CONSTABLE DHLAKAMA M. 994695P
and
CONSTABLE KARIRIRA L. 991058L
versus
THE TRIAL OFFICER
and
THE COMMISIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 11 October 2017 and 13 March 2018

**Opposed Matter**

*W. Mugiya,* for the applicants
*K. Chimiti,* for the respondent

MWAYERA J: The applicants approached the court seeking review of disciplinary proceedings concluded by the Police Trial Officer. What fell for determination was firstly whether or not the applicants' case satisfied review grounds as provided for by the law, and, secondly, whether or not the applicants could be tried in terms of the Police Act after having been charged in terms of ordinary law.

The brief background of the matter has to be put into perspective. The applicants were charged for contravening para 34 of the schedule to the Police Act [*Chapter 11:10*] as read with s 29 and 34 of the same Act. The misdemeanour being omission or neglecting or negligence to perform any duties in an improper manner. The first applicant, was charged on the basis of having channelled a deposit fine for public fighting to his own use. This court has jurisdiction to entertain review proceedings. Section 27 (1) of the High Court Act outlines the requirements of a review. It provides as follows:

> "Subject to this Act at any other law the grounds on which any proceedings or decisions may be brought on review before the High Court shall be:
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> (a) absence of jurisdiction on the part of the court, tribunal or authority concerned.
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> (b) interest in the cause, bias, malice or corruption on the part of the Presiding officer.
>
> (c) gross irregularity in the proceedings or decision."

It is apparent the applicant seeks permanent stay of prosecution under the Police Act on the basis that the applicant was also charged under the Criminal Law (Codification and Reform) Act. What is central here is whether or not the criminal trial in the magistrate court is the same as the disciplinary hearing envisaged under the Police Act. In my view these are two distinct processes clearly provided for by law. The process is akin to situation where a person is charged for a criminal offence for example, assault, then the complainant also sues for damages. Such two processes cannot be viewed as constituting double jeopardy which would call for review when one considers that the purpose of a review is to ensure that an individual receives fair treatment at the hands of the authority to which he has been subjected. The circumstances of this matter do not reveal unfair treatment see *Mugugu* v *Police Service Commission and Anor* 2010 (2) ZLR 185.

In the present case the disciplinary authority by instituting a disciplinary hearing did not abuse the lawful authority reposed on it by the Police Act. The Administrative Body was within its powers to constitute a disciplinary hearing. This is moreso when one considers s 9 of the Police Act which sanction that the Commissioner General of Police in consultation with the Minister of Home Affairs or any other Minister assigned by the President for the administration of the Police Act, may make standing orders which regulate the conduct and affairs of the Police Service.

The discipline regulation and orderly conduct of the Police Service does not in any manner oust criminal proceedings where allegations involve criminal connotations. I agree with the sentiments echoed by the Judge in H*athan Chilufiya* v *Commissioner General of Police and 3 Others* HH 89-16 when it was stated:

> "On the question of the accused person being exposed to double jeopardy as he is being tried in the Magistrates' Court for the same offence. I am satisfied that he can raise his conviction and sentence as mitigating factor if he is convicted in the Magistrates Court. A trial and conviction in terms of s 34 (1) is in terms of s 34 (9) not regarded as a conviction in terms of any other law. It is regarded as a disciplinary action. This means the applicant is not exposed to double jeopardy as alleged the trial in the magistrate court does not justify the staying of the sentence imposed for disciplinary purposes. The two actions are separate and well anchored on legal provisions. The charge as proffered under the tribunal is not a criminal charge but an alleged disciplinary misdemeanour. In clear contrast with a criminal charge which by law cannot be entertained by a disciplinary tribunal. The police standing orders clearly define what constitutes a criminal offence in the standing orders Volume 1 para (4) states
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> > 'Criminal offence means any offence under common law or statutory enactment other than an offence under the Police Act.'" [*Chapter 11:10*]

The police disciplinary tribunal has no jurisdiction to institute criminal proceedings as the law prescribes the criminal jurisdictions on specified courts and for disciplinary tribunal only to the extent that the jurisdiction is necessary to enforce discipline in the force concerned. Section 193 of the Constitution is instructive it states.

