

**Tawanda Majoni
Versus
The Commssioner Of Police**

HIGH COURT OF ZIMBABWE
OMERJEE and MAKONI JJ,
HARARE, 27 November and 25 February, 2004

J Tomana for the appellant
Mr Shava for the respondent

Criminal Appeal

OMERJEE J: The appellant was charged with contravening section 37 of the Schedule to the Police Act [Chapter 11:10] (hereinafter referred to as "the Act"). The charge sheet was couched in the following terms:

"in that between 23rd^h May 2002 and 22nd August, 2002 and at or near Harare the accused being a member of the Force did wrongfully and unlawfully and without the approval of the Commissioner carried out trade or business by engaging himself in private employment as a senior political reporter for the Sunday Mirror, a Zimbabwean weekly paper with bases throughout Zimbabwe and has an international circulation and by that contravened the said Act".

On the 16th September, 2002 the appellant represented by a legal practitioner appeared before a Board of Officers convened by the Commissioner of Police in terms of section 30(1) of the Act. Following a trial, the appellant was found guilty as charged. He was sentenced to three months imprisonment with labour and in addition he was to pay a fine of \$500. Aggrieved by the conviction and sentence he has appealed to this Court.

At the outset it should be pointed out that the charge sheet is somewhat inelegantly framed and contains factual inaccuracies. Firstly, there was an omission to make reference in the charge sheet to the word "occupation" as appearing in section 37 of the Schedule to the Act, Secondly, reference in the charge to "bases throughout Zimbabwe" is superfluous and of no relevance to the charge. That notwithstanding, this Court is satisfied that the appellant was aware of the case he was required to meet and did not therefore suffer any prejudice thereby.

The background facts relevant to the determination of this matter are either largely common cause or are not in dispute and may be summarised as follows -

1. The appellant attested into the Zimbabwe Republic Police Force ("ZRP") as a Constable on 17th February, 1997. At the relevant and material time he held the rank of Assistant Inspector and was based at Warren Park Police Station.
2. On 23rd May 2002 the appellant produced a note from a medical practitioner to the officer-in-charge Warren Park Police Station claiming that he was ill. He was accordingly granted sick leave for a period of fourteen days from that date.
3. On the 24th May 2002 whilst on sick leave the appellant tendered his resignation from the Force giving twenty four hours notice of such intention. His request was however declined by the District Commander.
4. The appellant then made further applications for leave (including both sick leave and vacation leave) to cover his absence from duty from 23rd May 2002 to 4th September, 2002 inclusive, when he left the Force.
5. It is not in dispute that the appellant commenced working for the "Sunday Mirror" a newspaper that was published and in circulation in the country at the time, with effect from the 23rd May, 2002.
6. There appeared a publication of an article in the Daily Mirror of 9th September, 2002, under the headline caption "Chihuri must go". Accompanying the article was a photograph of the Commissioner of Police, Mr Chihuri. The contents of the article were critical of the professional competence of the Commissioner of Police.
7. Following the appearance of this article the Police hierarchy on 10th September, 2002 ordered an investigation as to the source and origins of the said newspaper article.

8. Following investigations conducted by Detective Inspector Makedenge of C.I.D. Law & Order Section at Harare Central, the appellant was identified as the author of the said article. He was arrested on 12th September, 2002 and detained by the Police. The appellant was charged as indicated hereinbefore.
9. At his trial on the 16th September, 2002 the appellant initially tendered a plea of guilty. In the course of the proceedings the plea of guilty was altered to one of not guilty and the matter proceeded to trial.

It ought to be mentioned at this stage that in his Heads of Argument, appellant's counsel submits that the record of proceedings are not a complete record of the evidence that was heard by the Board. Appellant's counsel further submitted in his Heads as follows -

"...the record refers to lengthy, torrid, rigorous and mouth drying (*sic*) cross- examination without recording the questions and answers given by witnesses".

Counsel however submits, that the appeal can, still be determined on the basis of "selected and scanty evidence".

As a general proposition of law, all courts (including the present Board) are obliged to keep a full and comprehensive record of proceedings. A failure to do so, amounts to gross irregularity. We are however satisfied that in this matter there is sufficient material before the court to enable it to determine this matter without prejudice to the appellant and therefore to the ends of justice. See *S v Ndebele* 1988(2) ZLR 249 (H).

It was in essence the contention of the appellant at the trial that he had sought employment with the Daily Mirror with the knowledge and approval of his officer-in-charge Chief Inspector Tasaranago. That since the latter is deemed to act on behalf of the Commissioner and had allegedly authorised his obtaining such employment such authorisation must be deemed to have been done with the knowledge and authority of the Commissioner.

This Court is satisfied upon a close reading of the record that Tasaranago's testimony that he had not been informed by the appellant at the relevant time or at all that the latter was engaging in alternative employment is a correct finding. The evidence of Sergeant Mavhunga is corroborative of the testimony of Tasaranago in this regard. We are satisfied that there was no such disclosure and no authorisation was granted.

Furthermore and in any event Tasaranago was not of a rank that permitted delegation of the Commissioner's functions to him. (See s.10 of the Act). Mr *Tomana* in his address to the Court submitted that upon reflection, Tasaranago who held the rank of Chief Inspector, could not have lawfully granted authority to the appellant, as Tasaranago was not of the rank that could have permitted the delegation by the Commissioner of certain of his functions to him. Mr *Tomana* therefore conceded that the conviction of the appellant was proper for that reason.

It is not in dispute that the appellant during the period 23rd May 2002 to 4th September 2002 was bound by the conditions of service of his employer, the Zimbabwe Republic Police. Notwithstanding the fact that he was on leave and had tendered his resignation, which was to take effect on 4th September, 2002, he was still in receipt of his monthly salary and was enjoying the privileges enjoyed by serving members of the Force. He had secured employment with the Daily Mirror. That act on its own was not *per se* unlawful. The appellant however proceeded to actually work on behalf of his new employer whilst still in the employment of the ZRP. Secondly in doing so, he did not obtain the authority of the Commissioner of Police. In so doing he erred and acted in contravention of section 37 of the Schedule to the Act. The evidence on record establishes the appellant's guilt beyond reasonable doubt. In the result the conviction of the appellant is upheld.

In regard to sentence, the Board sentenced the appellant to three months imprisonment with labour and in addition he was to pay a fine of \$500.

The essence of the offence which the appellant stands convicted of is that of undertaking alternative employment whilst being a serving member of the ZRP.

In passing sentence the Board observed as follows:

"The sentence passed is seen to be corrective and deterrent to any would-be defaulters who are bent to work in cahoots with elements outside the Zimbabwe Republic Police with the intention of undermining its image and reputation. If this practice goes uncorrected, discipline within the ranks and file of the Zimbabwe Republic Police is undermined. In the Board's view the sentence is commensurate with the offence charged".

The expression of such sentiments not relevant to the charge the appellant was facing was a misdirection. It resulted in the Board imposing a sentence disproportionate to the moral blameworthiness of the appellant when viewed against the offence he was charged with. Indeed Mr *Shava* who appeared on behalf of the respondent, conceded in his Heads of Argument that he does not support the sentence imposed upon the appellant. We are in agreement with that concession.

In the result we are satisfied that for these reasons the sentence imposed in this matter cannot stand and it is set aside. It is substituted with the following sentence. The appellant is sentenced to a fine of \$500 or in default of payment to imprisonment for a period of 10 days.

In the circumstances the appeal against conviction is dismissed. The appeal against sentence succeeds to the extent indicated hereinbefore.

MAKONI J, agrees.

Muzangaza, Mandaza & Tomana, legal practitioners for the appellant
Office of the Attorney-General, legal practitioners for the respondent