CONSTABLE KAISI
versus
THE TRIAL OFFICER (SUPERINTENDENT SITHOLE)
and
COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 16 MAY 2017 AND 1 JUNE 2017

Opposed Application

N Mugiya for the applicant
L Musika for the respondents

MATHONSI J: This is a court application for review made in terms of s27 of the High Court Act [Chapter 7:06]. When the applicant filed the application he relied on one ground of review namely that:

> "The conviction of the applicant by the 1st respondent which was confirmed by the 2nd respondent was not done in terms of the law of natural justice and the entire proceedings ought to be set aside."

The respondents filed opposition to the application based on that ground of review. Subsequent to that the applicant filed an answering affidavit on 9 March 2017. His heads of argument were then filed on 20 March 2017 prompting the respondents to file their own heads of argument on 29 March 2017. With all the necessary documents in the record I set down the matter for hearing on 16 May 2017.

It was after service of the notices of set down on the parties, which was done on 3 May 2015, that the applicant proceeded to file a notice of amendment on 12 May 2017 giving notice that he intended to seek leave of the court at the hearing of the matter to amend the court application by deleting the sole ground of review and substituting new grounds in the following:

"GROUNDS FOR REVIEW

1. The trial proceedings presided over by the 1st respondent against the applicant and confirmed by the 2nd respondent on the 19th of December 2016 are pregnant with gross procedural irregularities in that;
   (a) The 1st respondent convicted applicant on a wrong charge.

(b) The 1st respondent's record of proceedings is in shambles.
(c) The 1st respondent failed to justify his sentence.
(d) The respondents convicted applicant on the basis of evidence which did not establish the essential elements of the offence for which he was charged with."

At the hearing of the matter Mr *Mugiya* who appeared for the applicant did not move an application for an amendment as notified. He launched into his submissions stating that he generally abides by his heads of argument. I immediately demanded to know from him the status of the notice of amendment of the court application supported by affidavit and at the eleventh hour especially regard being had to the fact that the respondents would not have an opportunity to respond to the new grounds of review having filed their opposition and heads of argument already.

Mr *Mugiya* did not justify the adoption of that course of action in application procedure and did not refer me to any authority entitling the applicant to amend the grounds of review the way he attempted to do. He did not even move for the grant of the amendment but proceeded to submit on the merits in terms of the new grounds. In my view the notice of amendment was improperly filed and did not result in the amendment of the pleadings without being granted by the court. It has to be ignored. In all fairness to the applicant however, the new grounds were merely an expansion of the sole ground that he relied upon in the application calling into question the propriety of the proceedings conducted by the first respondent. It must have been informed by a realization that the original ground was vague and too general to mean anything.

The applicant, a police constable based at Mzilikazi police station in Bulawayo appeared before a single officer on 4 January 2016 facing a charge of contravening paragraph 35 of the Schedule to the Police Act [Chapter 11:10] as read with sections 29 and 34 of the same act, that is acting in an unbecoming or disorderly manner or in any manner prejudicial to good order or discipline or reasonably likely to bring discredit to the police force. The allegations were that at about 0900 hours on 10 December 2015 the applicant was a member of a squad of officers that was manning a roadblock in Mzilikazi along Old Victoria Falls Road in Bulawayo. A team of officers from Police Internal Investigations arrived at the scene intending to check on the conduct of police business at the road block.

After pulling off the road in their vehicle the team called the police officers to their vehicle for a routine audit. While other officers complied, the applicant allegedly ran away proceeding into a trench or drainage line. As one of the officers gave chase and was closing down on him he was observed throwing an object into the drainage which later turned out to be $20-00 made up of different denominations of bank notes. When he was ordered to pick his money the applicant is alleged to have become belligerent and rude flatly refusing to comply. An attempt to apprehend him drew the worst out of him as he resisted arrest.

It is said that when the officers checked the group's books where their personal belongings are declared and recorded, it turned out that the applicant had not declared the amount of $20-00 in question raising suspicion that it may have been bribe money. The applicant denied the allegations and stated that at the material time he had gone behind the bushes to relieve himself and denied throwing away the money in question or being violent and rude.

Following a full trial in which the four officers from Police General Headquarters' internal investigations department testified on how the applicant had taken to his heels and thrown the money into the sewer drain before making a scene in public as he resisted arrest the applicant was found guilty and sentenced to fourteen days detention at Fairbridge Detention Barracks. He appealed against the conviction and sentence to the Commissioner General of Police.

In a judgment dated 19 December 2016 the Commissioner General dismissed the appeal against conviction but upheld the appeal against sentence noting that the trial officer had not given reasons for the sentence that he imposed. Taking into account the mitigating factors which the applicant had raised before the trial officer and that he was a repeat offender who had, on 4 January 2013, been convicted of contravening paragraph 35 of the Schedule to the Police Act, the Commissioner General reduced the sentence to ten days detention.

The applicant has now brought those proceedings on review before this court. In his founding affidavit, the applicant stated that his conviction was not in accordance with the due process of law in that he was convicted on a wrong charge because conduct chargeable under paragraph 35 of the Schedule to the Police Act, should take place in the presence of members of the public who should find it unbecoming thereby bringing discredit to the police force. As the

conduct complained of did not occur in the presence of members of the public the charge was not sustainable. The record of proceedings "is confused and confusing", which is a serious irregularity. The first respondent did not justify the sentence imposed and the evidence did not establish the essential elements of the offence. In respect of all the foregoing factors forming the basis of his complaint the applicant did not set out any particulars of the complaint preferring to leave the averments in outline. It is trite that an application stands or falls on its founding affidavit; *Mobil Oil Zimbabwe* v *Travel Forum (Pvt) Ltd* 1990 (1) ZLR 67 (H) 70.

The two respondents opposed the application taking a preliminary point that the application for review was made outside the eight weeks period provided for in r259 of the High Court of Zimbabwe Rules, 1971. This is because the proceedings before the first respondent were completed on 4 July 2016. The application was only filed in this court on 27 January 2017 well out of time without seeking and obtaining condonation of the late filing of the review application.

I should dispose of that point right away. After the first respondent handed down judgment on 4 July 2016, the applicant noted an appeal against that judgment to the second respondent in terms of s34 (7) of the Act which provides:

> "A member convicted and sentenced under this section may appeal to the Commissioner General within such time and in such manner as may be prescribed against the conviction and sentence and, where an appeal is noted, the sentence shall not be executed until the decision of the Commissioner General has been given."

The applicant exercised his right of appeal provided for in the Act as he is entitled to do because in our law a party is required to exhaust all internal or domestic remedies available before making an approach to this court. A failure by a party without good and sufficient cause, to exhaust domestic remedies available to them is generally fatal to the application. See *Sithole* v *Senior Assistant Commissioner and Others* HB 17/10; *Tutani* v *Minister of Labour & Other*s 1987 (2) ZLR 88 (H); *Communications Allied Services Workers Union of Zimbabwe* v *Tel-One (Pvt) Ltd* 2005 (2) ZLR 280 (H).

A litigant is expected to exhaust available domestic remedies unless there are good reasons for not doing so. See *Makarudze and Another* v *Bungu and Others* 2015 (1) ZLR (H) 27B-C. This court is loath to exercise its general review jurisdiction in a situation where a

litigant has not exhausted the domestic remedies available to him or her. See *Moyo* v *Gwindingwi N.O & Another* 2011 (2) ZLR 368 (H) 371 E; *Chawora* v *Reserve Bank of Zimbabwe* 2006 (1) ZLR 525 (H).

In that regard the applicant was correct to pursue his right of appeal provided for in s 34 (7) to the Commissioner General before seeking review. To that extent the termination of the proceedings before the first respondent on 4 July 2016 was irrelevant. The running of the period of eight weeks allowed by r259 during which to bring a review application only started when the appeal was determined on 19 December 2016. Therefore when the applicant filed this review application on 27 January 2017 he was still within the period allowed to bring an application for review. There is no merit in the preliminary point taken by the respondents.

On the merits of the application the respondents denied that there was any impropriety or irregularity in the conduct of the trial which was done in accordance with the law. In respect of the charge they expressed the view that the charges arose from the applicant's conduct at a public place in the full view of members of the public who witnessed the applicant conduct himself in an unbecoming manner. The record of proceedings was generated in a proper manner and reflects what transpired at the hearing.

Regarding sentence, the respondents' position is that while the first respondent did not give reasons for the sentence of fourteen days detention he imposed, that was corrected by the second respondent on appeal. In fact, giving full reasons, the second respondent reduced the sentence to ten days detention.

Mr *Mugiya* for the applicant touched on a number of issues. He submitted that the record of proceedings does not consist of a question and answer session in the testimony of the witnesses. An examination of the evidence shows that apart from the introductory part where the witness is recorded giving his particulars and background information, the rest of the testimonies of all the witnesses are recorded in question and answer form. Not having attempted to impugn the contents of the evidence as having been altered or misrepresented, Mr *Mugiya* was indeed clutching at straws. There is nothing wrong with the record and it is certainly not in shambles as alleged. Nothing more needs to be said about that.

Mr *Mugiya* also attacked the proceedings on the basis that the first respondent did not justify the sentence. While this is so in that the reasons for sentence do not appear anywhere in

the record, I agree with Mr *Musika* for the respondents that it is an irregularity which was corrected on appeal. Even though the second respondent devoted a lot of time in his judgment on appeal to the issue of sentence, the applicant still proceeded in this application as if that issue was not addressed at all.

At page 4 of his judgment the second respondent stated:

> "The trial officer did not give reasons for sentence and this is a fatal irregularity. See the *AG* v *Globecast Africa* HH 114-08. This court therefore must initiate the sentencing afresh. See *S* v *Sidat* 1997 (1) ZLR 487 (S). In his mitigation appellant submitted that he is a family man and a breadwinner. He is diabetic hence requires a special diet. He prayed for mercy and rehabilitative sentence, pointing out that the conviction alone is a dent on his career. Appellant however is a repeat offender who was once convicted on 4 January 2013 for contravening the same paragraph. The allegations on which he has been convicted have corruption connotations. The position of the organization and the nation is zero tolerance on corruption. In *S* v *Ngara* 1987 (1) ZLR 91 (SC) it was held thus:
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> > 'corruption of any form is viewed by the courts with abhorrence, particularly when resorted to by police officers whose duty it is to uphold the law and by their conduct set an example of impeccable honesty and integrity. Deterrence and public indignation must predominate above all other factors in the assessment of the penalty.'
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> Taking into account both the mitigatory and aggravatory circumstances of this case, a custodial sentence is called for. The detention barracks will cater for his special diet and should he face any medical challenges, there is Fairbridge Camp Hospital nearby. Accordingly, appellant is sentenced to ten (10) days imprisonment at Fairbridge Detention Barracks."

In my view the anomaly in the sentence imposed by the single officer was adequately addressed by the Commissioner General and indeed corrected. The applicant cannot find joy in that regard.

Upon realizing that the door had been closed in that direction which, I must say, was raised only to the extent that the sentence was not justified in the papers, Mr *Mugiya* changed gear. He submitted instead that the second respondent should not have alluded to the issue of corruption which had not been dealt with and placed before the applicant at the first instance. Surely that cannot be seriously said. For a start, the applicant did not challenge the sentence on that ground in both his affidavits in support of this application meaning that Mr *Mugiya* was

leading fresh evidence from the bar. I have already stated that an application stands or falls on the founding affidavit.

Secondly, this is a case where the applicant was found with bank notes amounting to $20-00 at 0900 hours in the morning while manning a roadblock. In terms of the police procedures, officers manning a roadblock are required to declare and surrender their valuables like money and cellphones to their leader before they commence duty at a roadblock. The applicant had not declared the money in question. Not only that, upon being called to attend an audit, he took to his heels and proceeded to throw away the money. If what the applicant had engaged in was not corruption, then nothing is. Therefore it was within the purview of the appeal court to take judicial notice of the spectre of corruption in assessing sentence, for corruption it was that it was dealing with. This was particularly so as the applicant had a relevant previous conviction.

A sentencer cannot close his or her eyes to the realities of the society we live in. He or she cannot ignore obvious facts because an unrepentant offender expects to be treated with kids gloves for a serious infraction which calls for a stiff penalty.

I will now move on to deal with the final issue relied upon by the applicant in seeking to overturn the proceedings, that of a wrong charge. I must say that one gets this distinct impression that the applicant would like to pick and choose the charge that should be preferred against him. Mr *Mugiya* submitted that the charge of contravening paragraph 35 of the Schedule cannot stick because there were no members of the public whose regard of the police service was compromised. He relied on the authority of *S* v *Pearce* 1982 (2) ZLR 303.

As I shall demonstrate hereunder, that case has no application to the present matter and is clearly distinguishable. For now let me state that the evidence on the circumstances of the applicant's apprehension on the morning of 10 December 2015 as presented by the four witnesses who were involved was not contested in any meaningful way. It was accepted by the trial officer as credible. It is not without reason that Mr *Mugiya* steered clear of that evidence in argument preferring to argue technicalities. I must say that if the circumstances did not involve a police officer in a public place and in full uniform, it would have been comical.

The place where the events unfolded is next to the high density suburbs of Mzilikazi and Makokoba. One can only imagine the awe with which the morning commuters and passersby witnessed the applicant absconding from the internal investigating team, getting into a sewer

drain, throwing the bank notes presumably aiming at the moving sewage to take away his source of shame but missing the moving scum and landing the notes on the side by the grass. Upon being confronted, he then waxed violent shouting at the top of his voice in the process resisting arrest as he tried to disown the money. It must have been quite a spectacle. Even if one were to be generous and agree with his own version that this altercation occurred when he was relieving himself behind the shrubs, surely is that what is expected of a police officer? To run behind the shrubs on being called for an audit and start relieving himself in public? Certainly not.

As stated the charge preferred against the applicant is contravening paragraph 35 of the Schedule as read with s29 and s34 of the Act. In terms of s29 a member who contravenes any provision of the Act or an order made thereunder or who commits an offence specified in the schedule shall be guilty of an offence and liable to a fine not exceeding level ten or to imprisonment for a period not exceeding five years or to both. In terms of paragraph 35 of the Schedule it is an offence if a member is found:

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

I have stated before in *Assistant Commissioner Matsika* v *Commissioner General of Police* HB 67-17 that the words "unbecoming" and "disorderly" are separated by the word "or" and are therefore disjunctive. The same applies to the phrases "any manner prejudicial to good order or discipline" and "reasonably likely to bring discredit to the police force." The paragraph is therefore an omnibus containing a number of offences. One does not have to commit all of them to be convicted it being enough for instance that he or she acted in an unbecoming manner. Another one may act only in a disorderly manner while another may act in a manner prejudicial to good order.

A trial under the Police Act is disciplinary in nature and is designed to regulate the conduct of members. As I said in *Assistant Commissioner Matsika, supra*:

> "The Police Service is often colloquially referred to as 'the disciplined or uniformed force' for a reason. It is that discipline is administered strictly and the conduct of its members is strictly regulated. The enforcement of discipline is the corner stone of Police Service and can never be compromised. If it were compromised there would be dire consequences to national security. It is for that reason that the conduct of members is regulated 24 hours a day."

In *S* v *Pearce, supra,* the court quashed the conviction of an officer who had made an unauthorized borrowing of property from Masvingo Show grounds which he packed after a horse show at that ground and took away for use at another show scheduled for Bindura. He had written a letter to Masvingo show grounds stating that he had taken the table and chairs for use and would return them in a week or two. The letter was not seen by the custodian of the property who did not even know that the chairs had been taken and could not even identify them.

SQUIRES J made this pronouncement at 307C-E:

> "Now, in the first place, whether conduct is 'unbecoming' or 'reasonably' likely to bring discredit to the Force' seems to me to be very much a matter of degree. And, secondly, it must surely be conduct that is objectively known to, or discernible by, someone else who is affected or offended by it, that is to say, someone to whom it is unbecoming or in whose eyes the Force is thereby brought into discredit. In the same way as the utterance or publishing of defamatory words do not constitute defamation unless there is publication to some audience, so someone must be aware of the conduct in order for the force to be discredited or for it to be thought unbecoming or disorderly. In the present case, no one knew of the accused's act in borrowing the table and chairs, not even retrospectively on receipt of the letter."

Where a police officer conducts himself or herself the way the applicant did on that day, at a roadblock in broad daylight and on a busy road in a high density suburb, there is no need for the authorities to lead evidence from members of the public that they found the conduct unbecoming or that in their estimation of the Police Force was reduced. It is a case of *res ipsa loquita* and clearly it cannot be disputed that members of the public were treated to a free circus. In my view the evidence led was enough to prove the offence in terms of paragraph 35. This case is distinguishable from *S v Pearce, supra*.

We cannot have police officers behaving like rogue elements running into sewer drains or even running behind shrubs being chased by internal investigations officers to hide incriminating evidence. It brings the entire edifice to the ground. Therefore the charge was proper and the evidence proved all the essentials of the charge.

In the result, the application is hereby dismissed with costs

Mugiya & Macharaga Law Chambers, C/o Muzvuzvu & Mguni Law Chambers applicant's legal practitioners
Civil Division of the Attorney-General's Office, 1st respondent's legal practitioners