CONSTABLE MUTAURWA L
versus
THE OFFICER-IN-CHARGE
(CHIKURUBI DETENTION BARRACKS)
and
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 16 November 2016

Urgent Chamber Application

N Mugiya, for the applicant
K Chimiti, for the respondents

FOROMA J: This is an urgent application by the applicant in terms of which he seeks the following relief:

A. Terms of the final order sought

1. The detention of the applicant be and is hereby stayed pending the finalization of his application for review filed with this court.
2. The respondents are ordered to pay the costs of suit.

B. Interim Relief Granted

Pending the confirmation of the provisional order an interim order is granted on the following terms.

(1) The detention of the applicant is stayed pending the finalization of this matter.

The applicant is a constable in the Zimbabwe Republic Police who was charged and tried in the court of a single officer in terms of s 34 as read with s 29 A (1) (d) of the Police Act [*Chapter 11:10*]. On being convicted of one count he was sentenced to 14 days imprisonment at the detention barracks and being dissatisfied with his conviction and sentence the applicant noted

an appeal to the Commissioner of Police the second respondent. The appeal was unsuccessful and dissatisfied with this result the applicant filed an application for a review of the single officers' court decision on 15 November 2016 under HC 11646/16. In his grounds of review the applicant relies on the single ground which was couched as follows – (1) The conviction of the applicant by the first respondent was contrary to the due process of our law and ought to be set aside. Considering that the review sought is that of the decision of the court of the single officer after an unsuccessful appeal against the same decision it is apparent that the applicant seeks to have a second bite of the cherry.

The applicant argues that the matter is urgent for the reason that in the event his review application succeeds and he has in the interim been required to serve the 14 day sentence his application for review will have been reduced to an academic exercise. In para 10 of his affidavit the applicant avers as follows:

"I am due to be detained anytime from now unless if this court intervenes on an urgent basis to stop the respondents' abuse of their powers and authority." The applicant does not explain why his detention after the dismissal of his appeal by the second respondent is an abuse of the respondents powers and authority. Section 34 (7) of the Police Act clearly provides as follows;

> "A member convicted and sentenced under this section may appeal to the Commissioner General …… and where an appeal is noted the sentence shall not be executed until the decision of the Commissioner General has been given."

The Commissioner General's decision having been given effectively dismissing the appeal the stay of execution of the sentence pending appeal is terminated and there can be no abuse of authority by the respondents in executing the sentence i.e requiring the applicant to serve his sentence.

The applicants' application was opposed by the respondents through an opposing affidavit deposed to by Augustine Chihuri's (the second respondent). The respondents raised two points *in limine* i.e (i) that the matter was not urgent and (ii) that there was no application for a review before the High Court as the purported application for review was way out of time in that it had been filed way past the 8 weeks of the termination of the suit/action or proceeding in

which the irregularity or illegality complained of is alleged to have occurred and no condonation had been sought.

At the hearing of the application Mr *Mugiya* who appeared on behalf of the applicant *argued that the application for review was timeous and relied on the case of Dzikamai Madzivire* v *The Trial Officer and The Police Commissioner General* HH 972/15 (a) judgment of TSANGA J in support of the proposition he urged upon the court namely that the 8 week period in terms of order 33 r 259 of the High Court Rules commences to run from the time of the Commissioner General of the Police's decision on appeal is handed down. He also referred me to the case of *Moyo* v *Gwindingwi and Anor* HH 168/11 wherein MATHONSI J states that "In a line of cases this court has determined that it will be very slow to exercise its general review jurisdiction in a situation where a litigant has not exhausted domestic remedies available to him. A litigant is expected to exhaust available domestic remedies before approaching the court unless good reasons are shown for making an early approach."

MATHONSI J's judgement lays down the correct approach on the need to exhaust domestic remedies before an approach is made to the High Court for a review. However I have great reservations in the argument that in terms of the Police Act exhaustion of domestic remedies entail pursuing an appeal before one can institute an application for a review where such remedy exists. Regrettably TSANGA J did not have an opportunity to consider this point in detail as the argument was conceded by the respondents' counsel in their heads of argument making it perhaps unnecessary for her to delve into the matter further. With respect the argument that the applicant who desires to seek a review of the single trial officer's proceedings has to wait until the outcome of an appeal in terms of s 34 of the Police Act is a misapplication of the position articulated by MATHONSI J above in the *Moyo* v *Gwindingwi* case on the need to exhaust domestic remedies.

I endeavor to illustrate the illogical consequences of such an approach below.

Section 34 of the Police Act says:

"3. Every officer who convicts and sentences a member under this section shall forthwith transmit the proceedings for review by the Commissioner General who may:-
(a) Confirm the conviction and sentence
(b) Alter or quash the conviction or reduce sentence…..
(c) Quash the conviction and sentence and remit
(d) …….

> Provided that no conviction or sentence shall be quashed or set aside by reason of any irregularity or defect in the record or proceedings unless the Commissioner considers that a miscarriage of justice had actually occurred."

Clearly s 34 (3) provides for automatic review of proceedings of a single officer's court where such officer has convicted and sentenced a member. The powers of the Commissioner General on review are clearly spelt out. It is the proviso to s 34 (3) which need detain me. It is clear that the Commissioner General shall not quash or set aside a conviction and sentence on account of an irregularity or defect in the record or set aside proceedings unless such irregularity or defect in the record or proceedings has caused or resulted in a miscarriage of justice. If an applicant seeking a review of the single officer's trial proceedings were to apply for a review to the High Court before the Commissioner General of Police has been afforded the opportunity to review the same proceedings such applicant can successfully be met with the defence that they have not exhausted domestic remedies precisely for the reason that the applicant could very easily secure his remedy or relief at domestic level via a review by the Commissioner General of Police.

The decision to note an appeal at the termination of the single officer's court trial is consciously made as a result of the convicted party making a deliberate decision to challenge the conviction and sentence by way of an appeal and not review. Once that election has been made as between appeal or review whatever its justification the litigant is bound by his election. This is because among other things the procedures are different. Where a decision to seek a review in the High Court (assuming such remedy was available to the litigant) is made then one has to be certain that they have complied with the rules regarding (1) grounds for review and time limits for filing the application and the parties to be cited among other things.

Order 33 r 259 is clear in its language. "Any proceedings by way of review shall be instituted within eight (8) weeks of the termination of the suit action or proceedings….".

There are no separate time lines which govern the dies for filing an application for a review in this court. Of course the court may for good cause shown extend the dies this is a clear reference to the need to apply for condonation. The 8 weeks are calculated from the termination of the suit, action or proceedings in which the irregularity or illegality complained of is alleged to have occurred. *In casu* two proceedings are involved-the trial in a single officer's court which terminated on the passing of sentence and the appeal to the Commissioner General which

terminated on the handing down of the Commissioner General's decision that dismissed the appeal. Bearing in mind that the applicant's application for review is concerned with the proceedings before the single officer's court trial (per ground of review above quoted) there can be no doubt that those proceedings for review purposes in the High Court terminated as indicated herein above i.e on passing of sentence.

To suggest that the proceeding before the single officer's court terminated with the dismissal of the appeal for review purposes would be mischievous and an unjustifiable straining of the language. If one were to argue so then the proceeding before the Commissioner General which is separate and could be subject of different grounds of attack for review purposes would not constitute a proceeding. Besides granting a review to an unsuccessful appellant after an unsuccessful appeal would be tantamount to providing such appellant a right of appeal against the commissioner General of police's decision that …….. as a review and whereas the proceedings are terminated on appeal.

Sight should not be lost of the fact that by providing for automatic review as indicated above the legislature intended to streamline the procedure involving disciplinary actions involving members of the police force accused of minor infractions. The Commissioner General of Police's exercise of statutory review powers is subject to the overriding consideration that the irregularity or illegality ought to have resulted in a miscarriage of justice before it can justify the resultant quashing of conviction and sentence. It is reiterated that the Commissioner General of Police is only required to quash proceedings if there has been an actual miscarriage of justice. The test on determining appeals must be the same - the appellant who has successfully argued his grounds of appeal will have successfully established that there has consequently been a miscarriage of justice. It is therefore safe to say that the Commissioner General not being a judicial Officer but being vested with review jurisdiction will interchangeably determine appeals and reviews on the same criteria i.e. whether there has been a miscarriage of justice. In my view to accept that the applicant can competently seek review of the single officer's court proceedings after an unsuccessful appeal to the Commissioner General is tantamount to conferring on the applicant a right of appeal against the Commissioner General's decision on appeal which the legislator did not grant. I therefore associate myself unreservedly with CHIGUMBA J's sentiments in the case of *Jani* v *Jani* i.e where she emphatically stated as follows:

"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"

In view of the view I hold as expressed herein the applicant has no right of review to the High Court against the decision of a single officer. It follows that the second point *in limine* succeeds even though not for reasons advanced by the respondents. It is also clear that even if the applicant had a right of review which I do not accept it has its application would still fail on the grounds that the purported review application would be null and void on account of it being way out of time in terms of Order 33 r 259 it having been filed without condonation. Being null and void it (the said review) would not give rise to any rights to the applicant see *Macfoy* v *United Africa Co. Ltd* [1961] 3 ALLER 1169 PC @ 1172. In the result the application is dismissed with costs.

Mugiya and Macharaga, applicant's legal practitioners
Civil Division of the Attorney – General's Office, respondent's legal practitioners