

JAMES CHIMOMBE
versus
ASSISTANT COMMISSIONER MOYO
and
ASSISTANT COMMISSIONER MACHEKA
and
COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 26 FEBRUARY and 4 MARCH 2020

Opposed application

P Marava, for applicant
B Moyo, for 1st, 2nd and 3rd respondents

TAGU J: This is an application for review of the decision of Assistant Commissioner Moyo which decision was confirmed by the 3rd respondent and the second respondent is pushing for its implementation.

INTRODUCTION

The applicant is an inspector in the Zimbabwe Republic Police stationed at Crime Prevention Unit (CPU) Harare as Officer-In-Charge. The first respondent is Assistant Commissioner Moyo. He is the Assistant Commissioner Crime for Harare Province and heads the team which comprises Criminal Investigating Department Harare Homicide detectives who investigated an anonymous complaint against the applicant. The second respondent is Assistant Commissioner Macheka. He is the Assistant Commissioner Administration Harare Province. He is the one who is being alleged to be pushing for the implementation of the recommendations which came out after the first respondent had done the investigations. The third respondent is the Commissioner General of Police cited in his official capacity as the person responsible for the

overall superintendence of the Police Service. He is the one who confirmed the recommendations which came out from the anonymous complaint against the applicant.

BACKGROUND FACTS

Sometime in November 2018 the first and second respondents received an anonymous complaint against the applicant. The applicant only came to know of the complaint letter, findings and recommendations that were made after what he termed “shoddy” investigations of the complaint were done as well as the additional instructions from the third respondent on the day he was instructed to sign the suspension order by the second respondent during the end of April 2019. He said he managed to peep through the complaint during the absence of Superintendent Chiukaka. He said from the first day the first respondent commenced investigations in respect of the anonymous complaint up to the final day he came with findings and recommendations no one had showed him the anonymous complaint, the findings, recommendations and additional instructions from the third respondent which were done by the Deputy Commissioner General Crime. His legal practitioners requested for the same but no response was done. According to the applicant the investigations failed to unmask the writer of the anonymous complaint who is a key witness in the matter. He suspects the writer to have been someone from the Crime Prevention Unit Section who was being given daily arrests targets. He further submitted in his founding affidavit that the first respondent should have recorded statements from the transferred members from CPU as well as current ones to spice up his enquiry.

The applicant further complained of not having received any recommendations from the first and second respondents despite that he was the most outstanding Officer- In- Charge which is a clear indication that they were not happy with his services from the date they received the anonymous complaint against him.

His version is that when he peeped through the complaint letter he noted the following-

“Number 046190 F Inspector Chimombe James was dealing in corrupt activities at Crime Prevention Unit Harare. It is alleged that I arrested Prisca Tekwa, Chipayi Johnson, Tom Rutanhire, Dexter Tinarwo, Obey Nemitava, Tawanda Warikandwa, Blessing Warikandwa, Mcclaret Magay, Kudakwashe Mawire and many others on different occasions releasing them after being bribed of figures up to \$1000.00.”

Other officers like Assistant Inspectors Matava, Mudzinganirwa, Matsote, Constable Chimusoro, Chadawa and others were also included in the complaint that they were also practicing corrupt activities, destroying dockets and other official records at Crime Prevention Unit Harare.

Further allegations against him were that he was demanding money from Crime Prevention Unit members after each deployment and those who defied his orders were threatened with transfer from the section. The final allegations were that the applicant was boasting of for cover from Assistant Commissioner Kadungu at ZRP Harare Provincial Headquarters as well as other senior officers stationed at ZRP General Headquarters Internal Investigations.

He said some of the recommendations made against him were that he was to be charged both criminally and administratively for having asked for bribes and that he be transferred from the section. As a result the second respondent ordered Superintendent Chiukaka who is the Acting Chief Superintendent Operations Harare Province to suspend him from active police duties.

