SAMUEL MISI
versus
COMMISSIONER GENERAL OF POLICE (N.O)
and
POLICE SERVICE COMMISSION

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 26 September 2018 & 18 October 2018

Opposed Application

Mr. Ziro, for the applicant
Mr. D Jaricha, for respondent

MUZOFA J: This is an application for condonation of late noting of an appeal and extension of time to note an appeal.

The applicant is a former member of the Zimbabwe Republic Police. He was a constable. Following allegations of misconduct, he was charged and was tried before a single officer. He was found liable and sentenced to 7 days imprisonment at Fairbridge Detention Barrack. He did not appeal against the decision. On 30 December 2016, the applicant was discharged from service after a board of suitability made recommendations to the first respondent for his dismissal. The applicant noted an appeal to the second respondent. The appeal was dismissed on 23 March 2017. The applicant seeks to appeal against the decision of the second respondent.

A preliminary point was raised for the first respondent that the application is not properly before the court in that the applicant has no right of appeal against the decision of the second respondent. I directed that parties make submissions on the preliminary point and the main application the outcome on the preliminary point will inform me how to proceed with the main matter.

On the authority of *Sergeant Khauyeza (FO48677* v *The Trial Officer (Superintendent J. Mandizha) and Another* HH 311/18 it was submitted for the respondent that section 33 of the Police Act [*Chapter 11:10*] "the Act" allows for an appeal from a decision of the board of officers only. No appeal lies from a decision of the second respondent.

In response, for the applicant it was submitted that the intended appeal is against the first respondent's decision. Further that the Police Act does not oust this court's jurisdiction to hear appeals, s 171 (1) (d) of the constitution provides that this court can hear any appeal unless specifically ousted. The Police Act is actually silent on the issue. Counsel relied predominantly on the case of *Constable Jani 985403P* v *The Officer in Charge ZRP Manina and Ors* HH 550/15 that since the Act is silent on the issue that is not equivalent to an express ouster. It was also submitted that the courts have in the past heard appeals against the decision of the second respondent one such case was said to be *Anatos Mpofu* v *Commissioner of Police and Police Service Commission* SC 15/08 where the Supreme Court exercised its review powers and set aside the first respondent's decision. Practice has shown that this court has heard both appeals and reviews of the respondents' decisions.

From the applicant's pleadings and oral submissions it is unclear which decision is subject of the intended appeal. The first page of the notice indicates that the applicant intends to appeal against the decision of the Board of Officers made on 30 December 2016 and then paragraph (e) of the notice provides:

> "It is due to (*sic*) fact that in terms of s 33 of the Police Act appellant (*sic*) days to note an appeal have lapsed and hence applicant makes this application."

The averment seem to suggest that the applicant was tried by a board of officers in terms of s 33 of the Act. However this is not the true position, the applicant was tried by a single officer and s 33 of the Act does not apply to his case. The founding affidavit sets out the facts but this time it is clear that the applicant intends to appeal against his dismissal, a decision made by the first respondent and confirmed on appeal by the second respondent. The pleadings indicate lack of particularity by the legal practitioner. I believe the legal practitioner could have done better.

That as it maybe the court has to determine if the application is properly before the court. The question is whether an appeal can be made to this court from a decision of the second respondent.

Section 50 of the Act empowers the first respondent to convene a Board of Inquiry to inquire into the suitability or fitness of a regular force member. After the inquiry and the recommendations made by the Board of Inquiry, the first respondent may discharge the member, reduce his or her rank or salary, withhold an increment of salary or demote the member. In terms on s 51 of the Act an appeal from the decision of the first respondent lies to the second respondent. The Act is silent as to whether an appeal from the decision of the second respondent can be made to this Court. Section 171 (1) (d) of the Constitution gives this court

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

The enabling Act, the High Court Act in s 30 (1) provides that this 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."

From the statutory provisions it is apparent that this Court's jurisdiction in appeal matters is not as unfettered as in instances where it sits as a court of first instance. The Constitution gives it jurisdiction to hear appeals subject to an Act of Parliament. The High Court Act clearly provides that this court can only entertain an appeal where any enactment provides that an appeal lies to this court.

I cannot agree with applicant's submissions that the silence in the Police Act does not mean an ouster of appellate powers. What is clear is that the Police Act does not give the applicant the right to appeal to this court against the decision of the second respondent. The second respondent is the final authority in such matters. Whether that is proper or not is not before this court ,this court's task is to determine if the law gives the applicant the right to appeal. The *Jani* case (*supra*) relied upon by the applicant addressed an application for review of a decision by a single officer. *In casu* this is an appeal against the decision of the first and second respondents exercising their administrative functions. The decision in *Sergeant Khauyeza* (supra) settles the issue. In a detailed judgment the court examined the law and precedent on the issue in respect of the right of appeal against the respondent's decisions. What is relevant to this case is the finding that the Police Act does not provide for a right of appeal from a decision of the respondents discharging administrative duties as the executive authority for the police force. The preliminary point has merit.

Even if the court's finding is misdirected on the preliminary point I am fortified in that the applicant does not have prospects of success in the main application. For an application for

condonation to succeed the court has to consider the degree of non-compliance, the explanation thereof the prospects of success and the balance of convenience. see *Kodzwa* v *Secretary for Health & Anor* 1999 (1) ZLR 313 (S), *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S).
The prospects of success are an important consideration although not necessarily decisive. However it maybe a futile exercise to condone an applicant who has no prospects of success at all.

In this case, the applicant does not intend to appeal against the conviction. He intends to appeal against the dismissal. It is a settled principle of labour law that a determination on an appropriate penalty is a matter within the discretion of the employer and the courts generally do not interfere with such discretion unless it is shown that the employer's discretion was grossly unreasonable. See *Nampak Corrugated Wapeville* v *Khoza* 1999 (2) ZLR 108 LAC. In this case there is no indication how the respondents' discretion was improperly exercised.

The applicant conceded that the offence he was convicted of involved an element of dishonesty. Honesty in an employment relationship is the hallmark of a contract of employment. Conduct that undermines the trust and confidence between the employer and the employee is regarded as sufficient to justify dismissal. Dishonesty goes to the root of the employment relationship. In this case the applicant could not demonstrate how the respondents' discretion was not properly exercised. It is not enough to allege that the employer should have resorted to alternative penalties. The applicant should show that the offence he was convicted of was so negligible that it could not attract a dismissal. Applicant indicated that he was still a young trainee who needed supervision. However the type of offence committed by the applicant is not one that can be classified as lacking in supervision. The applicant literally misrepresented information in order to show favour to another person. That kind of conduct needs no supervision but is inherent in the person .Generally people know what is right and wrong the applicant decided to do the wrong thing. The Police force requires a kind of people that are principled. Applicant could not state the true facts because they did yield what he wanted. This is a low level dishonesty but keeping him in the police force could be akin to releasing poison to the public. In addition I accept the submission by the first respondent that the first respondent is empowered to make regulations and in terms of Circular 3 of 2012 the first respondent listed a number of offences that attract a dismissal. One such offence is an offence involving dishonesty. Since the applicant committed an

offence that involved dishonesty, a dismissal was inevitable. There are no prospects of success on appeal.

From the foregoing the following order is made.

1. The preliminary point be and is hereby upheld.
2. The application for condonation of late noting of an appeal be and is hereby dismissed with costs.

Hungwe and Partners, applicant's legal practitioners
Attorney General's Office (Civil Division), 1st respondent's legal practitioners