

CONSTABLE CHIKOSHA
and
SERGEANT TAPERA
versus
THE OFFICER IN CHARGE
CHIKURUBI DETENTION BARACKS
and
THE OFFICER IN CHARGE
MUREWA DISTRICT HEADQUARTERS
and
THE COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 30 December, 2014 and 12 January, 2015

Urgent Chamber Application

N Mugiya, for the applicants
Ms T.S Musangwa, for the 1st & 3rd respondents

MANGOTA J: The applicants who are respectively a constable and a sergeant in the Police Force were, on 14 August 2014, convicted of contravening para 34 of the Schedule to the Police Act [*Cap 11:10*] (the Act). They were each sentenced to 12 days detention at Chikurubi Detention Barracks.

The applicants appealed to the Police Commissioner General against their conviction and sentence. They did not mention the date on which they filed their appeal. The appeal was, however, filed in terms of s 34 of the Act as read with s 11 (1) of the Trials and Boards Regulations, 1965.

The applicants stated, in the urgent chamber application which they filed with the court on 24 December 2014, that they could not apply for review at the time of their conviction and sentence. They said the Act did not allow them to apply for review of the proceedings of the trial officer but to appeal, as they did, to the Police Commissioner General. They submitted that, on 5 December 2014, the first respondent advised them that the

Police Commissioner General had dismissed their appeal. The first respondent, they said, did not inform them of the reasons for the dismissal of the appeal.

They stated that the verbal communication which they received from the first respondent allowed them to apply to this court for Condonation of late filing of review. They attached to their urgent chamber application Annexures A1 and A2. The annexures constitute the applicants' applications for Condonation. They filed their respective applications on 5 December, 2014.

The applicants submitted that, on 22 December 2014, the first respondent phoned and advised them that he had been directed to detain them at Chikubi Detention Barracks where they would serve the 12-days sentence which the trial officer imposed upon them. They stated that their apprehension was that they would be detained within the next 48 hours which were calculated from the moment that the first respondent phoned them if the court did not intervene to stay the detention. They stated, further, that they made an effort to appeal to the court against the decision of the Police Commissioner General. The first respondent, they alleged, refused to accept their notices of appeal. They, accordingly, prayed, as an interim order, that:

- (a) their detention be stayed pending the return date;
- (b) the first respondent be ordered to accept their notices of appeal and forward the same to the registrar of this court – and
- (c) the respondents be ordered to furnish them with the Police Commissioner General's decision and its reasons within 48 hours which were, or are, calculated from the date of the order of the court.

It was the applicants' contention that the respondents would not suffer any prejudice at all if their abovementioned prayer was granted. They stated that they, on the other hand, would suffer irreparable harm if they were detained before the application for review and their appeal against the decision of the Police Commissioner General have been heard and finalised.

The first and the third respondents opposed the application. The second respondent did not.

Each of the two respondents who opposed the application raised a preliminary matter after which he, or she, proceeded to address the substantive aspects of the application. The first respondent's *in limine* matter was that he had nothing to do with the applicants whom he said had erroneously cited him as a party to their application. He stated that he did not receive

appeal judgments as the applicants had alleged. He said his mandate was to receive defaulters when they are brought to him for detention. He submitted that he did not communicate with defaulters before they are brought to his barracks for detention.

The third respondent's preliminary matter was that the application was not urgent. She stated that, because he deserted the Police Service and in the process placed himself outside her jurisdiction, the first applicant had not been served with the decision of the Police Commissioner General. It was her submission that the second applicant was reported to have been sick and was in hospital during the period 20-26 December, 2014. She stated that, because of the mentioned report which she had received, the second applicant was also not served with the judgment of the Police Commissioner General. She said the person whom the applicants cited as the second respondent was non-existent in the police force or at Murehwa District Headquarters.

The respondents attached to their opposing papers Annexures 1A and 2A. The first annexure is a radio signal which pertained to the first applicant's alleged desertion from the police service. The signal which is date-stamped 24 December, 2014 has some type-written contents which are so faint in form as to be completely illegible. The second annexure is the judgment of the Police Commissioner General to whom the applicants filed their appeal against their conviction and sentence. He delivered his judgment on 8 December, 2014. He, in the judgment, dismissed the applicants' appeal and ordered that the latter should "start to serve their sentences immediately" (emphasis added)

It is the order of the Police Commissioner General which persuaded the applicants to file their application with the court on an urgent basis. The order, albeit not communicated to them formally and in written form but verbally, instilled in the applicants fear that they would be detained and compelled to serve their sentence before their application for review of the proceedings of the trial officer had been heard and conclusively dealt with. They were, therefore, acting within the law when they applied, as they did, for the matter to be heard on the basis of urgency.

The third respondent stated, correctly so, that the applicants' application for review was out of time and was, therefore, not compliant with the rules of court. The applicants acknowledged the fact that their application for review was out of time. They, however, took the procedure which the law allows them to have taken. They did not file their review papers with the court. They applied for condonation of late filing of review. They gave reasons for the delay which occasioned their application for review. They stated that they could not

apply for review at the time that they were convicted as the Police Act, under which they fall, only allowed them, as a first step, to appeal to the Police Commissioner General against the trial officer's proceedings. It was their testimony that, when the first respondent advised them on 5 December 2014, that their appeal had been turned down, they seized the opportunity to apply for condonation. They remained hopeful that their application in the mentioned regard would succeed after which they would apply that the proceedings of the trial officer be reviewed by the court.

The Police Commissioner General handed his judgment in respect of the applicants' appeal on 8 December 2014. On 22 December 2014, the first respondent allegedly advised the applicants, through the phone, that he had been directed to detain them at Chikurubi Detention Barracks so that they would commence to serve their sentence. The first respondent denied ever making the mentioned communication to the applicants. However manner the applicants received the message which pertained to their detention, the fact still remaining. The fact was that the issue of the detention was communicated to the applicants on 22 December 2014. They filed their application with the court some two days after the message had been conveyed to them. Their conduct in the observed regard is definitely consistent with persons who had a real, as opposed to a fanciful, apprehension. The court is satisfied that their matter was not only urgent but also that they treated the same with the urgency which it deserved.

Other than stating that the first applicant was a deserter and the second applicant was in hospital from 20 – 26 December 2014, the respondents' opposing papers did not contain anything of substance which worked to the detriment of the applicants. The court remained of the view that the applicants were persons who were crying out to mother justice to come to their protection. They stated, correctly so, that an injustice would be visited upon them if the court did not intervene in respect of what was about to occur to them. They insisted that justice be allowed to take its course before anything untoward was allowed to happen to them. They stated, correctly so, that the respondents would not suffer any harm if they are allowed to move towards the attainment of justice in respect of their application for review of the trial officer's proceedings.

It is trite that any party who is not satisfied with the decision of the lower court has a right to either appeal against the same or to apply to a superior court and have the proceedings reviewed. The law as prescribed in the constitution of the country, the statutes and case law authorities provides for that. A party is, in short, permitted to exhaust all

remedies which are available to him before anything with which he is not satisfied is enforced upon him and against his will.

It is on the basis of the abovementioned well known and established legal principle as read with the respondents' opposing papers that the court is persuaded to lean in favour of the applicants. The court's sworn duty is to dispense justice and not injustice. Counsel for the respondents agreed, correctly so, with the court on the stated matter during the time that he was addressing the court.

The court is satisfied that the applicants established their case on a balance of probabilities. The application, accordingly, succeeds with costs.

Messrs Mugiya and Macharaga, applicants' legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners