CONSTABLE NYABEREKA 982058D
versus
THE COMMISSIONER GENERAL OF POLICE
and
THE STATE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 15 June 2017

Chamber application

TSANGA J: This is an opposed chamber application in which the applicants wish to reinstate an appeal. However, in view of the provisions of the Police Act [*Chapter 11:10*] that deal with matters that have appeared before a single officer, the issue is whether the appeal that they seek to reinstate is one that was validly before this court in the initial instance.

Section 29A outlines the jurisdiction and punishment that may be imposed by different courts and tribunals with jurisdiction to try a member who commits an offence. These include the High Court, the magistrate court, the board of officers, and, an officer. The least jurisdiction is accorded to a single officer. The proceedings by such single officer are reviewable by the Commissioner General in terms of s 34(3) whilst an appeal against a decision by such single officer also lies with the Commissioner General in terms of s 34 (7) of the Act. Section 34 (4) talks of the High Court's involvement in cases where the Commissioner-General has referred the case to the High Court through the Prosecutor-General because of the perceived inadequacy of the sentence. However, as observed in the case of *Jani* v *OIC ZRP Mamina & Ors* HH-550-15, the High Court may exercise its full review jurisdiction over decisions of single officers and/or the Commissioner General because of s 26 of the High Court Act [*Chapter 7:06*] which gives it full review powers over all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities.

However, in the case of an appeal where such has been dismissed by the Commissioner General in terms of s 34(7) of the Police Act, then the matter ends there in the sense that the Act does not provide for any further action to be taken before any other forum. This is in contrast, for example, to a trial by a board of officers or by a magistrate's court, where a right of appeal to the High Court is specifically provided for.

The issue whether this court has jurisdiction to hear appeals from the police on disciplinary issues on matters that have been heard by a single officer and where the appeal has been entertained by the Commissioner General of the Police and dismissed, is one that has been addressed by this court. The argument in *Chatukuta* v *Nleya NO & Ors* 2014 (2) ZLR 852 (H) was that such an appeal could be entertained by the High Court because the right to appeal or to seek review is now enshrined in s 70(5) of the Constitution. Furthermore, it was reasoned in that case that the courts could therefore not deprive any person of such a right unless there are reasonable restrictions prescribed by the law. The Police Act was held not to provide for such reasonable restrictions, but to be simply silent on the right of appeal by an aggrieved member against the decision of the Commissioner-General made in terms of s 34(7) of the Act.

However, this constitutional argument was analysed fully in the case of *Tamanikwa* v *Board President & Anor* HH-676-15 where it was held that s 70(5) of the Constitution did not confer such jurisdiction since both the High Court Act [*Chapter 7:06*] and the Constitution s 171(1)(d) make it clear that the court's appellate jurisdiction exists only where an Act provides for it. As such, it was reasoned that appellate jurisdiction could not be imposed merely because it is not excluded. MATHONSI J expressed this reasoning as follows:

> "While this court will jealously guard its original jurisdiction, it does not possess the magical crystal ball to guard the appellate jurisdiction it does not have or to install it merely because a statute had not specifically ousted it. This is because s 171(1) (d) of the constitution makes it clear that this court may only exercise appellate jurisdiction conferred to it by an Act of Parliament. In line with that s 30(1) of the High Court Act provides that this court shall determine appeals from courts or tribunals in terms of an enactment.
>
> In that respect the appellate jurisdiction cannot be imposed merely because it is not excluded. Surely it was never the intention of the law giver in enacting s 70(5) of the constitution that any party aggrieved by a decision of any tribunal should just rock up at the High Court with an appeal not provided for in any enactment. Chaos would ensue if that was to be the case. I am fortified in that view by the existence of a right of review as opposed to appeal available to an aggrieved party. Such a party can therefore not foist appellate jurisdiction on this court which is not conferred by an Act of Parliament. The Police Act, certainly does not confer such jurisdiction".

In the cases of *Jani* v *OIC ZRP Mamina & Ors* HH-550-15 and in *Tamanikwa* v *OIC ZRP Beatrice & Ors* HH-616-15, the courts also held that no appeal lies to the High Court against the decision of a single officer where an appeal has been dismissed by the Commissioner General. I am in agreement with this line of reasoning moreso when the

provision in question is analysed from the perspective of the mischief which it clearly intends to prevent.

What can be gleaned from s 29A of the Police Act and the jurisdiction accorded the various bodies is that there are issues of police discipline as outlined in the applicable schedule to the Police Act, whether involving the public or issues internal to the police which are left in the hands of the police themselves to deal with using their internal procedures, and, there are others which are not. Materially, a member convicted of an offence by a single officer is not regarded as having been convicted of an offence for the purpose of any other law. It can be concluded from the penalty that can be imposed by a single officer, that those matters are indeed at the level of fairly minor infractions. The papers filed in this application reveal that the applicant was arraigned before the single officer in a matter which fell within the ambit of para 35 of the Schedule to the Police Act and related to "acting in an unbecoming or disorderly manner or in any manner prejudicial to good order or discipline or reasonably likely to bring discredit to the Police Force".

There is an obvious reason why in a matter at this level of discipline before a single officer, why in an appeal to the Commissioner General, he is made the final arbiter by the applicable provision in the Police Act. It is not an oversight but is manifestly deliberate. The Commissioner General has the last word in maintaining everyday discipline, which is crucial for the reputation of the police force as a whole. It would be improper at this level of daily internal discipline to veto the final disciplinary action of the Commissioner General. In other words, at the level of transgressions heard by a single officer and where the appeal lies with the Commissioner General, the goal is clearly to reinforce his authority on discipline by giving him the ultimate authority. There is nothing unconstitutional in allowing for such internal processes of discipline which can unfold to a logical conclusion for minor infractions. Where the law is clear on the hierarchy of command and grievance structures, challenges to the decision of the highest internal authority can only foster a culture of lack of discipline. Therefore the rationale behind the provision of the Act is to prevent the rolling back of discipline, were the actions of the highest internal authority to be overruled on matters of everyday discipline.

Having said that, as already it cannot be entirely overlooked noted that there are indeed a number of cases such as the one in this instance, of appeal dismissals by the Commissioner General, where subsequent attempts have been made to foster appeal jurisdiction on the High Court at the behest of disgruntled officers. It could very well be that

those found guilty on appeal find themselves unresponsive to order and authority because of the perceived readiness by those who will have heard their case to resort to negative disciplinary authority in the form of imprisonment. The fine imposed at the level of discipline before a single officer is a fine not exceeding level 2 or imprisonment not exceeding fourteen days or both such fine and imprisonment. (See s 29A (iii)). Furthermore, the applicable provision permits the imposition of some other minor punishment whether in addition **or as an alternative** to the stipulated punishment. A level 2 fine stands at $15.00 while imprisonment for 14 days is what is at the extreme end of the permissible penalty. Invariably, the cases brought have been those where imprisonment had been imposed. It may indeed be a perception that an iron fist has been used instead of looking at other alternatives of punishment which itself contributes to poor discipline in the form of challenges to the authority of the Commissioner General. But this is ultimately a related though separate issue for in-house research and introspection on causes and solutions.

What is of significance in this instance is that s 34(7) states as follows as regards appeals before the Commissioner General:

> "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.
> (8) Unless an appeal has been noted, every sentence imposed by an officer shall forthwith be executed."

The section is explicit that once the decision of the Commissioner has been given in an appeal, the sentence imposed is to be executed thereafter.

In the result, there is no valid appeal that is before the High Court that can be reinstated.

The application is accordingly dismissed with costs.

Mugiya & Macharaga Law Chambers, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners