ASSISTANT INSPECTOR CHATUKUTA
versus
THE TRIAL OFFICER
(CHIEF SUPERINTENDENT NLEYA S)
and
THE OFFICER IN CHARGE
(FAIRDRIDGE SUPPORT UNIT)
and
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 20 November 2014 and 19 December 2014

Urgent Chamber Application

N Mugiya, for the applicant
O Ngavi, for the respondents

MAWADZE J: This is an urgent chamber application in which the interim relief sought by the applicant is couched in the following terms:-

"INTERIM RELIEF GRANTED

Pending the confirmation of the provisional order

It is ordered that;

1. The respondents be and are hereby interdicted from detaining the applicant until they serve him with a copy of the reasons for the dismissal of his appeal which shall be served through his legal practitioners who noted the appeal

2. The 1st respondent is ordered to acknowledge and date stamp the copy of the notice of appeal for the applicants within 24 hours of date of this order

3. Once the applicant files the appeal, the respondents are barred from detaining the applicant until the appeal so filed is finalised.

SERVICE OF THIS ORDER

Service of this order shall be effected by the applicant's legal practitioners"

The terms of the final order sought are as follows;

"TERMS OF THE FINAL ORDER

That you show cause to this Honourable court why a final order should not be made in the following terms:-

1. The respondents are ordered not to interfere with the applicant's 1liberty unless in terms of the law.

2. The respondents are interdicted from barring the applicant from pursuing his constitutional rights

3. The respondents are ordered to pay costs of suit."

The applicant is an Assistant Inspector in the Zimbabwe Republic Police (ZRP) and at the material time was an instructor at Ntabazinduna Training depot in Bulawayo. The first respondent Chief Superintendent Nleya S is the trial officer who tried the applicant in terms of the Police Act [*Cap 11:10*].

The second respondent is the officer in charge of Fairbridge Support Unit in Bulawayo who cited in his official capacity and the same applies to third respondent the Commissioner General of the Police.

The facts giving rise to this application are as follows;

The applicant was tried by a single officer as is provided for in s 34 of the Police Act [*Cap 11:10*] (the Police Act) for contravening para 34 of the Schedule to the Police Act which relates to the offence defined as follows;

"Omitting or neglecting to perform any duty or performing any duty in any improper manner."

The basis of the charge is that the applicant who was an instructor at Ntabazinduna Training Depot in Bulawayo wrongfully and unlawfully transacted with recruit trainees by selling them learning material being handout notes from the Criminal Code [*Cap 9:23*] to trainee squads 126,127,136,137,142,143,146,147 and 148 all of 2012 for US$6-00 without the Depot Commandant's authority to undertake financial dealings with recruit trainees.

The applicant who denied the charges was convicted and sentenced to nine (9) days imprisonment at Chikurubi Detention Barracks.

Dissatisfied with both the conviction and sentence the applicant appealed to the Commissioner General of the Police in terms of s 34 (7) of the Police Act as read with s 11 of

the Police (Trials and Boards of Inquiry) Regulations 1965. On appeal the conviction was confirmed and the sentence of 9 days imprisonment was altered to 4 days imprisonment as applicant had already served 5 days of the 9 days imprisonment when a trial *de novo* was ordered on 20 October 2014.

It is applicant's case that after the appeal was dismissed by the Commissioner General, he was not favoured with the reasons for dismissing the appeal by the Commissioner General. Instead on 13 November 2014 the second respondent the Officer in charge at Fairbridge Support Unit advised the applicant that he was to be detained for purposes of serving the 4 days imprisonment as his appeal had been unsuccessful. This prompted the applicant to approach this court on an urgent certificate seeking the interim relief in the terms already outlined.

At the time of the hearing Mr. *Ngavi*, for the respondents conceded that there was no legal basis for the respondents not to furnish the applicant with reasons for the dismissal of the appeal by the Commissioner General. Consequently he undertook to immediately provide Mr. *Mugiya* for the applicant with the reasons for the dismissal of the appeal. This has now been done and a copy of the reasons for dismissing the appeal is now filed of record. Mr. *Ngavi* also undertook that the respondents would not detain the applicant for the purposes of serving the 4 days imprisonment until this matter is finalised. This means therefore the item number (1) on the terms of the interim relief sought is no longer an issue.

What has prompted the applicant to approach this court on an urgent basis is that the first respondent had virtually barred the applicant from filing an appeal with this court against the decision of the Commissioner General of Police and instead has threatened to detain the applicant in order to enforce the 4 days imprisonment. The applicant's contention is that his constitutional rights as enshrined in s 49 of the Constitution (the right to personal liberty) and s 70 (5) (b) of the Constitution (the right to appeal against conviction and sentence) are being wantonly violated by the respondents. The applicant alleges that he has been ordered to report for work on 17 November 2014 and there was a probability he would be detained as respondents have shown total disdain of the applicant's fundamental human rights and freedoms, a duty or obligation applicant contends is bestowed upon the respondents in terms of s 44 of the Constitution.

It is applicant's case that he has no other remedy except to approach the court on an urgent basis in order to protect his constitutional rights. The applicant contends that the respondents suffer no prejudice if the provisional order is granted and that he, the applicant

would suffer irreparable harm if he is ordered to serve the 4 days imprisonment without exhausting the available remedy of pursuing the appeal to its logical conclusion as such an appeal would be rendered *brutum fulmen.*

Attached to the applicant's founding affidavit is the copy of the notice of appeal incorporating the grounds of appeal against conviction and sentence which applicant intends to file with this court.

The third respondent opposed this application and took a point in *limine*. The point in *limine* taken by Mr. *Ngavi* for the respondents is simply as follows;

That no appeal lies against the decision of the Commissioner General of the Police once the Commissioner General has dismissed the appeal in terms of s 34 (7) of the Police Act. Mr. *Ngavi* argued that the applicant's purported appeal to this court is of no effect at law as the Police Act does not provide for any further appeal to the High Court against the decision of the Commissioner General. The respondents contend that the Commissioner General is the highest and final court of appeal in as disciplinary matters presided over by a single trial officer in terms of s 34 of the Police Act.

In deciding to grant or decline to grant the interim relief sought, the issue which falls for determination in this case is whether an appeal lies against the decision of the Commissioner General of the Police where a member of the Police Force has been tried in terms of s 34 (1) of the Police Act and has unsuccessfully appealed to the Commissioner General in terms of s 34 (7) of the Police Act.

It is common cause that the Police Act in s 34 does not provide for such an appeal against the decision of the Commissioner General. That can be contrasted with the provisions of s 33 of the Police Act which deals with the right to appeal to the High Court against the decision of the Board of Officers which provides;

> "33 Appeal from board of officers to High Court
>
> (1) Any person convicted of an offence by a board of officers may appeal to the High Court against such conviction or order of such board.
>
> (2) The provisions of the Magistrates Court Act [*Cap 7:10*] and the High Court Act [*Cap 7:06*] which relates to appeals from the Magistrates Court, the prosecution of such appeals, the power of the High Court thereon, the execution and suspension of sentence and the institution of further proceedings after a conviction has been set aside shall apply, *mutatis mutandis* to appeals from board of officers.

> Provided that any reference in other provisions to the clerk of court shall be construed as reference to Chief Staff Officer of the Police force."

It is important to note that this same right of appeal enshrined in s 33 of the Police Act is accorded to a member of the Police who would have been tried by the Magistrates Court in terms of s 32 of the police Act. The question which arises is therefore whether a member tried by a single officer in terms of s 34 of the Police Act and has unsuccessfully appealed to the Commissioner General in terms of s 34 (7) of the Police Act should be denied the right to appeal to the High court and consequently to the Supreme Court, a right enjoyed by members of the Police Force tried by either a board of officers or the Magistrates Court. Is this a proper interpretation and construction of the law?

The starting point in my view is to consider the provisions of the Constitution; specifically s 70 (5) which provide as follows:-

"S 70 Rights of accused persons

(1) ---------- (irrelevant)
(2) ---------- (irrelevant)
(3) ---------- (irrelevant)
(4) ---------- (irrelevant)
(5) Any person who has been tried and convicted of an offence has a right, <u>subject to reasonable restriction that maybe prescribed by law to-</u>

(a) have the case reviewed by a higher court or
(b) appeal to a higher court against the conviction and sentence" (underlining is my own for emphasis)

It is therefore clear to my mind that the right to appeal or to seek review is now enshrined in our constitution. The courts would therefore not deprive any person of such a right unless there are reasonable restrictions prescribed by the law. The Police Act does not provide for such reasonable restrictions, but is simply silent on the right of appeal by an aggrieved member against the decision of the Commissioner General made in terms of s 34 (7) of the Act. This leads me to the question of whether an appeal lies against the decision of the Commissioner General made in terms of s 34 (7) of the Police Act. Is an aggrieved member of the Police Force is such circumstances barred from approaching the High Court? Does the High Court have jurisdiction to deal with an appeal made by a member against the decision of the Commissioner General made in terms of s 34 (7) of the Police Act?

The respondents' argument is that such a member can only approach the High Court on review and not appeal. In other words the argument by the respondents that the High

Court in such circumstances, can only exercise its inherent jurisdiction in relation to review powers but cannot do the same in relation to appeals. I find this argument to be illogical.

The jurisdiction of the High court is provided for both in the Constitution and the High Court Act.

Section 171 of the Constitution provides as follows;

"171 Jurisdiction of the High Court

(1) The High Court -
(a) has original jurisdiction over all civil and criminal matters throughout Zimbabwe.

