SERGEANT MAZUNGUNYE F 048394B
versus
THE TRIAL OFFICER (SUPERINTENDENT MUTEMA)
and
COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 22 MAY 2017 AND 1 JUNE 2017

Opposed Application

N Mugiya for the applicant
L Musika for the respondents

MATHONSI J: This is a clear case of forum shopping where the applicant has engaged in the triple jump routine of hop, step and jump from the court of a single officer, to the appeal court of the Commissioner General of Police and then to this court where he has arrived panting and breathless seeking a review of the decision of the single officer in disciplinary proceedings instituted against him.

The applicant, a police sergeant stationed at Zimbabwe Republic Police Gwanda was charged with contravening paragraph 34 of the Schedule as read with sections 29 and 34 of the Police Act [Chapter 11:10], that is omitting or neglecting to perform any duty or performing any duty in an improper manner. He initially appeared at Gwanda District Headquarters and pleaded to the charge on 19 August 2016 but the trial dragged on and on for one reason or the other until 3 January 2017 when he was convicted and sentenced to seven days detention at Fairbridge Detention Barracks.

The applicant was aggrieved. On 9 January 2017 he noted an appeal in terms of s34 (7) of the Act to the Commissioner General of Police against both conviction and sentence. On 10 January 2017, the trial officer who is the first respondent herein responded to the appeal which response was served on the applicant on 11 January 2017. The appeal in question is yet to be determined by the Commissioner General.

Upon receipt of the first respondent's response and in a sudden turn of events the applicant filed this review application in this court on 11 January 2017 on the following grounds:

"GROUNDS FOR REVIEW

1. The 1st respondent grossly misdirected himself when he convicted the appellant through retrospective application of the law.
2. The 1st respondent erred when he failed to treat the court as a record (whatever that means).
3. The 1st respondent erred when he convicted the applicant on a wrong charge altogether."

In support of the review application the applicant stated in his founding affidavit that the first respondent had conducted the trial proceedings in a manner that was contrary to what was expected of a court of record. This is because the record of proceedings is not a reflection of what transpired in court in that the objections made by his defence counsel were not recorded. In addition, the first respondent did not afford him an opportunity to question witnesses on issues arising from questions posed by the court.

The applicant stated further that because the trial officer merely rubber-stamped what was said by the state on an exception to the charge he had made long after pleading not guilty to it, the trial officer ended up convicting him on a wrong charge altogether. Further, because he only became aware of circular 1/2012 and circular 1/2009 on the day of the trial, he could not be charged on the basis of those circulars as they had not been brought to his attention before the alleged offence. There was retrospective application of the law.

It is significant that the applicant filed this application without completing the appeal process which he had commenced and without bothering to withdraw the appeal either. The respondents immediately took that point *in limine*, namely that the application for review was incompetent by reason that the applicant made it without exhausting domestic remedies available to him in terms of the Act, a process which he commenced and left hanging in preference to this application. The respondents also took the preliminary point that there are no valid grounds of review as the applicant cannot seek review on what are in essence appeal grounds.

In his answering affidavit the applicant contemptuously dismissed the points *in limine* stating:

> "*AD IN LIMINE*
> The points *in limine* raised by the 1st respondent are baseless and meant to test the court's intelligence. I am advised, which advice I accept that this Honourable Court enjoys inherent powers to review proceedings and decisions of the lower courts. Further in terms of the Constitution section 70 (5) (a) I have a right to have my case reviewed by a High court."

So many words were used in that response which leave one none the wiser after reading it. The issue is simple, after lodging an appeal to the Commissioner General which is a remedy available to the applicant aggrieved by the decision of a single officer, did the applicant exhaust that remedy? It does not assist the applicant to use diversionary tactics and say a lot of things without addressing a simple and pointed issue. There is therefore no doubt that the applicant has not denied that the remedy of an appeal was commenced but not completed. That which is not denied in pleadings is taken to have been admitted.

The applicant spurned the opportunity to explain why he did not exhaust internal remedies when it was presented to him electing to grand stand about the issue. Having left the appeal hanging and making an early approach to this court on review, he was obliged to give good and sufficient reasons for doing so. This is because, this court will always refrain from exercising its general review jurisdiction where a party has not exhausted domestic remedies.

That is the point made by NDOU J in *Sithole* v *Senior Assistant Commissioner and Others* HB 17-10 where the learned judge stated:

> "If I am wrong in the above finding, still the application had to be dismissed for failure to exhaust internal remedies. Even if it is true that the applicant failed to get audience with the 1st and 2nd respondents, applicant is at liberty to approach the Police Service Commission for relief- section 16 of the Police Trials and Boards of Inquiry Regulations 1965. Thus applicant's failure without good and sufficient cause to exhaust domestic remedies available to him is fatal to his application – *Tutani* v *Minister of Labour and Others* 1987 (2) ZLR 88 (H) and *Communications Allied Svc(s) Workers Union of Zimbabwe* v *Tel-One (Pvt) Ltd* 2005 (2) ZLR 280 (H) at 287."

The above pronouncement cannot be faulted at all. Domestic remedies in respect of this matter are those provided for in the Police Act [Chapter 11:10] to a member aggrieved by the decision of a single officer. In terms of s34;

> "(1) A member, other than an officer, who is charged with a contravention of this Act or any order made there under or any offence specified in the Schedule may be

> tried by an officer of or above the rank of Superintendent and sentenced to any punishment referred to in paragraph (a) of subsection (2) of section twenty-nine
> (2) ---
> (3) ---
> (4) ---
> (5) ---
> (6) ---
> (7) A member convicted and sentenced under this section may appeal to the Commissioner General within such time and in such manner as may be prescribed against the conviction and sentence and, where an appeal is noted, the sentence shall not be executed until the decision of the Commissioner General has been given."

As a sergeant the applicant is not an officer as defined in section 2 of the Act. He therefore falls squarely under the provisions of s34 which I have reproduced above. He has a remedy in terms of the Act to appeal to the Commissioner General. As I have said he took that route and before the appeal was determined, he set about forum shopping which he cannot do.

It was stated in *Tutani* v *Minister of Labour and Others supra* at 95D that where domestic remedies are capable of providing effective redress in respect of the complaint and secondly where the unlawfulness alleged has not been undermined by the domestic remedies themselves, a litigant should exhaust the domestic remedies before approaching the courts unless there are good reasons for not doing so. That judgment was cited with approval by the Supreme Court in *Girjac Services (Pvt) Ltd* v *Mudzingwa* 1999 (1) ZLR 243 (S) at 249 C-F.

Let me therefore repeat what I stated in *Moyo* v *Gwindingwi NO & Another* 2011 (2) ZLR 368 (H) 371E;

> "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 the domestic remedies available to him. A litigant is expected to exhaust available domestic remedies before approaching the courts unless good reasons are shown for making an early approach."

See also *Makarudze and Another* v *Bungu & Others* 2015 (1) ZLR 15 (H) 27B-C.

While it is true that this court has review jurisdiction even in respect of unterminated proceedings of an inferior tribunal, it retains a discretion to decide whether to exercise that jurisdiction or not. This court will certainly not jump to exercise its jurisdiction where clearly the applicant has other remedies available to him which he has spurned in favour of making an

early approach to this court. See *Chiwundo* v *Zimbabwe National Family Planning Council* HH 212-13 (unreported).

I am therefore satisfied that there is merit in the point *in limine* taken by Mr *Musika* for the respondents. I do not agree with Mr *Mugiya* for the applicant that domestic remedies did not provide an effective remedy in the circumstances or that the applicant was entitled to pursue both the appeal and the review at the same time because had he waited for the determination of the appeal he would have been out of time to bring the review application.

As I have said an appeal is a remedy provided for in the Act. The applicant did not provide any explanation in both affidavits that he filed which could have shown good and sufficient cause for making an early approach. He could not attempt to do so in heads of argument filed by counsel. In any event even the explanation in the heads of argument does not even begin to constitute good and sufficient cause required by case law.

This court has repeatedly stated that the eight weeks period during which a litigant is entitled to bring the proceedings under review only begins to run from the time the final decision in terms of the domestic remedies has been made. See *Makarudze and Another; supra*. It was therefore within the rights of the applicant to exhaust the domestic remedies and then bring the review application after that. No good and sufficient cause for not doing so has been given.

In any event, I am not satisfied that there are valid grounds for review in this matter because what the applicant has set out as review grounds, vague as it is, are not proper grounds set out in s27 of the High Court Act [Chapter 7:06] and indeed the common law. If anything, the applicant may be able to use them as grounds of appeal not review.

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

Mugiya and Macharaga law Chambers, applicant's legal practitioners
Civil Division Attorney General's Office, respondents' legal practitioners