shall be first disposed of. The hearing officer (first respondent) could not exercise his jurisdiction because the applicants chose to apply for review of the proceedings.

The applicants are moving this court in terms of the draft order to allow the exception which was dismissed by the first respondent. In other words the applicants are not happy with the dismissal of the exception and the application for review is a disguised appeal, such a course adopted by the applicants is not supported by any cited law and is not encouraged by this court. It is my considered view the applicant have failed to establish any irregularity on the part of the first respondent which would justify interference with his discretion to dismiss applicant's exception.

Section 190 of the criminal Procedure and Evidence Act permit joint trials and the respondent's submissions on their point sounds valid. The charges as argued by the respondents were not vague and the applicants, by pleading to them, shows that they comprehended them.

Legal practitioners should properly advise their clients, more particularly in unterminated proceedings where an interlocutory decision is given by a trial officer to proceed with the hearing than to hurriedly bring a matter for review where the applicants will ask the court to grant permanent stay of proceedings relying on flimsy grounds for such an application.

As clearly slated in the matter of *Masuku* v *Delta Beverages 2012* (2) ZLR 112 (H)

> "The determining factor in the position of an application for review is the irregularity of the procedure adopted by a tribunal board or presiding *quasi-judicial* board. An application for a review is validated or authenticated not by its mere title but by the facts which should be a complainant regarding the irregular procedure adopted by the authoritative body whose determination has prejudiced applicant"

(See also *Kwete* v *African Commercial Publishing and Development Trust and Others*. HH-216-98; *Matshimbare* v *Gweru City Council* s-183-95)

The proceedings alluded to in s 27 of the High Court Act refer to the entire process from the time the charge is put to the accused up to the conclusion of the hearing, if the method used by the court or tribunal is challenged, the higher court will examine the entire process and determine whether there are grounds justifying interference by it. In this present application, the applicants have dismally failed to establish such basis, more particularly taking into account that the proceedings were still incomplete.

Disposition

The application is dismissed with costs.

Mugiya & Macharaga Law Chambers, legal practitioners for the applicants
Civil Division of the Attorney General's Office, legal practitioners for the respondents