

CONSTABLE TAMANIKWAS. 061552D  
versus  
THE OFFICER IN CHARGE ZIMBABWE REPUBLIC POLICE BEATRICE  
and  
THE OFFICER IN CHARGE CHIKURUBI DETENTION BARRACKS  
and  
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE  
TAGUJ  
HARARE 29 June 2015 & 15 July 2015

### **Urgent Chamber Application**

*N. Mugiya*, for the applicant  
*P. Kapasura*, for the respondents

TAGUJ: This matter came before me via the urgent chamber book on 29 June 2015. At the hearing of the matter the respondents raised a point *in limine*. The point *in limine* was opposed by the applicant. Mr *Mugiya* who appeared for the applicant raised the defence that there was, at law, no notice of opposition to the relief being sought on the basis that the respondents' purported supporting affidavits were defective because they cited case authorities in their affidavits. Mr *Mugiya* undertook to provide the court with case authorities by the end of that day. Mr *Kapasura* who appeared on behalf of the respondents argued that it was proper to cite case authorities in the opposing affidavit where a point *in limine* has been raised since this was an urgent chamber application. I waited for Mr *Mugiya* to supply the said authorities, but in vain. To date, the 8<sup>th</sup> July 2015 no such case authorities have been filed. I am therefore, forced to write this ruling on the point *in limine* without the benefit of such case authorities.

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

**“TERMS OF THE FINAL ORDER SOUGHT:**

**IT IS ORDERED THAT:**

- (a) The Respondents are interdicted from detaining the Applicant until his appeal on HC CA 542/15 is finalised.
- (b) The Respondents are ordered to pay costs of suit.

**PROVISIONAL ORDER GRANTED**

Pending the confirmation of the provisional order

- (a) Respondents are barred from detaining the Applicant pending the return date.
- (b) Should the Respondents have already executed their detention against the Applicant at the time of this order, they are ordered to release the Applicant forthwith.

**SERVICE OF THE PROVISIONAL ORDER**

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

The facts of the matter are that the applicant was tried by a single officer on 30 June 2015 in terms of s 34 of the Police Act [*Chapter 11:10*] and was subsequently convicted and sentenced to 10 days imprisonment at the Chikurubi Detention Barracks. The applicant then appealed against the decision of the trial officer to the Commissioner General of Police in terms of s 34 (7) and (8) of the Police Act, which appeal suspended the operation of the conviction and sentence passed by the trial officer. On 23 June 2015 the Officer in charge Beatrice (first respondent) notified the applicant through a radio signal from the Commissioner General of Police (third respondent) that the applicant's appeal had been turned down and that he needed to detain the applicant so that he serves his sentence. The applicant proceeded to file his appeal to the High Court against the decision of the Commissioner General of Police in terms of s 70 (5) of the Constitution of Zimbabwe under case no. CA542/15. Pending the determination of his appeal at the High Court, the applicant has approached this court on an urgent basis seeking an interdict order interdicting the respondents from detaining him.

The respondents raised a point *in limine* couched in the following words:-

"The application is not properly before the court in that it is placing reliance on an appeal to this Honourable Court which is not properly before the court. This is so in the sense that the Police Act does not provide for a further appeal to the High Court against the decision of the Commissioner General of Police on appeal"

I was referred to persuasive judgements of *Jona Ndalama v Commissioner General of Police and Chief Superintendent and Co- Ministers of Home Affairs* HB 21/14, *Constable Janhi v Commissioner General of Police* HH550/15 and *Assistant Inspector Chatukuta v The Trial Officer & Others* HH705/14.

The sole issue for determination at this stage is whether or not a further appeal lies to the High Court against the decision of the Commissioner General of Police where a member was tried by a single officer.

Section 34(1) of the Police Act provides as follows-

**"34 Trial before court consisting of one officer**

- (1) A member, other than an officer, who is charged with a contravention of this Act or any order made thereunder or any offence specified in the schedule may be tried by an officer of or above the rank of Superintendent and sentenced to any punishment referred to in paragraph

(d) of subsection (2) of section twenty-nine”

Section 34 (7) and 34 (8) govern appeals from the decision of the single officer. The sections provide as follows:-

“(7) A member convicted and sentenced under this section may appeal to the Commissioner- General within such time and in such manner as may be prescribed against the conviction and sentence and, where an appeal is noted, the sentence shall not be executed until the decision of the Commissioner-General has been given.

(8) Unless an appeal has been noted, every sentence imposed by an officer shall forthwith be executed”.

My interpretation is that other than what is provided for in terms of s 34 (7) of the Police Act, there is no other provision for an appeal to this court from a decision of a single officer. The Provision in the Police Act that makes reference to an appeal to the High Court is section 33. It says-

**“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 any sentence or order of such board.”

My understanding is that only those convicted by a board of officers can appeal to the High Court. The Commissioner –General is not mentioned, neither can the board of officers be interpreted to mean or include the Commission General. When the legislature in its wisdom enacted s 34 (7) it was aware of the provisions in s 33. If it wanted the decision of the Commissioner General to be appealed to the High Court it could have expressly said so. For example, a member who is aggrieved by the decision of the Commissioner General can appeal to the Police Service Commission in terms of section 51 of the Act. Section 51 says-

**“51 Appeal**

A member who is aggrieved by any order made in terms of section forty- eight or fifty may appeal to the Police Service Commission against the order within the time and in the manner prescribed, and the order shall not be executed until the decision of the Commission has been given.”

If the legislature contemplated an appeal from the Commissioner General to the High Court, it should have said so in clear terms. It follows that once the Commissioner General has dismissed the appeal from the single officer that will be the end of the matter.

Even section 33 (2) of the Police Act is very clear. It says-

“(2) The provisions of the Magistrates Court Act [*Chapter 7:10*] and the High Court Act [*Chapter7:06*] which relate to appeals from a magistrates court, the prosecution of such appeals, the powers 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 a board of officers:”

Section 33(2) therefore talks of a board of officers and not an officer or a Commissioner General. It is only in terms of s 34 (4) of the Police Act that the Commissioner General can *mero motu* refer the case to the High Court through the Attorney- General if he considers that any punishment imposed by an officer in terms of subsection (1) is inadequate. But this is not the case here.

Mr *Mugiya* submitted that the applicant is exercising his rights in terms of section 70 (5) of the Constitution of Zimbabwe. The section says-

“70 Rights of accused persons

(1).....

(2).....

(3).....

(4).....

(5) Any person who has been tried and convicted of an offence has the right, subject to reasonable restrictions that may be prescribed by law, to-

(a) have the case reviewed by a higher court, or

(b) appeal to a higher court against the conviction and sentence.”

*In casu*, the applicant is not intending to make an application for review to the High Court, but to appeal. The respondents’ argument was that the appellate powers of High Court are conferred to it in terms of s 34 (1) of the High Court Act [*Chapter 7.06*]. Section 34 (1) of the High court Act provides as follows:

“The High Court shall have jurisdiction to hear and determine an appeal in any criminal case from the judgment of any court or tribunal from which, in terms of any enactment, an appeal lies to the High Court”

According to the respondents if the enabling Act (the Police Act) does not provide for a further appeal as is in the present case, then it cannot therefore be assumed that the High Court has such powers, and the application has to be dismissed on this basis.

However, in determining this case I did not lose sight of the provisions of s 171 of the Constitution of Zimbabwe which confers jurisdiction to the High Court of Zimbabwe. The section says-

**“171 Jurisdiction of 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 other subordinate courts and to 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 it by an Act of Parliament.”

In my view, s171 (d) of the Constitution confers the High Court with such appellate

jurisdiction as may be conferred on it by an Act of Parliament. In the present case the Act under review is the Police Act. As I demonstrated above the Police Act does not confer appellate jurisdiction on the High Court in respect of decisions of single officers. It only confers jurisdiction where a member has been tried, convicted and sentenced by a board of officers. In respect of a single officer the High Court can only be involved where the Commissioner General has referred the case to it through the Attorney General. Nothing is said about appeals from the decision of the Commissioner General where a member has been tried by a single officer.

For the foregoing reasons I agree with Mr *Kapasara* that the application that the applicant seeks to rely on is not properly before this court. In the result I uphold the point *in limine*. The application is dismissed.

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