

**EDMOS GABARINOCHEKA**

**Versus**

**OFFICER COMMANDING TRAFFIC  
CENTRAL BUSINESS DISTRICT, BULAWAYO**

**And**

**OFFICER IN CHARGE TRAFFIC POLICE  
DRILL HALL, BULAWAYO**

**And**

**COMMISSIONER GENERAL OF POLICE N.O.**

**And**

**CO-MINISTERS OF HOME AFFAIRS N.O.**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J  
BULAWAYO 13 & 17 OCTOBER 2011 & 26 JANUARY 2012

*L. Ncube* for applicant  
*L. Musika* for respondents

Judgment

**NDOU J:** The applicant seeks an order in the following terms:

“The final order sought

That the provisional order granted by this honourable court confirmed in the following manner:-

1. That the hearing referred to in paragraph 1 of the interim relief be and is hereby referred for hearing at the Magistrates’ Court.
2. The respondents be and is hereby ordered to pay costs of suit if opposed to this application.

Interim relief granted

Pending the finalization of this matter, the applicant be granted the following relief:-

1. The respondents be and are hereby ordered to suspend the hearing of the 13<sup>th</sup> October 2011, or any such trial or hearing involving the applicant, on the charge of “performing any duty in an improper manner” until the finalization of this matter.
2. That should the hearing proceed in contravention of paragraph 1 above such hearing be and is hereby held to be of no force or effect.”

The salient facts of the case are the following. The applicant is a Sergeant in the Zimbabwe Republic Police (“ZRP”) now stationed at Gwanda Police Station. All along and for the past fourteen years, he has been stationed at the National Highway Patrol i.e. ZRP, Traffic Section. The applicant has been in the police force for around twenty-six years. On 17 September 2011 at around 1300 hours he was patrolling in the Bulawayo Central Business District using a BMW patrol car registration number ZRP 003461 together with his team members i.e. Constable R. Thebe, Sergeant Nhoti and Constable Marava. The applicant was the team leader. They set up a road block along Fort Street, opposite Bakers Inn. The applicant waved a white omnibus with a red strip registration number ABQ 9523 and it stopped. The vehicle was attended to by Constable R. Thebe. The vehicle had an excess of four passengers. Constable Thebe told the driver of the offence and invited him to pay a US\$20 fine. The driver Owen Kurenga paid the spot fine. The fine was receipted on Z69J number 1032611 and the driver signed it. It is not what transpired between the driver and Constable Thebe that is in issue. It is what is alleged to have transpired between the driver and the applicant that resulted in him being charged under the Police Act [Chapter 11:10]. The gravamen of the charge against him is that he discovered that the driver had photocopies of Route Authority and Operator’s Licence serial numbers 023238 and 029439 respectively. It is alleged that the applicant got emotional indicating that the papers were invalid and tore them in full view of members of the public. This conduct is alleged to have reached the ears of his superiors resulting in him being charged under the Police Act. He was charged for contravening section 34 of the schedule to the Police Act i.e. “Perform a Duty in an Improper Manner”. The events preceding the charge are the following. This incident as alluded to, above, occurred on 17 September 2011. The same evening the applicant was questioned by his superior one Superintendent Mhlanga. He denied any wrong-doing. He was questioned once more on 18 September 2011. He denied wrongdoing again. On 19 September 2011 he was telephoned by one of his commanders in Harare. He was instructed to go and surrender the above-mentioned BMW patrol vehicle in Harare the same day. He was told to bring his entire team with him. He complied and when they got to Harare they were once more interrogated about the issue. They all made written reports of their side of the story. Thereafter, the applicant was with immediate effect transferred from National Traffic to Gwanda Police Station. The rest of his team were also moved from National Traffic to Nkulumane, Rusape and Mashava Police Stations respectively. The applicant reported for duty at Gwanda Police Station. On 3 October 2011 he was

telephoned by Assistant Inspector Khabo and advised to attend a disciplinary hearing on 4 October 2011 at 9am at ZRP Southampton Building in Bulawayo. The latter told him that he was the Prosecutor in the matter. At that time he was not told of the charge he was facing. He sought legal representation. When they got to the hearing his legal practitioner was furnished with a charge sheet and a copy of the synopsis. The charge sheet reads, *inter alia*,

“The accused, being a member of the force, did wrongfully and unlawfully perform a duty in an improper manner, that is to say, he tore up a certified copy of the Route Authority Serial Number 023238 and a certified Operators Licence Serial Number 029439 for vehicle number ABQ 9523 to wit a Toyota Hiace, belonging to Sibanda Motors.”