The applicant concluded by saying the first respondent came up with findings and recommendations without hearing his side of the story in contravention of his constitutional and administrative rights hence he wants the decision of Assistant Commissioner Moyo which decision was confirmed by the third respondent and which second respondent is pushing for its implementation to be reviewed and set aside.

THE RELIEF SOUGHT

The applicant now seeks the following orders-

“IT IS ORDERED THAT

1. The suspension order be and is hereby declared invalid and is set aside.
2. The findings and recommendations which were made by the 1st Respondent and anything arising from such findings and recommendations be and is hereby set aside.
3. 1st, 2nd and 3rd Respondents will bear costs of suit on a higher scale if they oppose this application.”

All the respondents opposed the application.

In his Notice of Opposition the first respondent denied that he headed the team that investigated the applicant. He said inter alia, that what happened is that the anonymous letter was directed to his immediate commander who is the Officer Commanding Harare Province by his

Internal Investigations Department. It came to him in his capacity as the officer responsible for crime with instructions to cause investigations in the matter. He then appointed a team of four, headed by Chief Superintendent Nxumalo to conduct the investigations. Immediately thereafter he was given another assignment out of Harare which he is still undertaking to this date hence he has no knowledge of what happened including the outcome of the investigations as the team was not reporting to him. He submitted that although he did not conduct the investigations he does not agree that applicant's right to a fair hearing was violated since this was a mere investigation to confirm the genuineness of the anonymous complaint with a view to then institute criminal and/or disciplinary investigations. He doubted that it would be in the interest of justice to declare the suspension invalid if the investigations revealed that there is a reasonable suspicion that applicant committed the alleged crimes despite some irregularities in the conduct of the investigations which irregularities would be addressed during the criminal and/or disciplinary inquiries or trial. According to him the Police is mandated to detect, investigate and prevent crime hence it matters not that no report of bribery was lodged or filed with the Police. He therefore has no knowledge of the transfer of the applicant which is better known by the second respondent.

The second respondent denied in his Notice of Opposition that he was pushing for the implementation of the recommendations as alleged. He said his only role was to inform the third respondent of the action taken by the relevant officers. This he did in his capacity as the Administrator of the Province. He said he perused the docket and was satisfied that the applicant had a case to answer hence he forwarded it to the third respondent for a convening order. He confirmed that the investigations of the disciplinary docket are complete and all that remains is for the third respondent to convene the board of inquiry (trial). He denied that the applicant is being sacrificed for any short cuts and averred that applicant himself in his para 30 confirmed that other Police Officers were also charged meaning there is no selective application of the law. He concluded by saying to stay the disciplinary proceedings against the applicant would certainly not in the best interest of justice given what he saw in the docket.

The third respondent in his Notice of Opposition confirmed that the Police Service is under his command which Service is mandated to detect, investigate and prevent crime. He confirmed further that he received information, through an anonymous letter, relating to criminal

activities by members of the Police Service stationed at Harare Crime Prevention Unit. He then caused investigations to be instituted to confirm that information. He said it is common cause that once investigations are instituted, there must be an outcome. In the present matter the outcome of the investigation was that there was reasonable suspicion that some of the mentioned members, including the applicant, were indeed involved in criminal activities while others had only violated the Police Disciplinary Code of Conduct. Flowing from that he directed that members be charged in terms of both criminal and disciplinary law. He therefore said he knows of no law that directs him to inform a person suspected of having committed an offence that he is being investigated prior to taking a decision to charge him. He reiterated that courts have pronounced themselves on numerous occasions that Police must investigate in order to arrest and not to arrest in order to investigate. He urged the court not to review and set aside his decision since he acted lawfully.

Attached to the Notices of Opposition is a supporting affidavit deposed to by one Cleopas Chiukaka, a Superintendent in the Zimbabwe Republic Police currently stationed at Harare Provincial Headquarters as the Crime Prevention Officer. In February 2019 he was appointed Acting Chief Superintendent Operations. He confirmed receiving instructions from the second respondent to implement the recommendations arising from an investigation of an anonymous complaint involving the applicant and other members of the Police Service stationed at Harare Crime Prevention Unit in April 2019. He said after perusing the documents attached to the instruction he was satisfied that he should implement the recommendations as stipulated. He then prepared a disciplinary docket. He then informed the applicant of the allegations contained in the anonymous letter, the outcome of investigations and recommendations. The applicant then indicated he would submit his report. Thereafter he suspended the applicant from active police duties in terms of the Police Standing Orders in the presence of Harare Province Chief Clerk, Staff Chief Inspector Mhiripiri. Second respondent was absent and applicant willingly signed. He denied that the third respondent applied the law on the applicant selectively.

The parties perceive the following to be the issues for determination.

1. Whether or not the respondents violated the applicant's right to be heard before, during and after investigations.
2. Whether or not the anonymous letter was authored in accordance with the law.

3. Whether or not there was full investigation of the case before the findings and recommendations were arrived at, and
4. Whether or not the applicant's suspension is justified.

WHETHER OR NOT THE RESPONDENTS VIOLATED THE APPLICANT'S RIGHT TO BE HEARD BEFORE, DURING AND AFTER INVESTIGATIONS?

The applicant in his heads insisted that he was never afforded the right to be heard when the shoddy findings and recommendations were made. He submitted that the whole procedure taken by the respondents in arriving at its findings and recommendations is fraught with irregularities which renders even his suspension a nullity and must be set aside. He said it is an elementary notion of fairness and justice that a decision should not be made against a person without allowing the person concerned to give his side of the story. Put in the contest of administrative decision making, the applicant submitted that the *audi alteram partem* principle requires that a decision affecting a person's rights or his or her legitimate expectations of receiving a benefit, advantage or privilege should only be made after hearing first that person and taking into account what he or she has said. In support of his contention the applicant referred the court to the provisions of sections 3(1) (a) and 3(2) of the Administrative Justice Act [*Chapter 10.28*] as well as the case of *Taylor v Minister of Education and Another* 1996 (2) ZLR 772 (S) at 780 A-B where it was said-

“The maxim *audi alteram partem* expresses a flexible tenet of natural justice that has resounded through the ages. One is reminded that even God sought and heard Adam's defence before banishing him from the Garden of Eden. Yet the proper limits of the principle are not precisely defined. In traditional formulation it prescribes that when a statute empowers a public official or body to give a decision which prejudicially affects a person in his liberty or property or existing rights, he or she has a right to be heard in the ordinary course before the decision is taken, see *Metsola v Chairman Public Service Commission & Anor* 1989 (3) ZLR 147 (S) at 333B-F.”

In addition the applicant cited the case of *Moyo v President Board of Inquiry & Ors* (1996) where the High Court stated that although a board is essentially convened to assemble evidence and to make recommendations to the Commissioner who would then make a decision this did not mean that the Board is not obliged to observe the precepts of natural justice. The court went further and stated that the Boards which collect evidence upon which decisions affect the individual have a duty to act fairly. The court stated that the Boards are mandated to inform the person involved of the complaints made against him and give him reasonable opportunity to

make statements with regard to those allegations. This position was reiterated in a number of court decisions including but not limited to, *Chairman PSC & v Gwisai* S-188-91; *Metsola v Charman PSC supra*.

In short the applicant's argument is that the anonymous letter of complaint should have been brought to his attention immediately after it was received and that the investigations which followed should have been made with him being aware of what was going on and that his side of the story should have been taken into account before any recommendations were made. In light of his argument he said the respondents acted in violation of the *audi alteram partem* rule and his suspension and the impending trial proceedings must therefore be set aside.