(b) has jurisdiction to supervise Magistrates Courts and review their decisions

(c) may decide constitutional matters except those that only the Constitutional Court may decide; and

(d) has such appellate jurisdiction as may be conferred on if by an Act of Parliament (my emphasis)

(2) An Act of Parliament may provide for the exercise of jurisdiction by the High Court and for that purpose may confer power to make rules of court."

My understanding of the above constitutional provisions is that the High Court being a superior court of record has original jurisdiction in all civil and criminal matters in Zimbabwe. The inherent jurisdiction conferred upon the High court is exercised unless it is specifically ousted.

The respondent contends that s 171 (d) of the Constitution shows that an Act of Parliament may confer or remove appellate jurisdiction from the High court. It is therefore correct that, in terms of s 171 (d) of the Constitution the appellate jurisdiction of the High Court may be limited by a statute. This leads to the question as to whether there is indeed a statute which limits the appellate jurisdiction of the High Court in the circumstances of this case.

Section 13 of the High Court Act [*Cap 7:06*] (the High Court Act) provides as follows;

"1.3 Original Civil Jurisdiction

Subject to this Act or any other law, the High Court shall have full original civil jurisdiction over all persons and over all matters within Zimbabwe."

It is clear from the provisions of the Police Act that disciplinary proceedings held in terms of the Police Act are of a civil rather than criminal nature despite the fact that convicted members or officers of the Police Force may be sentenced to terms of imprisonment. this leads me to the appellate jurisdiction of the High Court in civil matters.

Section 30 of the High court Act provides as follows:-

"30 Jurisdiction in appeals in civil cases

(1) The High court shall have jurisdiction to hear and determine an appeal in any civil case from the judgment of any court or tribunal from which in terms of any other enactment an appeal lies to the High court.

(2) Unless provision to the contrary is made in any other enactment, the High Court shall hear and determine and shall exercise powers of an appeal referred to in subsection (1) in accordance with the Act."

It is clear to my mind that in terms of s 30 of the high Court Act the High Court can, firstly, exercise its appellate jurisdiction in respect of any proceedings of any tribunal if the relevant Act governing those proceedings provides for an appeal to the High Court. The second instance where the High Court will exercise its appellate jurisdiction is where the relevant Act governing the proceedings of such a tribunal does not oust the jurisdiction of the High Court. This is the simple and ordinary interpretation which should be accorded to the provisions of s 30 (1) and (2) of the High Court Act.

The Police Act does not at all oust the appellate jurisdiction of the High Court in relation to proceedings held in terms of s 34 of the Police Act. While an appeal lies to the Commissioner General against the decision of a single trial officer in terms of s 34 (7) of the Police Act, there is no provision in the Police Act which states that no appeal lies against the decision of the Commissioner General made in terms of s 34 (7) nor is there a provision which bars an aggrieved member to approach the High Court on appeal against the decision of the Commissioner General. Put simply, the appellate jurisdiction of the High Court is not specifically ousted.

In the case of *Rateyiwa* v *Kambuzuma Housing Co-op and Anor* 2007 (1) ZLR 311 (H) at 314 G-H GOWORA J (as she then was) succinctly summarises how this court will approach the question of its jurisdiction or lack thereof as follows;

> "This court has full jurisdiction over all persons and over all matters in Zimbabwe. Such jurisdiction is ousted only when Parliament has specifically provided for its ouster. Even where an Act seeks to provide for the ouster of the jurisdiction of this

> court, this court will only admit to such ouster where the legislation in question ousts the jurisdiction in no uncertain terms. It is trite that the High Court, being a superior court with original jurisdiction justifiably, and rightfully so, guards such jurisdiction jealously."

The rationale for this approach is to ensure that all our citizens irrespective of their station in life should access justice. This is precisely why the jurisdiction of the High Court, whether appellate jurisdiction or otherwise cannot be ousted by implication but has to be expressly excluded. This informs the maxim that the High Court, unlike other inferior courts which may only do what the law permits, may do everything which the law does not forbid. See Herbastein and Van Winsen in *The Civil Practice of South African High Courts*, ed5 at pp 49.

I am therefore satisfied for the reasons stated that the Police Act does not oust the appellate jurisdiction of this court in relation to decisions made by the Commissioner general in terms of s 34 (7) of the Police Act. There is therefore no legal bar to the applicant appealing to the High Court against the decision of the Commissioner General made in terms of s 34 (7) of the Police Act.

I am therefore inclined to dismiss the point in *limine* taken by the respondents.

The respondents have not opposed the interim relief sought on the merits. I do not see how they would have done so successfully.

While the terms of the interim relief sought are badly and clumsly drafted, it is clear that what applicant seeks in the interim is the stay of the order committing him to prison for 4 days pending the return date. I am inclined to grant that interim relief.

In the result, it is ordered as follows,

Pending the finalisation of the matter;

IT IS ORDERED THAT;

The order granted by the third respondent committing the appellant to prison be and is hereby suspended.

Mugiya & Macharaga Law Chambers, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners