CONSTABLE CHIHWAI P. 065008K
versus
THE TRIAL OFFICER N.O. (SUPERITENDENT GOWE)
and
THE COMMISSIONER GENERAL OF POLICE N.O.

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 24 April & 16 May 2018

Urgent chamber application

N Mugiya, for the applicant
No appearance for the 1st respondent
Ms *B Shava*, for the 2nd respondent

MUZOFA J: This matter was filed as an urgent chamber application on 13 April 2018. I determined that the matter was not urgent and ordered that it be removed from the roll of urgent matters.

Counsel for the applicant requested to make representations. Consequently parties appeared before me on 24 April 2018.

The applicant sought stay of his detention pursuant to disciplinary proceedings in terms of the Police Act [*Chapter 11:10*], pending determination of his application for review.

According to the founding affidavit, the applicant was charged, tried and convicted for contravening para 35 of the schedule to the Police Act by the first respondent. He was sentenced to 14 days imprisonment and to pay a fine of $10 in terms of s 29 A of the Act.

An appeal to the second respondent was unsuccessful. The applicant subsequently filed an application for review with this court under case number HC 8146/17 which is still pending.

The applicant alleges that on 11 April 2018 his officer in charge advised him that he should be detained pursuant to the sentence imposed. To that extent he filed this application.

The applicant also alleges that this is the second time the respondents seek to detain him. In September the respondents sought to detain the applicant. The applicant approached

this court in case HC 8150/17 and before the matter was heard parties agreed that the respondents will not detain him until the application for review in HC 8146/17 is finalised.

The applicant is of the view that the respondents should not be allowed to review its decision. In other words the respondents should not change its decision, they should stick to its initial decision not to detain the applicant until the application for review is finalised.

Accordingly applicant seeks an interim order that

> "The detention of the applicant by the respondents is stayed pending finalisation of this matter."

And in the final order that;

> "1. The detention of the applicant by the respondents is declared unlawful and wrongful.
> 2. The respondents are ordered to pay costs of suit on a client-attorney scale, jointly and severally one paying the others to be absolved."

The application was opposed by the second respondent, there was no appearance for the first respondent. It was submitted that the applicant did not serve the first applicant at his address in terms of Order 32 r 231 (1) of the Rules. Secondly, that the applicant did not comply with r 242 (2) (B) of the Rules.

I will address the preliminary issues first. The first issue should not detain the court much. As rightly submitted by Mr *Mugiya* counsel for the second respondent had no instructions to make submissions for the first respondent.

Secondly service was effected at the Police general Headquarters and one Constable Tafura a Registry Clerk accepted service. In terms of r 39 (2) (b) service of process other than for an order affecting the liberty of a person may be served.

> "by delivery to a responsible person at the residence or place of business or employment of the person on whom service is to be effected or at his chosen address for service."

In essence service of process in a case such as this can be effected at the place of employment. The Police General Headquarters in my view in the absence of further submissions from counsel for the second respondent would suffice.

For those reasons the first preliminary point is dismissed.

That the applicant did not comply with r 242 (2) (b). There is no merit in this preliminary point.

I say so because the rule deals with a situation where a chamber application is deliberately not served on any of the parties by the applicant, it provides

> "2. Where an applicant has not served a chamber application on another party because he reasonably believes one or more of the matters referred to in paragraphs
> (a) to (e) of subrule (1)-
> (a) …….
> (b) unless the applicant is not legally represented, the application shall be accompanied by a certificate from a legal practitioner setting out, with reasons his belief that the matter is uncontentious likely to attract perverse conduct or urgent or urgent for one or more reasons set out in paragraphs (a), (b), (c), (d) or (e) of subrule (1)."

The certificate of urgency filed of record was not filed pursuant to r 242 (2) (b) and it was unnecessary to do so. The applicant served the first respondent. The certificate of urgency filed of record was in accordance with r 244 and that rule sets out what should be in that certificate.

To that extent the second preliminary point is dismissed.

Reverting to the urgent chamber application, it is common cause that the question for determination first is whether there is urgency.

Whether the application is urgent must be set out clearly in the founding affidavit as per PARADZA J in *Dexprint Investments (Pvt) Ltd* v *Ace Property and Investments (Pvt) Ltd* HH 120/02:

> "The affidavit must establish that the applicant will suffer some form of prejudice or harm, and probably irreparable at that, if relief is not afforded him instanter. As rightly emphasized by the learned judges … the element of harm should not be confused with urgency."

A perusal of the founding affidavit *in casu* does not establish the urgency. The applicant indicates that the officer in charge called him and advised him that he was to be detained. There is no indication what prejudice or irreparable harm would befall the applicant consequent to the detention.

What remains a fact in this case is that the applicant's appeal was dismissed and the respondents were at liberty to execute the sentence.

There is no law that suspends the sentence pending an application for review to this court.

What the applicant indicated to the court was that there was a threat of imminent detention to serve a lawful sentence that on its own cannot constitute urgency.

This is the point that emerges in the *Tripple C Pigs and Anor* v *Commissioner General* ZLR 2007 (1) ZLR (27) (H) case wherein the applicant sought an order on an urgent basis to stop the respondent from collecting the amounts levied against the applicants by the respondents until their appeal in the Fiscal Appeal Court was determined.

The court held that, that in itself did not constitute urgency. Similarly *in casu* the fact that detention was imminent in itself is not urgent.

The applicant also raised the issue that the respondents should not be allowed to review their decision, Mr *Mugiya*'s submissions were that this was the real issue.

Besides that there was no proof that the respondents made any decision so far as detention after the dismissal of the appeal by the second respondent, I find nothing in the submission constituting urgency.

As stated before when the appeal was dismissed, the applicant was susceptible to serve the sentence imposed by the first respondent. There is no provision that suspends the sentence pending an application for review.

In any event, the said application for review might be improperly before the court and that would mean there is no application for review at all. The applicant's grounds for review impugn the first respondent's decision. According to the applicant, the first respondent's decision was made on 7 June 2017. The application for review was filed on 1 September 2017. This was clearly outside the 8 weeks provided in r 259 within which an application for review must be filed.

Mr *Mugiya* referred to s 34 (7) and (8) of the Police Act as authority that derogates from r 259. The argument was not properly taken in my view. The fact that the applicant opted to relate to the first respondent's decision and not the second respondent's decision cannot exonerate the applicant. The applicant is bound by the wording of the grounds for review. Accordingly the timelines are calculated from the decision of the first respondent.

From the foregoing clearly there is no urgency in this matter. The applicant failed to set out the basis of the urgency in the founding affidavit. A legal practitioner cannot in anyway supplement the founding affidavit by way of oral submissions.

Accordingly the application, it being not urgent, is removed from the roll of urgent matters.

No order as to costs.

Mugiya and Macharaga Law Chambers, applicant's legal practitioners
Civil Division, 2nd respondent's legal practitioners