TONDERAI NJANIKE
versus
THE CHAIRMAN POLICE SERVICE COMMISSION

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 17 September 2014 & 29 October 2014

Opposed Application

J. Mandewere, for the applicant
Miss *C. Saruwaka*, for the respondent

MWAYERA J: The applicant approached the court with an application for review of the decision of the respondent wherein the respondent confirmed the decision of the single Trial Officer of convicting the applicant of contravening para 35 of the schedule to the Police Act [*Cap10:11*] that is

> "Acting in an unbecoming manner or in any manner prejudicial to good order or reasonably likely to bring discredit to the Police Force."

I dismissed the application and outlined reasons thereof.

The applicant has requested the reasons for dismissal of the application and such reasons for my decision are herein spelt out.

The applicant who was legally represented, presented an application for review devoid of grounds for review as required by rules of this court. Order 33 r257, makes it clear that a 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 application on the face of it is fatally defective as the applicant only alluded to grounds of review in the founding affidavit. Further the record of proceedings before the single trial officer was not attached. At hearing the parties made concessions requesting the court to exercise its discretion and hear the matter on merit. In exercising discretion the court viewed the larger picture of justice upon entertaining the matter on merit.

The applicant brought the matter for review on basis that it viewed the decision by the respondent to be not only irrational but outrageous in its defiance of logic.

The background to the matter as observed from papers is that the applicant was a constable stationed at ZRP Masvingo Offices. The applicant was discharged from the police force on 22/3/11 after being found to be "unfit to remain in the police force" in terms of s 50(4) of the Police Act [*Cap11:10*].

Allegations which prefixed the charge and finding were that on 16 November 2010 the applicant was on duty manning the charge office. A suspect one Faith Phiri who was pregnant requested to go to the toilet at around 0200hrs. The applicant escorted her and while the suspect was using the toilet the applicant is alleged to have opened the door and asked for sexual favours. He was denied same and he imposed himself on the said Faith and raped her. The suspect reported the case to a police officer who took over duty from the applicant.

It was against this backdrop that the applicant was charged in terms of para 35 of the Police Act [*Cap 11:10*] for acting in an unbecoming manner or in any manner prejudicial to good order or discipline or reasonably likely to bring discredit to the Police Force.

The applicant was convicted before a single trial officer and sentenced. He followed the internal channels and his appeal to the Commissioner General of Police was dismissed and further appeal to the Police Service Commission hit a brick wall. The present application is for review of the Police Service Commission decision.

The rules and even the High Court Act in particular s 27 is the legal basis for such review. Section 27 (1) (c) states that

> "Subject to this Act or any other law, the grounds on which any proceedings or decisions may be brought on review before the High Court shall be
> (a) ----------
> (b) ----------
> (c) Gross irregularity in proceedings or decision"

The question to be decided by this court is whether or not the decision by the Police Service Commission was so irrational as to defy logic; or put differently whether or not the alleged conduct of the applicant was unbecoming to such an extent that it warranted him being discharged for conduct putting the Police Force into disrepute.

In casu it is important to consider what facts were placed before the Police Commission and *juxtapose* those with the conclusion reached so as to measure whether or not such decision defied logic such that no reasonable person having applied their mind to

such facts would come up with the same conclusion. The applicant in the present case is not challenging the manner in which proceedings were conducted but that the decision is irrational as it is not supported by the facts which were presented before the decision maker that is the Police Service Commission.

In casu the facts before the Police Service Commission are that the applicant escorted a female suspect to toilet and allegedly opened the door before she finished relieving herself and he allegedly raped her. It is these circumstances that led to the applicant being held unfit for police force. The argument that the criminal matter of rape under the Criminal Law Codification Reform Act [*Cap 9:23*] had not yet been concluded at the time of the disciplinary hearing has no effect or force on the disciplinary proceedings. There is no bar to disciplinary hearings where Criminal Charges emanating from the same set of facts are pending. The degree of proof is different for the obvious reason of the distinction between disciplinary hearing and Criminal Hearing. The applicant during review sought to place evidence that the complainant withdrew her statement but this is new evidence which was not placed before the trial officer and equally the appellant authority. The evidence which was not before the trial officer and the appellant authority cannot stand as a basis for imputing that the decision reached was illogical.

What is clear from papers and record of proceedings is that the conclusion that the applicant had acted in an unbecoming manner or manner prejudicial to the good order or discipline or reasonably likely to bring discredit to the Police Force is well anchored on the evidence adduced on record. It is that record which the appellant authority the respondent based its decision on. The applicant's challenge related to the substantive correctness of the decision rather than the procedural irregularities committed during the hearing. The evidence available before the trial officer was that the applicant had escorted to toilet and raped a pregnant female suspect. The issue of alleged subsequent withdrawal was not before the trial officer and the appellant authority that is the respondent. In the absence of evidence to refute such allegations there would have been no basis for the respondent to up turn the decision of the trial officer and Commissioner of Police. The decision was not completely irrational and divorced from the facts which were before the respondent.

On the issue of irrationality I sought guidance in the case of *Secretary for Education and Science* v *Tameside Metropolitan Borough Council* 1977 AC1014 at 1025-1026 were LORD DENNING cautioned that

> "No one can properly be labelled as being unreasonable unless he is not only wrong but unreasonably wrong, so wrong that no reasonable person could sensibly have that view"

In casu the respondent was faced with evidence of a male police detail having escorted and raped a pregnant female suspect and it agreed with the chain of trial finding that such conduct made the applicant unfit for the Police Force and hence confirmed the decision. Only the decision of the Police Service Commission is being challenged on review. The respondent's decision was based on facts placed before it and it was not for the respondent to carry out an investigative role in a bid to adduce further evidence. The procedure followed in bringing the matter to the respondent is not challenged but the decision. Given the set of evidence placed before the respondent one cannot say the decision was removed from the facts so as to render it irrationally illogical.

The decision was based on the facts presented before the respondent and accordingly the application has no merit and is accordingly dismissed with costs.

Sawyer & Mkushi, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners