SERGEANT MLOYIE 048003J
versus
THE TRIAL OFFICER
(SUPERINTENDENT MAKUNIKE)
and
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 20 June 2016

Ruling

N Mugiya, for the applicant
Ms *A Magunde*, for the respondent

FOROMA J: This application was instituted as an urgent application. The applicant a member of the police in terms of the Police Act was charged with contravening para 35 of the Schedule to the Police Act [*Chapter 11:10*] as read with s 29 A (d) and 34 (1) of the said Act as amended by the Criminal Penalties Act Number 22/2001 that is to say that the applicant was being accused of acting in an unbecoming manner prejudicial to discipline or reasonably likely to bring discredit to the police force in that on or about the 5th day of March 2016 and at (or near) ZRP Cranborne Barracks Harare he being a member of the service did wrongfully and unlawfully insult his Excellency the President of Zimbabwe, Comrade Robert Gabriel Mugabe by saying "President Mugabe is too old and incapable of leading this country. President Mugabe is the cause of the suffering going on in this country and is married to a prostitute Grace Mugabe."

The applicant was charged and brought for trial in terms of s 29A as read with s 34 of the Act before a court consisting of a single officer. Section 34 (i) of the Police Act aforesaid provides as follows÷

> "A member other than an officer who is charged with contravention of this Act or any order made there under or any offence specified in the Schedule may be tried by an officer of or above the rank of superintended and sentenced to any punishment referred to in paragraph (d) of sub-section (2) of section twenty nine"

The penalty that the court of an officer can impose on convicting a member tried by this court is provided in s 29 A d (iii) A- which is a fine not exceeding level two or

imprisonment for a period not exceeding fourteen days or both such fine and such imprisonment or B- a minor punishment whether imposed in addition or as an alternative, to the punishment referred to in sub para A.

It is important to note that s 30 (5) provides that a member who is convicted of a contravention of this Act by a board of officers shall not be regarded as having been convicted of an offence for the purposes of any other law. For the avoidance of doubt such conviction is not a previous conviction for the purposes of sentencing in a subsequent criminal conviction. By implication a conviction by the High Court or a magistrates' court may be regarded as a conviction (previous conviction) for the purposes of any other law. Suffice it to say also that a conviction by the court of an officer is not to be regarded as a previous conviction for the purposes of any other law in terms of s 34 (a) of the Act.

The factual background to the application is as outlined below the appellant attended trial and unsuccessfully excepted to him being charged and tried before this court of an officer arguing that the court had no jurisdiction to try him as he had already been charged in the ordinary criminal court of an offence arising from the same facts. The applicant also unsuccessfully made an application for the matter to be referred to the Constitutional Court as a contravention of his constitutional rights. These two unsuccessful applications are acknowledged by the first respondent. The applicant further alleges that the first respondent was patently biased and that he had threatened him in the course of trial which allegations the first respondent disputed strongly.

The applicant filed 2 (two) applications for review of the conduct of the trial by the first respondent citing the above complaints among others and the application *in casu* was for a stay of the trial proceedings pending the determination of the review applications.

At the hearing of the application the respondents took as a point *in limine* the fact that the matter was not urgent. In addition the respondents opposed the application generally as without merit. In support of the point *in limine* raised the respondents argued that there is no irreparable harm that the applicant can claim to suffer as in the event of his conviction on the charge the applicant can appeal against the conviction to the Commissioner General and the noting of an appeal will automatically suspend the serving of any sentence imposed by the court in terms of s 34 (7) of the Police Act. Besides the respondents argued that no proper case had been made out for the interdicting of the trial before the first respondent. The applicant in response argued that because the first respondent has no jurisdiction to try the applicant the latter stands to suffer irreparable harm if trial is not stayed in that the applicant

if convicted may be incarcerated before the law comes to his rescue. This contention cannot possibly satisfy the test for urgency *in casu* given that s 34 (7) provides that a member convicted and sentenced under this section may appeal to the Commissioner against the conviction and sentence and once the appeal is noted the sentence shall not be executed until the decision of the Commissioner General has been given.

The often quoted judgment of Chatikobo J in the case of *Kuvarega* v *Registrar General and Anor* 1998 1 ZLR 188 clearly provides guidelines on when a matter should be considered urgent.

Applying the ratio of *Kuvarega* case I am not convinced that the applicant has made out a case which deserves to jump the queue. I express no view on the merits of the review applications save to say that even if the applicant were successful the potential success does not make the matter so urgent as to deserve the case jumping the queue. The parties addressed argument on the issue of jurisdiction of the first respondent to try the applicant in light of applicant having been charged in the ordinary criminal courts on the same set of facts. I do not consider it necessary to go into the merits of the grounds for review considering the view I have come to regarding whether or not the matter is urgent.

In the circumstances I make the following order.

It is ordered that:

(1) The matter is not urgent and is therefore removed from the roll of urgent matters.

(2) The applicant is to pay the respondents' costs.

Mugiya & Macharaga Law Chambers, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners