D/SGT MANYUMBU P046131 R
versus
TRIAL OFFICER (SUPERINTENDANT TIVATARA)
and
THE COMMISSIONER GENERAL OF POLICE
and
THE MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 7 April 2014 and 8 April 2014

Urgent Chamber Application

N. Mugiya, for the applicant
Ms C. Saruvanga, for the respondents

BHUNU J: This is an urgent chamber application for review. The applicant is a detective sergeant in the Zimbabwe Republic Police. He was charged with acting in an unbecoming manner or in any manner prejudicial to good order or discipline or reasonably likely to bring discredit to the Police force in contravention of para 35 of the schedule to the Police Act [*Cap 11:10*]. He pleaded not guilty to the charge but was nevertheless convicted and sentenced to 10 days imprisonment by the first respondent in his capacity as the Trial Officer.

Dissatisfied with the outcome of the disciplinary proceedings he appealed to the second respondent who in turn dismissed the appeal on 28 February 2014. Aggrieved by the outcome of the appeal proceedings he filed an urgent application before ZHOU J seeking stay of execution of the sentence imposed upon him. He however withdrew the application because his papers were not in order.

The mere filing of the review proceedings succeeded in delaying execution of the sentence in terms of s 34(7) of the Act which obliges the authorities to stay execution pending appeal. There has been argument as to whether an appeal includes a review for the purposes of s 34 (7) of the Act. I am inclined to take the robust view and hold that indeed for the purposes of s 34 (7) an appeal includes a review. The section reads:

> *"(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."*

It is clear that the predominant intention of the law maker was to prevent the incarceration of the defaulting officer while his appeal is pending to avoid irretrievable harm by imprisoning someone who may eventually win his case on appeal. A review is a form of limited appeal based on allegations of procedural irregularities arising from the record of proceedings. That being the case, the mischief intended to be averted in the case of an appeal applies with equal force to a review. There is equally no point in incarcerating a defaulting officer before the determination of a valid review pending in the Court.

The law however comes to the rescue of the vigilant. In order to benefit from the reprieve granted by law the applicant must act promptly without undue delay. In this case the applicant appears to have layed back until he was prodded into action by the prospect of imminent imprisonment. This is clear from para 5 and 6 of his founding affidavit where he says:

> "5. What has ignited urgency in this matter is that on the 17th of March 2014, I was served with a warrant of detention. See attached warrants marked Annexure 'D'. I could not be detained on the 17th of March 2014 because I had filed an Urgent Chamber Application but the said application was withdrawn after the judge told me to rectify my application for review which I did. However the 1st Respondent had told me to come so that I am detained today the 27th of March 2014.
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> 6. At the time of signing this affidavit the 1st Respondent is actually waiting for me and I will be detained in the next few hours and that I am definite. He said he is using the same warrants of detention which he had issued in the first place which are attached hereto"

It is clear that the applicant is using review proceedings as a subterfuge to avoid imprisonment. The tragedy is that once he had withdrawn his application for an urgent stay of execution he threw away the shield and the respondents were perfectly entitled to arrest and detain him. The mere fact that the delay was caused by his attempt to retrieve his shield cannot provide him with any remedy because he was entirely to blame for its loss.

The respondents are therefore entirely correct in saying that the urgency is self created in that the applicant voluntarily withdrew the application for stay of execution instead of amending it or applying for jointer if he had left any other party from the proceedings as he now alleges that he had omitted to cite the second respondent. This was an act of gross negligence how could he fail to cite the very person whose conduct he was complaining against?

The applicant cannot blame anyone else but himself and his lawyers for filing defective papers and therefore rendering the matter not urgent. The applicant has made his bed so he must lie on it. It was remiss of the applicant and his lawyers to wait until he had been threatened with instant detention before springing into action to protect his freedom. The case of *Kuwarega* v *Registrar General and Anor* 1998 (1) ZLR 188 (H) is authority for the proposition that a matter is not urgent simply because the day of reckoning is imminent. I accordingly hold that the matter is not urgent.

Mugiya & Macharaga Law Chambers, the applicant's legal practitioners
The Prosecutor General's Office, the respondents' legal practitioners

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