

EX TEMPORE

SERGEANT KHAUYEZA
v
**(1) THE TRIAL OFFICER (2) THE COMMISSIONER -
GENERAL OF POLICE**

**SUPREME COURT OF ZIMBABWE
PATEL JA, BHUNU JA & BERE JA
HARARE, JANUARY 25, 2019**

N. Mugiya, for the appellant

K. Chimhiti and D. Jaricha, for the respondents

PATEL JA: This is an appeal against the judgement of the High Court in Case No. HC 5569/17 in which the High Court dismissed an urgent chamber application seeking the stay of the appellant's detention, which was ordered by the Commissioner -General of Police (the second respondent), pending the finalisation of an application for review by the High Court of the proceedings before the single trial officer (the first respondent).

The High Court dismissed the urgent chamber application on the basis that the appellant had already appealed against the decision of the single trial officer to the Commissioner-General of Police and could not therefore seek a review of the decision of the trial officer. The High Court

also found that the appellant could not seek the stay of the detention order imposed by the Commissioner-General as he had not questioned the decision of the Commissioner-General.

At the hearing of the appeal, the Court took the position that the present appeal should be confined to the specific facts pertaining to the appellant himself and the determination of the court *a quo* in that regard. The other questions raised on appeal were purely academic, relating as they did to other cases before the High Court, and were therefore not properly before this Court.

As agreed with counsel, the issues to be determined herein were as follows:

- Whether the appellant was entitled to approach the High Court on review of the trial officer's decision after the dismissal of his appeal by the Commissioner-General.
- Whether the appellant was entitled to approach the High Court to stay the order of detention imposed by the Commissioner-General without having appealed his decision, pending the review of the trial officer's decision by the High Court.

During the course of submissions by counsel, it became apparent that the review proceedings in Case No. HC 5385/17 were not actually pending at the time that the urgent chamber application was heard and determined by the court *a quo*. It was common cause that the decision of the trial officer was made on 29 March 2017. However, the application for review of that decision was only filed on 15 June 2017, well beyond the eight weeks prescribed by the High Court Rules.

Mr *Mugiya*, for the appellant, claimed that he had filed an application for condonation, for the late noting of the application for review, on 23 June 2017 and that the former application was still pending. He later contradicted himself by stating that the application for review had been amended by consent and therefore did not require any condonation. All of these claims were categorically refuted by Mr *Chimhiti*, for the respondents. To further compound the matter, none of the documents relied upon by Mr *Mugiya* to support his contentions formed part of the record before us.

Mr *Mugiya* eventually sought an order striking the matter off the roll with a tender of wasted costs. Mr *Chimhiti*, on the other hand, sought the dismissal of the matter with costs.

In our view, there was no review properly pending before the High Court at the time that the urgent chamber application was heard and determined by the court *a quo*. Therefore, the entire proceedings before the court *a quo* were premised on an erroneous factual background. Consequently and by the same token, the present appeal was also predicated on the same erroneous set of facts. In the result, we are of the unanimous view that the appeal, having been lodged on an improper footing, should be dismissed rather than being struck off the roll.

It is accordingly ordered that the appeal be and is hereby dismissed with costs.

BHUNU JA: I agree.

BERE JA: I agree.

Mugiya & Macharaga Law Chambers, appellant's legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners