EX DETECTIVE CONSTABLE MAPURAZI
and
EX DETECTIVE CONSTABLE LAKI
and
EX DETECTIVE CONSTABLE GOREDEMA
versus
THE TRIAL OFFICER (CHIEF SUPERINTENDENT JIRI)
and
THE CHIEF STAFF OFFICER
and
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 2, 11, 23 and 30 November 2016

Opposed Application

N. Mugiya, for the applicants
N. Muzuva, for the respondents

MUSAKWA J: The applicants are seeking a declaratory order to the effect that their prosecution in terms of the Police Act [*Chapter 11:10*] was unlawful and wrongful. They also seek an order that the disciplinary proceedings that were instituted against them be declared null and void and an award of costs of suit.

In his founding affidavit which finds support from co-applicants the first applicant claims that they were charged with an unspecified offence at Marondera Magistrates Court. There is no averment as to the outcome of those criminal proceedings. It is further averred that the applicants were subsequently charged with contravening para 35 of the schedule to the Police Act. This again is not specifically pleaded although it can be inferred that it was a disciplinary hearing. Upon being convicted the applicants were sentenced to 7 days' imprisonment. An appeal lodged with the third respondent was dismissed. The applicants were then discharged from the Police Force although the date of discharge is not specified.

It is further averred that in terms of the Police Act as well as Standing Orders and Uncoded Rules once a member is charged under ordinary law he cannot be charged with the same offence under the police Act. Thus it is contended that the appellants were discharged from the Force on the basis of a flawed conviction. Again, the actual offence the applicants

faced at Marondera was not specified in the papers. It was only upon clarifying with Mr *Mugiya* during his address that it was indicated as a contravention of s 174 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*].

Mr *Mugiya* adopted similar arguments he submitted in HC 5472/16 which was on the same roll as the present matter. The only difference between the two matters is that in the present matter the applicants claim to have been acquitted at the Magistrates' Court.

The contentions advanced in HC 5472/16 are as follows: It is contended that s 278 of the Criminal Law (Codification and Reform) Act requires to be interpreted whether it prohibits dual prosecution. He further submitted that s 70 of the Constitution prohibits dual prosecution. In light of s 2 of the Constitution it therefore means that that s 70 prevails over the Police Act. Mr *Mugiya* equated the disciplinary process to a criminal process. He based this on similar procedure including the same standard of proof.

Mr *Muzuva* submitted that the decision to discipline the applicants was purely administrative. In this respect he referred to s 35 of the Police Act. Without any authority he then submitted that the standard of proof is on a balance of probabilities. Mr *Muzuva* could not have been correct on this aspect as s 35 (1) of the Police Act provides that:

> "The proceedings before or at any trial by a board of officers or an officer in terms of this Act, shall as near as may be, be the same as those prescribed for criminal cases in the courts of Zimbabwe."

The above provision can only mean that the procedure on the admissibility of evidence is similar to procedure in the civil courts. In such a case the standard of proof can only be beyond a reasonable doubt. The burden of proof can only be that of proof beyond reasonable doubt on account of the penalty of imprisonment that may be imposed by the disciplinary authority.

Section 193 of the Constitution provides that:

> "Only the following courts may exercise or be given jurisdiction in criminal cases—
>
> (*a*) the Constitutional Court, the Supreme Court, the High Court and magistrates courts;
>
> (*b*) a court or tribunal that deals with cases under a disciplinary law, to the extent that the jurisdiction is necessary for the enforcement of discipline in the disciplined force concerned."

That the enforcement of discipline in a disciplined force is conducted through proceedings of a criminal nature does render such proceedings criminal. It is clear that s 193 (b) of the Constitution clothes a disciplinary court or tribunal with criminal jurisdiction for

limited purposes of enforcing discipline. The issue of standard of proof which is beyond reasonable doubt is again not strictly confined to criminal proceedings. It equally applies to disciplinary proceedings involving professions such as legal practitioners. See for example the case of *Mugabe and Another* v *Law Society of Zimbabwe* 1994 (2) ZLR 356 9S). In that case the Supreme Court held that the standard of proof required was dependent on whether the allegations had criminal connotations.