> "Only the following court may exercise or be given jurisdiction in criminal cases
> a) The Constitutional Court, Supreme Court, High Court and Magistrates Court.
> b) A court at tribunal that deals with cases under a disciplinary law to extent at the jurisdiction if necessary for the enforcement of discipline in the disciplined force concerned."

In the present case the institution of disciplinary proceedings did not in any manner oust the institution of criminal proceedings given the alleged fraud. The institution of disciplinary hearing does not preclude criminal proceeding and vice versa. A reading of s 278 of the Criminal Law and Codification and Reform Act [*Chapter 9:23*] clearly shows that criminal proceedings in respect of the same conduct for which disciplinary proceedings have been instituted is permissible. See s 278 of the Code on Relation of Criminal to Civil or disciplinary proceedings, it states:

> "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:
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> (a) the defence force or
>
> (b) the police force or
>
> (c) the prison service or any other force organised by the state which has as its sole or main objective preservation of public security and of law and order in Zimbabwe.
>
> 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 consequent 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 of any time before or after commencement of such criminal proceedings."

In this case the applicants are members of the police force who were properly arraigned before the criminal court and also properly arraigned before the disciplinary tribunal for alleged improper conduct. The two umbrellas of proceedings are legally sanctioned. The disciplinary hearing is administrative and not criminal in nature hence there is no double jeopardy or prejudice entitling relief under the umbrella of unfair

treatment. It is settled that the test applied on review is whether or not the proceedings are in accordance with real and substantial justice. The applicant sought to impute unfairness on the basis that criminal proceedings were also underway. The discussion above has shown that it is permissible to run both disciplinary and criminal proceedings in respect of the members in terms of both the Police Act and Criminal Law Codification and Reform Act.

The applicant in oral submission sought to have the proceedings by the tribunal permanently stayed on basis that it was contrary to s 70 (1) of the Constitution. The applicant argued that the relevant Constitutional provision prohibited dual prosecution. If one is to take a close look of s 70 of the Constitution generally covers or deals with the rights of accused persons. Section 70 (1) (m) which applicant sought to rely on states:

> "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 of either acquitted or convicted on the merits."

Despite pointing out to Mr *Mugiya*, counsel for the applicant that s 70 (1) (m) was not applicable given his client had not been subjected to double criminal prosecution for an offence or omission for which they had been pardoned or acquitted, Mr *Mugiya* insisted that continuation of the disciplinary hearing would be *ultra vires* the Constitution in particular section 70 (1) (m). The facts are clear that the applicants were not subjected to double prosecution. The disciplinary hearing was properly convened in terms of the Police Act and standing rules and that would not bar the institution of criminal proceedings.

The criminal proceedings were not over a matter for which the applicants had directly been pardoned or acquitted. The point taken by Mr *Mugiya* on applicability of s 70 (1) (m) of the Constitution to the present review in which the applicant sought permanent stay of disciplinary hearing was ill conceived. One could not help but read a deliberate ploy to mislead the court and paint a picture that there was double criminal prosecution. What the applicant sought to impugn was a properly constituted disciplinary hearing. In the absence of any indications of illegality or procedural irregularity and unfair treatment, there is no basis for setting aside and staying permanently the disciplinary hearing. In fact I must mention that the applicants seemed to be taking a gamble with the court in a bid to frustrate the disciplinary process.

The applicants in the founding affidavit relied on not having been served with state papers and also that they were being tried in the criminal magistrate court. The first argument was not pursued in the heads of argument and oral submissions. The applicants pursued the second grand of dual prosecution and introduced new grounds that their rights as provided for in section 70 (1) (m) of the constitution were being flouted. As has been shown there was no dual criminal prosecution. The disciplinary hearing and criminal trial are distinct processes legally sanctioned and in the circumstances of this case there was no question of double jeopardy arising.

The requirements of review have been established and I find no reason why the disciplinary proceedings should be permanently stayed. The application has no merit and it ought to fail. The applicant should bear the costs.

Accordingly it is ordered that:

The application for review be and is hereby dismissed with costs.

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