CHRISPEN TSHUMA

Versus

M. MANZINI-MOYO N.O.

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 16 MAY 2022 & 2 JUNE 2022

Application for review

M.E.P. Moyo, for the applicant
Ms. C.E. Kamema, for the respondent

DUBE-BANDA J

1. This is an application for review made in terms of section 26 as read with section 27 (1) (b) and (c) of the High Court Act [Chapter 7:06]. Applicant seeks an order couched in the flowing terms:

   i. The decision of the respondent in *State v Constable Chrispen Tshuma* of 25 March 2019 be and is hereby set-aside.

   ii. The decision of the respondent is substituted as follows: the defaulter is hereby found not guilty and acquitted.

2. The application is opposed.

3. This application will be better understood against the background that follows. Applicant is a member of the Zimbabwe Republic Police (ZRP). He appeared before the respondent (trial officer) charged with contravening paragraph 35 of the Schedule to the Police Act [Chapter 11:10], i.e. 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 as read with section 34 of the Act. It being alleged that on the 13th March 2018, and at Entumbane Complex, behind the Complex durawall, applicant forcibly had sexual intercourse with the complainant without her consent.

4. The trial officer found that the applicant was positively identified as the perpetrator of the crime, and also dismissed his *alibi*. He was convicted on 25 March 2019, and sentenced to ten days in the detention.

5. In case number HC 949/20 and on the 3rd June 2021, applicant was granted an order for condonation. The court ordered that: the applicant's application for condonation for late filing of review be and is hereby granted; and that the review application be filed within 20 days of receipt of the order.

6. Applicant filed this review application on the 8 June 2021, seeking an order setting aside the decision of the respondent, and an order that he be found not guilty and acquitted. It is against this background that applicant has launched this application seeking the relief mentioned above.

7. At the commencement of the hearing, Ms. *Kamema* abandoned the preliminary points taken in the opposing affidavit.

8. In essence, the grounds on which the applicant seeks to review the decision of the 1st respondent are these:

i. That the conduct of the respondent offends the principles of natural justice, as it is loaded with bias, grossly irregular and unreasonable in that:

   a. Respondent admitted into evidence, a parade that was irregularly conducted in that the people in it were not alike, wore different types of clothing and complainant was told unequivocally before the parade that the suspect was part of the parade.

   b. Respondent elbowed out the prosecutor and displayed bias by conducting an inquiry into applicant's *alibi*, when that issue was not in dispute and the prosecutor had not led evidence on it. Such inquiry did not meet the tenents of justice in that it was premature, calculated to supplement the State case against

the applicant and prevent applicant from seeking his discharge at the close of the State case. The inquiry into the *alibi* of the applicant was such that the respondent led evidence to his satisfaction and blinkered himself from considering the applicant's *alibi* as presented in his defence outline.

9. Mr *Moyo* counsel for the applicant abandoned the first ground of review. He made submission in respect of the second ground of review. Counsel submitted that respondent as the trial officer, *mero moto* called four witnesses to testify. Counsel argued that it was not for the respondent to call witnesses to build a case which the prosecution had failed to establish. It was contended that respondent was prosecuting the case on behalf of the State, and this constitutes gross irregularity and bias. Counsel submitted that respondent's decision was irregular in that it had no justification and therefore irrational.

10. Ms. *Kamema* counsel for the respondent informed the court that applicant appealed the decision of the respondent to the Commissioner-General of Police. The appeal against conviction and sentence was dismissed. Counsel provided the court with a copy of the judgment of the Commissioner-General. Counsel submitted that it is the decision of the Commissioner-General that applicant must take issue with, not that of the respondent.

11. Counsel submitted that the trial officer did not descend into the arena, he is permitted in terms of section 232 of the Criminal Procedure and Evidence Act [Chapter 9:07] to call a witness if the evidence of such person is essential to the just decision of the case. It was submitted that it was a critical issue for determination before the trial officer whether the applicant was present at his work station at the time the office was allegedly committed. It was argued that the trial officer called the witnesses to clarify whether indeed applicant was present at his work station. Counsel argued further that respondent did not commit any irregularity, and therefore the application must be dismissed.

12. Mr *Moyo* in reply conceded that indeed applicant appealed the decision of the respondent to the Commissioner-General, and the appeal was dismissed. Counsel submitted it was not necessary in this application to disclose the appeal to the Commissioner-General, as such appeal was disclosed in the application for condonation in HC 949/20. HC 949/20 was the application for condonation referred to above.

13. Counsel contended further that the appeal to the Commissioner-General was in line with section 7 of the Administrative Justice Act [*Chapter 10:28*], i.e. to comply with the requirement to exhaust internal remedies before approaching this court. It was argued that the appeal to the Commissioner-General was an internal issue, which had no bearing to this application. It was argued that it was competent, notwithstanding the appeal to the Commissioner-General for applicant to challenge the decision of the respondent on review before this court, because if the review succeeds, the judgment of the Commissioner-General would fall by the way side.

14. The gist of the matter is that applicant appeared before the trial officer, and was convicted and sentenced. He appealed the decision of the trial officer to the Commissioner-General, and his appeal was dismissed on 9 April 2020. On the 8th June 2021, he filed this application before this court. In this application he attacks the decision of the trial officer, which he appealed and lost to the Commissioner-General.

15. It is no longer open and competent for application to seek to review the decision of the trial officer before this court. The decision of the trial officer has been superseded by that one of the Commissioner-General. He cannot no longer be aggrieved by the decision of the trial officer, for the simple reason that he appealed it to the Commissioner-General. If he is still aggrieved, it must be by the judgment of the Commissioner-General dismissing his appeal. I say so because, an appeal and review are both ways of reconsidering a decision. While the reason for seeking one or the other will usually be the same, i.e. dissatisfaction with the result, the two perform different functions. Applicant appealed to the Commissioner-General because he was dissatisfied with the decision of the trial officer. He lost the appeal. He cannot still be dissatisfied with the decision of the trial officer, if he is still dissatisfied it must be by the decision of the Commissioner-General. In the circumstances of this case, to permit applicant to seek to review before this court the decision of the trial officer, would be tantamount to allowing him a second bite at the cherry. He tried his lucky before the Commissioner-General and failed.

16. Ms. *Kamema* submitted that it is the decision of the Commissioner-General that applicant must take issue with, not that of the respondent. I agree. The appeal to the Commissioner-General is in terms of the law, it cannot be just of no consequence as argued by Mr *Moyo*. Having found that the applicant cannot be permitted to seek to review the decision of the respondent in this court, after having appealed it and failed before the Commissioner-General, it is not necessary for me at this stage to consider the merits of this application for review. The application must fail at this stage.

27. The general rule is that the costs follow the result. There is no reason why this court should depart from such rule in this case. The applicant is to pay the 2nd respondent's costs on the scale as between party and party.

In the result, it is ordered at follows:

The application be and is hereby struck off the roll with costs.

Mathonsi Ncube Law Chambers, applicant's legal practitioners
Attorney-General's Office Civil Division, respondent's legal practitioners