CONSTABLE TAMANIKWA
versus
BOARD PRESIDENT
(CHIEF SUPERINTENDENT BALENI)
and
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 29 July 2015 and 5 August 2015

Urgent Chamber Application

N. Mugiya, for the applicant
T. Tabana, for the respondents

MATHONSI J: The applicant is a police constable based at ZRP Beatrice. A board of inquiry-suitability has been convened to inquire into his suitability to remain in the force or to retain his rank, salary or seniority. The board was due to sit on 24 July 2015 causing him to file this application seeking to stop the proceedings before the suitability board.

The reason for seeking a stay of the proceedings is that after the Commissioner General of Police confirmed the conviction and sentence of the applicant on 23 June 2015 he noted an appeal to this court in terms of s 70(5) of the Constitution. He had been convicted of contravening paragraph 34 of the Schedule to the Police Act [*Chapter 11:10*] and sentenced to 10 days imprisonment.

The applicant states that he sees no reason why an appeal to the High Court should not suspend the decision appealed against. Proceeding with the hearing has the effect of undermining the authority of this court. He will be prejudiced if the suitability proceedings continue, although he does not state how. He will suffer irreparable harm as he "will definitely be discharged" from the force. Again he does not say why he is so sure that he will be discharged when the board's terms of reference are to look into his suitability or fitness "to remain in the Police Service, retain

his rank, salary or seniority." Discharge is not the only outcome of the inquiry.

Section 70 (5) of the constitution in terms of which the applicant has appealed to the High Court provides :

> "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."

The High Court has review jurisdiction over all inferior courts and tribunals in terms of s 26 of the High Court Act [*Chapter 7:06*]. While it has appellate jurisdiction as well s 30 of the High Court Act dealing with the jurisdiction in civil cases provides:

> "(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 enactment, the High Court shall hear and determine and shall exercise powers in respect of an appeal referred to in subsection (1) in accordance with this Act"

That provision accords with what is contained in s 171 (1)(d) of the constitution which reads:

> "The High Court has such appellate jurisdiction as may be conferred on it by an Act of Parliament."

The central issue to be determined in this matter is whether the applicant has established the requirements of an interdict. In doing so one cannot avoid dealing with the issue of whether there exists a valid appeal that has been lodged against the decision of the Commissioner General of Police.

I have given a recital of the provisions dealing with appeals because the applicant purports to have approached the High Court on appeal in terms of s 70(5) of the constitution. That is what the notice of appeal filed on 24 June 2015 says. There is no doubt in my mind that s 70(5) of the constitution does not set out any appeal procedure. Also it certainly does not give the applicant a right to appeal to this court from a decision of the commissioner general. Its import is the conferment of broad constitutional rights of recourse to a "higher court" on review or appeal.

For that reason, the noting of the appeal to this court cannot possibly be in terms of s 70(5) of the constitution. There has to be another basis for lodging the appeal in the High Court. I shall return to that issue later but for now let me deal with the central issue of an interdict.

In order to succeed in interdicting the respondents from conducting the suitability board proceedings, the applicant must establish the traditional requirements for a temporary or final interdict namely;

1. A clear or *prima facie* right;
2. An injury actually committed or reasonably apprehended;
3. The absence of similar protection afforded by any other ordinary remedy; and
4. A balance of convenience favoring the grant of the interdict.

See *Setlogelo* v *Selogelo* 1914 AD 221 at p 227; *Boadi* v *Boadi & Anor* 1992 (2) ZLR 378; *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* 1996 (2) ZLR 52(5) at p56.

In my view the establishment of a right presents serious difficulties for the applicant because the convening of a board to inquire into the suitability or fitness of a police officer to remain in the police service, to retain his rank, salary or seniority is provided for in the law. In terms of s 50(1) of the Police Act, the Commissioner General has authority to convene such a board. An activity conducted in accordance with the law cannot lawfully be interdicted unless if in so doing the conven or commits an irregularity or violates the law in terms of which he is so acting.

Faced with that obvious difficulty Mr *Mugiya* for the applicant sought to argue that while the applicant cannot lawfully prevent the suitability board proceedings, he can lawfully secure a temporary interdict until such time that his purported appeal has been determined. I cannot, in all fairness, understand what that means. Where a temporary interdict is granted against proceedings conducted in terms of the law, a paradox arises. It can only mean that the interdict itself is what is unlawful or irregular.

I must say that if an applicant cannot establish the first requirement of a clear right (in respect of a definitive or permanent interdict) or a *prima facie* right (in respect of a temporary or interim one), but is able to establish the other requirements, that will not be enough even though the requirements are complimentary. The absence of a right is fatal to the application.

The applicant insists that his right to an interdict is found in the appeal that he has noted to the High Court. Mr *Tabana* for the respondents submitted that the purported appeal is a nullity by reason that no right of appeal lies to the High Court against the decision of the Commissioner General to confirm a conviction and sentence imposed by a single officer in terms of s 34 of the Police Act. To the extent that the appeal was a nullity it could not found an application for an interdict.

The issue has been a subject of two diametrically different pronouncements of this court before. MAWADZE J was the first into the fray in *Chatukuta* v *The Trial Officer & Ors* HH 705/14. In that case the applicant had his conviction by a single officer confirmed by the Commissioner General. He noted an appeal to this court in terms of s 70 (5) of the Constitution. When his superiors threatened to execute the sentence of imprisonment he made an urgent application to stop the execution. The learned judge concluded that a right of appeal lay in the High Court reasoning that;

> "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 an appeal against the decision of the Commissioner General. Put simply, the appellate jurisdiction of the High Court is not specifically ousted."

To the learned judge everything turned on the absence of an ouster provision as opposed to the existence of a provision conferring appellate jurisdiction.

CHIGUMBA J was very emphatic in her conclusion in *Jani* v *The Officer in Charge ZRP Mamina & Ors HH* 550/15. She said;

> "The provisions of the Police Act are clear. There is no provision for an appeal or review to this court from a decision of a single officer. This court may only review the decision of a Board of Officers, or entertain an appeal against the decision of a Board of Officers. The reasoning behind this discrimination is clear. Single officers may only adjudicate on simple offences which do not attract stiff penalties. They preside over a simple and fast and streamlined procedure designed to clear less serious infractions."

Therein lies the conundrum of conflicting views expressed by this court. I however respectfully disagree with MAWADZEJ. Ordinary jurisdiction and appellate jurisdiction must be treated differently. While this court will jealously guard its original jurisdiction, it does not

possess the magical crystal ball to guard the appellate jurisdiction it does not have or to install it merely because a statute had not specifically ousted it. This is because s 171(1)(d) of the constitution makes it clear that this court may only exercise appellate jurisdiction conferred to it by an Act of Parliament. In line with that s 30(1) of the High Court Act provides that this court shall determine appeals from courts or tribunals in terms of an enactment.

In that respect the appellate jurisdiction cannot be imposed merely because it is not excluded. Surely it was never the intention of the law giver in enacting s 70(5) of the constitution that any party aggrieved by a decision of any tribunal should just rock up at the High Court with an appeal not provided for in any enactment. Chaos would ensue if that was to be the case. I am fortified in that view by the existence of a right of review as opposed to appeal available to an aggrieved party. Such a party can therefore not foist appellate jurisdiction on this court which is not conferred by an Act of Parliament. The Police Act, certainly does not confer such jurisdiction.

Having come to that conclusion, it must follow therefore that the filing of an appeal in the High Court was an exercise in futility, it was a nullity. This application being predicated upon a nullity cannot be sustained as a nullity cannot give rise to anything valid. There is therefore no legal basis for stopping the proceedings before the board, the applicant having failed to establish the requirements of an interdict.

In the result, the application is hereby dismissed with costs.

Mugiya & Macharaga Law Chambers, applicant's legal practitioners
Attorney General's Office, respondent's legal practitioners