Whether Acquittal Bars Any Disciplinary Proceedings

Section 278 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] defines disciplinary proceedings as follows:

> "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;"

Section 278 (2) of the Criminal Procedure and Evidence Act provides that-

> "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 consequence of the conduct or at the instance of the relevant disciplinary authority, as the case may be".

No ambiguity arises from a plain reading of the above provision. The provision simply permits disciplinary proceedings where a person has been acquitted in a criminal trial. It is not in conflict with any provision of the Constitution.

On the other hand s 70 of the Constitution provides that:

"(1) Any person accused of an offence has the following rights—

(*a*) to be presumed innocent until proved guilty;

(*b*) to be informed promptly of the charge, in sufficient detail to enable them to answer it;

(*c*) to be given adequate time and facilities to prepare a defence;

(*d*) to choose a legal practitioner and, at their own expense, to be represented by that legal practitioner;

(*e*) to be represented by a legal practitioner assigned by the State and at State expense, if substantial injustice would otherwise result;

(*f*) to be informed promptly of the rights conferred by paragraphs (*d*) and (*e*).

(*g*) to be present when being tried;

(*h*) to adduce and challenge evidence;

(*i*) to remain silent and not to testify or be compelled to give self-incriminating evidence;

(*j*) to have the proceedings of the trial interpreted into a language that they understand;

(*k*) not to be convicted of an act or omission that was not an offence when it took place;

(*l*) not to be convicted of an act or omission that is no longer an offence;

(*m*) not to be tried for an offence in respect of an act or omission for which they have previously been pardoned or either acquitted or convicted on the merits;"

The applicants were charged with misconduct arising from contravening s 174 of the Criminal Law (Codification and Reform) Act for which they were found not guilty. It is possible for the same conduct to give rise to criminal as well as disciplinary charges. In this respect see *Felix Shangu* v *Commissioner General of Police and Ors* HB-110-16. In the present case the misconduct charge itself is not a contravention of s 174 of the Code. Paragraph 35 of the schedule to the Police Act relates to-

> "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."

Even if the above charge arose from the same conduct, it cannot be equated to s 174 which relates to criminal abuse of office which is essentially an act of corruption. Even the levels of punishment are not the same, with a contravention of s 174 attracting a fine not exceeding level thirteen or imprisonment not exceeding fifteen years or both. On the other hand a contravention of the Police Act attracts a fine not exceeding level ten or imprisonment not exceeding five years or both.

Therefore, the trial of a member of the Police Force for misconduct arising from a criminal charge on which he or she has been acquitted is not unlawful. Such a process does not create double jeopardy for the member. That is why in terms of s 30 (5) and s 34 (9) of the Police Act, a member who is convicted under the Act shall not be regarded as having been convicted of a crime for purposes of any other law. In *Felix Shangu* v *Commissioner General of Police and Ors supra* MATHONSI J made similar observations.

I have also not read any provision of the Police Act which provides that a member charged with a criminal offence in the civil courts cannot be charged with the same offence in terms of the Police Act. The only time a member may face similar charges might arise where for example, having been informed of a trial before a board of officers such member elects to be tried by a magistrates court in terms of s 32 of the Police Act. Assuming the charge is a contravention of any of the offences in the schedule to the Police Act and the member is

acquitted by the magistrates' court, it is possible for disciplinary charges to be preferred under the same charge. That is what the applicants may have had in mind. However that is not the issue before me.

A contention has also been made that Uncoded Rules prohibit dual prosecution. This is an aspect that was casually thrown in the founding affidavit. Section 9 of the Police Act provides that-

> "Subject to this Act, and in consultation with the Minister, the Commissioner-General may make Standing Orders with respect to the discipline, regulation and orderly conduct of the affairs of the Police Force."

The particular provisions of the Uncoded Rules or Standing Orders that prohibit dual prosecution were not cited. There is just a general reference in the applicants' heads of argument to Uncoded Rules Volume 111. I have already pointed elsewhere in this judgment shortcomings in the founding affidavit in as far as material averments are concerned. There is no room for adjudicating on an aspect that is not identified with sufficient particularity.

In the result, the application is dismissed with costs.

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