At the commencement of the trial his legal practitioner objected to the hearing continuing on the basis that applicant had not been properly served with a notice to attend the hearing and he needed more time to instruct his legal practitioner. The hearing was postponed to 13 October 2011. On 5 October 2011 the applicant’s legal practitioner addressed a letter to the Presiding Officer, one Superintendent A C Dube, requesting that the matter be referred for trial before a magistrate. The basis for the request for referral is stated thus-

“Our basis for this objection is grounded on section 35 of the Police Act Chapter 11:10 which lays down clearly that the proceedings before or at any trial by a board of officers or an officer in terms of the Act, shall as near as may be, be the same as those prescribed for criminal cases in the Court of Zimbabwe.

To this effect, we believe that our clients will not be afforded a fair trial as the case before the court involves, Levy Sibanda the Deputy Commissioner General of Zimbabwe Republic Police who for all intents and purposes is the complainant in this case.

Furthermore, the principles of natural justice are also very clear in cases of this nature, as the Presiding Officer in this matter is a junior to the complainant, who holds a superior office and position and our client has reasonable and well founded belief or fear that the latter may influence the decision of the trial officer and the opposite equally obtains as the trial officer is a junior of the complainant who may be afraid to deliver judgment not in favour of his superior, for fear of victimization.

Attached is the initial copy of the charge sheet against our client that was then amended, to substantiate the above-mentioned points.”

The initial charge sheet read as follows –

“... did wrongfully and unlawfully destroyed by tearing a certified copy of the route authority serial number 023238 and a certified copy of an operator’s licence belonging to Levy Sibanda the Deputy Commissioner General of the Zimbabwe Republic Police.”

The respondents decided to proceed with the trial under the Police Act resulting in this application to stop them. The respondents’ case is basically that the applicant does not have any right to elect to be tried by a magistrate when appearing before a single officer. Their understanding is that the applicant could have had the right to elect to be tried by a magistrate if he was an officer and the Commissioner General convened a Board of Officers to deal with the matter. This is the preliminary legal issue that I have to determine. The election of trial by magistrate is provided for under section 32 of the Police Act [Chapter 11:10]. This section reads:

“32. Member may elect trial by Magistrates Court

If notice is given, in the manner and time prescribed by a member whom it is proposed to try before a board of officers in terms of paragraph (c) of subsection (1) of section twenty-nine that he wishes that the charge against him be tried by a magistrates’ court and not by a board of officer, the charge shall be tried by a magistrates’ court.”

It is common cause that the applicant is not facing the charge before a board of officers in terms of section 29(1)(c) of the Act. The applicant is being charge before a single officer in terms of section 29(1)(d) of the Act.

It has to be emphasized that the election provided for in section 32 only applies to trials before board of officers and not trials before a single officer. The procedure under section 29 (1)(c) is for serious offences yet the procedure under section 29(1)(d) is for minor infractions of the Police Act and regulations made thereunder. Such minor infractions are punishable by imprisonment of up to fourteen (14) days and a fine of up to level two (2). These are minor disciplinary measures in the police force and are not regarded as criminal offence. Section 34 (9) provides –

“9. A member who is found guilty of a contravention of this Act by an officer shall not be regarded as having been convicted of an offence for the purposes of any other law.”

These proceedings are subjected to automatic review by the Commissioner General. All these factors clearly evince that the legislature deliberately excluded a member charged before a single officer from the provisions of section 32. In brief, such a member cannot elect to be tried by a magistrates' court. On this point alone, the applicant cannot choose to be tried by a magistrates' court. Accordingly the application is dismissed with costs.

James, Moyo-Majwabu & Nyoni, applicant's legal practitioners  
Civil Division, Attorney General's Office, respondents' legal practitioners