On the other hand the respondents acknowledges what the *audi alteram partem* rule entails. However, the respondents submitted that the applicant's right to be heard was not violated. They said the investigations were necessary so as to substantiate the allegations levelled against the applicant. The applicant was then suspended following disciplinary procedures to be instituted against him. It was their contention that it is at this point in time that the applicant will have the opportunity to answer to the allegation and exercise his right to be heard. The disciplinary board will give him an opportunity to defend himself and also seek legal representation. They said it is clear from this application that the applicant is misguided on what his right to be heard entails and at what stage should he be talking of a violation of this right. They argued further that, surely, where there has been an anonymous report or letter the best procedure would be to investigate the said complaints and not to inform the applicant that there is an anonymous letter against him. Informing the applicant that investigations will be carried against him would surely have defeated the course of justice and render the whole investigation useless. They said no reasonable human being would just seat idle knowing that there are investigations against them. Faced with such a scenario one would do anything in their power to try and cover up their tracks.

The respondents further submitted that it boggles one's mind why the applicant is so much worried about the investigations of the anonymous letter when he ought to celebrate that the investigations will present him with the opportunity to answer his case. He will finally exercise his right to be heard during the disciplinary hearing. It would have been ridiculous to inform the applicant of the anonymous letter and want his views before the investigations are

done. He therefore could not have been asked to answer for something that has not been substantiated or investigated. The respondents therefore, submitted that the first, second and third respondents acted lawfully, reasonably and in a fair manner.

With the greatest of respect, I agree with the counsel for the respondents. It would have been ridiculous for the respondents to advise the applicant that he was under investigations. This would have defeated the whole purpose. In fact the recommendations to have him charged have been brought to his attention. The anonymous letter and the findings have since been brought to his attention. Now he has been given an opportunity to defend himself. There was there for no violation of the applicant's rights to be heard by the respondents. He is yet to submit his side of the story. He has not been found guilty yet.

WHETHER OR NOT THE ANONYMOUS LETTER WAS AUTHORED IN ACCORDANCE WITH THE LAW?

It is the applicant's contention that the anonymous letter was not authored in accordance

to the law. His submission being that the members of the Police Service who still remain anonymous contravened sections 26.4, 26. 5 and 26. 7 of the Police Standing Orders Volume 1 in respect of forwarding a frivolous complaint. He said for brevity's sake section 26.1. provides that-

“Any member who feels or considers that he has a just cause for complaint on any matter relating to his treatment as a member of the Force, or arising out of the conditions under which he serves, may submit a written statement on the subject through the usual channels to the Commissioner General within the time and in the manner prescribed in the Police [Trials and Boards of Inquiry] Regulations. Provided that if the matter can be dealt with by an Officer of or above the rank of Superintendent other than the Commissioner General to the satisfaction of the member concerned, it shall be so dealt with.”

He further cited section 26.5 of the Police Standing Orders Volume 1 which provides that-

“No member shall complain on behalf of another member and collective complaints or representations are not permitted except in accordance with the constitution of the Z, R. Police Association.”

Lastly he submitted that section 26. 7 of the Police Standing Orders Volume 1 provides that “deliberations or discussions by members with object of conveying praise, censure, or any mark of approbation towards their superiors are prohibited.”

In short the applicant said the respondents acted contrary to the *ex turpi causa* rule. The principle stipulates that one cannot seek recourse from a disgraceful conduct. He insisted that the anonymous complaint was written by a member/or members of the Police Force hence it was not authored in accordance with the law.

The respondents submitted that there is no law in Zimbabwe governing the procedure which ought to be followed when there is an anonymous letter. They said an anonymous letter is one without any name acknowledged, as that of author, contributor or the like. The issue of anonymous letters can be likened to whistleblowing which is an act of drawing public attention or the attention of any authority figure to perceived wrongdoing, misconduct, unethical activity within public, private and third sector organizations. The respondents therefore averred that the correct steps to be followed in the event of an anonymous letter would be to investigate the said allegations, irrespective of who made the report. They said it is not the mandate of the employer to inform the employee that there is an anonymous letter against you and we are going to investigate it. This kind of behavior would actually defeat the whole cause of justice because there is the risk of the employee rectifying his mistakes in order to evade justice. To the respondents the question as to whether the anonymous letter was authored in accordance with the law as suggested by the applicant is vague and embarrassing and a clear waste of the court's time to dwell on such an issue that is ungovernable.

The court's position is this that we are dealing with an anonymous letter. The author of the letter of complaint is not known. The applicant himself confirmed that the shoddy investigations failed to unearth the writer or writers of the anonymous complaint. But surprisingly, the applicant insists that the writer or writers of the anonymous letter of complaint are members of the Police Service. I do not know where he is getting this. If indeed it had been proved or evidence had been unearthed that the complaint letter was written by members of the Police force, then the sections of the Police Act that the applicant cite may be applicable. What we have is but just speculation and the court cannot rely on speculations. In any case I do not think there is law that governs how anonymous letters should be written. There is nothing untoward in the manner the anonymous letter was written.

WHETHER OR NOT THERE WAS FULL INVESTIGATION OF THE CASE BEFORE THE FINDINGS AND RECOMMENDATIONS WERE ARRIVED AT?

The applicant insisted that there was no full investigations because his side of the story was not heard before and during the recommendations. The respondents contented that full investigations before the findings and recommendations were arrived at were done. In my view this point has already been made elsewhere in my judgment. Superintendent Cleopas Chiukaka in his supporting affidavit clearly stated that after perusing the documents attached to the instruction that was forwarded to him by Assistant Commissioner Macheka, he was satisfied that he could implement the recommendations as stipulated hence he was able to prepare a disciplinary docket. This was only possible after the full investigations were done. If there was something outstanding he could have said he is waiting to finalize the docket. I am therefore satisfied that full investigations were done before the findings and recommendations were arrived at.

WHETHER OR NOT THE APPLICANT’S SUSPENSION IS JUSTIFIED?

In advancing his argument that the respondents erred at law in suspending the applicant at investigation stage contrary to the provisions of section 47 of the Police Act, the applicant submitted that a member cannot be suspended in contemplation of charging him/her. He cited the provisions of section 47 of the Police Act which provides as follows-

“47Suspension of members

- (1) The Commissioner –General may suspend a member-
 - (a) pending his trial or after his conviction for any offence, whether under this Act or otherwise...”
 - (b)

He therefore submitted that the import of the above excerpt is that a member cannot be suspended in contemplation of charging him/her as this will be in contrary to the letter, tenor and spirit of section 47 supra which is supplemented by paragraphs 32.1 of Part 2 of Standing Orders Volume 1.

The respondents are of the view that the applicant was correctly informed of his suspension and given reasons as to why he was being suspended. They reiterated that section 47 of the Police Act chapter 11.10 gives the Commissioner General the authority to suspend a member in the following circumstances:

- (a) pending his trial or after his conviction for any offence, whether under this Act or otherwise, or
- (b) pending the holding of a board of an inquiry in terms of section fifty ; or
- (c) where the Commissioner General is considering acting in terms of subsection (4) of section fifty. In *casu* they argued that the suspension from active duty letter reads as follows-

“The suspension is as a result of the disciplinary charges pending against you as stipulated below....”

Hence the suspension letter stipulated the counts that the applicant appended his signature on as evidence that he was served. Even the supporting affidavit of Superintendent Cleopas Chiukaka is very clear where he said he then informed applicant of the allegations contained in the anonymous letter, the outcome of the investigation conducted on the anonymous letter, and the recommendations thereof. He further said he informed the applicant of his own investigations resulting in the compilation of the disciplinary docket, read out the charges he was facing and invited him to respond if he so desired. The applicant then indicated that he would submit his written response which he did. Hence from the foregoing the suspension of the applicant was justified.

I therefore, for the reasons above will found that the applicant’s application for review lacks merit and I will dismiss it with costs.

IT IS ORDERED THAT

1. The application to set aside the suspension of the applicant be and is hereby dismissed.
2. The findings and recommendations which were made by the 1st Respondent and anything arising from such findings and recommendations be and are hereby confirmed.
3. The applicant to bear costs of suit on a higher scale.

Mtewa Law Chambers, applicant’s legal practitioners
Civil Division of the Attorney General’s Office, 1st, 2nd and 3rd respondents’ legal practitioners.