Judgment No. SC 12/08
Crim. Application No. 114/08

(1) THE COMMISSIONER GENERAL OF POLICE
(2) OFFICER COMMANDING CID LAW AND ORDER
(3) OFFICER COMMANDING CID FRAUD SQUAD
(4) OFFICER IN CHARGE, BUHERA POLICE STATION
(5) OFFICER IN CHARGE, MURAMBINDA POLICE STATION
(6) OFFICER TARUVINGA v

ERICK MATINENGA

SUPREME COURT OF ZIMBABWE
HARARE, JUNE 20, 2008

T Zvekare, for the applicants

D Mehta, with him *C Mhike*, for the respondent

Before: CHIDYAUSIKU CJ, In Chambers

On 12 June 2008 the applicants filed an application which was headed "Application for Leave to Appeal" and which reads as follows:

> "TAKE NOTICE that an application is hereby made for leave to appeal against the whole judgment of His Lordship Justice Chitakunye sitting at the High Court on 7th and 8th of June 2008."

The application was filed by Ms F Ziyambi, counsel for the applicants. Although the head note to these papers is entitled "Application for Leave to Appeal" the parties filing the application are referred to as "the appellants" and "the respondent". Accompanying

the application was a supporting affidavit from Mr Jagada of the Attorney-General's Office. The draft order attached to the application was not seeking leave to appeal against the High Court judgment but the setting aside of that judgment. The draft order provides:

"**IT IS ORDERED THAT:**

The appeal be and is hereby granted."

With the greatest of respect, I find this application most confusing in a number of respects. While I accept that in criminal matters the Attorney-General is entitled to apply for leave to appeal against a judgment of the High Court in terms of s 44(6) of the High Court Act [*Cap 7:06*] ("the Act") to a Judge of the Supreme Court, there is nothing on the papers to indicate that the applicants were proceeding in terms of that section. The applicants are not the Attorney-General. Section 44(6) of the Act provides as follows:

> "(6) If the Attorney-General is dissatisfied with the judgment of the High Court in a criminal matter, whether in the exercise of its original or appellate jurisdiction or on review, including a review pursuant to section 57 of the Magistrates Court Act [*Chapter 7:10*] –
>
> (a) on a point of law; or
>
> (b) because it has acquitted or quashed the conviction of the person who was the accused in the case on a view of the facts which could not reasonably be entertained;
>
> he may, with the leave of a judge of the Supreme Court, appeal against such judgment to the Supreme Court:
>
> Provided that the person who was the accused in the case shall have the right, should he so desire, at his own expense to appear in person or to be legally represented or a judge of the Supreme Court may order that such person be legally

> represented in which event the expenses of such representation shall be defrayed out of moneys appropriated for the purpose by Act of Parliament." (the emphasis is mine)

Also attached to the application was a notice of appeal which suggested to me that this was indeed an application for leave to appeal in terms of s 44(6) of the Act.

I might also add at this stage that a few days ago I had dismissed without a hearing a Chamber application from the applicants. In the dismissed Chamber application the applicants had sought through the Chamber application to set aside a judgment of the High Court. This is unheard of. A judgment of the High Court can only be set aside by the Supreme Court and not by a Judge of the Supreme Court sitting as a single Judge in Chambers.

Against this background I decided to set down the matter for argument by the parties. Before the date of the hearing, the respondent filed an opposing affidavit. In the opposing affidavit the respondent raised two preliminary points, namely (1) that the matter was not properly before me; and (2) that the applicants were in contempt and should not be heard by the Court. In the opposing affidavit the respondent also gave lengthy details of the background to this case in response to the averments of the founding affidavit of the applicants.

At the hearing of this matter, I indicated to both counsel that I wished to deal with the two preliminary points raised by the respondent before dealing with the merits of the matter.

As regards the second issue, namely the contempt and the contention that the applicants should not be heard as they were in contempt, I was advised that the respondent's continued incarceration had been regularised by the placement of the respondent on remand and that there were contempt proceedings against the applicants pending in the High Court. I wish to point out that had this not been the case I would have had no hesitation in refusing to entertain the application without the respondent being first released from custody in compliance with the High Court order. When it comes to compliance with Court orders the issue is very simple. You obey first and argue afterwards. There is no way this application would have been entertained by this Court without the applicants first complying with the High Court order, right or wrong. See *Associated Newspapers of Zimbabwe (Pvt) Ltd v The Minister for Information and Others* SC 20/03.

Turning to the first issue, the applicants' submissions at the hearing compounded the confusion in regard to this application. Counsel for the applicants indicated that he was withdrawing the application for leave to appeal to this Court and that the applicants were now appealing against the judgment of the High Court in terms of s 43 of the Act. Section 43 of the Act provides as follows:

> **43 Right of appeal from High Court in civil cases**
>
> (1) Subject to this section, an appeal in any civil case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction.
>
> (2) No appeal shall lie –

(a) from an order allowing an extension of time for appealing from a judgment;

(b) from an order of a judge of the High Court in which he refuses an application for summary judgment and gives unconditional leave to defend an action;

(c) from –

(i) an order of the High Court or any judge thereof made with the consent of the parties; or

(ii) an order as to costs only which by law is left to the discretion of the court, without the leave of the High Court or of the judge who made the order or, if that has been refused, without the leave of a judge of the Supreme Court;

(d) from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court, except in the following cases –

(i) where the liberty of the subject or the custody of minors is concerned;

(ii) where an interdict is granted or refused;

(iii) in the case of an order on a special case stated under any law relating to arbitration.

(3) An order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory order within the meaning of subsection (2)."

In terms of the High Court Rules, anyone wishing to appeal against a judgment of the High Court files a notice of appeal with the Registrars of the High Court and the Supreme Court. A person does not appeal against a judgment of the High Court by orally advising a Judge of the Supreme Court in Chamber proceedings that a party is appealing against a judgment of the High Court. The procedure of noting an appeal

against a judgment of the High Court is laid down in the Rules. No attempt has been made to follow the Rules.

When this was brought to the attention of counsel for the applicants, he withdrew whatever it was that was before me and I dismissed whatever it was that was before me. For the avoidance of doubt, there is nothing pending in the Supreme Court involving the parties in this matter.

In the result, the application was dismissed with costs.

Office of the Attorney-General, applicants' legal practitioners

Atherstone & Cook, respondent's legal practitioners