

TAWANDA SIBANDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 11 November 2013 and 29 November 2013

Chamber Application

I.Mureriwa, for the applicant

E.Mavuto, for the respondent

TAGU J: On the 11th November 2013 I dismissed a Chamber Application brought by the applicant made in terms of s 35 of the High Court Act [*Cap7:06*] for upholding appeal and quashing of conviction after perusing the documents filed of record. I have now been asked to supply the reasons for the dismissal for purposes of an appeal. These are they.

This is a chamber application made in terms of section 35 of the High Court Act [*Cap 7.06*]. The application is for an order for upholding an appeal and quashing of conviction and sentence in respect of counts 7, 8 and 10 wherein the applicant was convicted and sentenced by a Harare Regional Court on the 18th September 2013. The documents showed that the applicant has since noted an appeal against conviction and sentence with this Honourable court. Pending the determination of the appeal the applicant made an application for bail under number B 907 /13 and the application was dismissed by HONOURABLE JUSTICE CHATUKUTA.

The counsel for the respondent in the bail application was Mr *E. Mavuto*. During the bail hearing Mr *Mavuto* who opposed bail made certain utterances to the effect that the applicant had prospects of success on appeal in respect of counts 7, 8 and 10. It is on the basis of such utterances that the applicant now makes this application alleging that the Attorney – General had made a concession. He now wants this court to uphold appeal and quash the conviction and sentence in respect of those counts.

Section 35 of the High Court Act [*Cap 7:06*] on which this chamber application is made is very clear. It provides that:-

“35 Concession of appeal by Attorney-General

When an appeal in a criminal case, other than an appeal against sentence only, has been noted to the High Court, the Attorney-General may, at any time before the hearing of the appeal, give notice to the registrar of the High Court that he does not for the reasons stated by him support the conviction, whereupon a judge of the High Court in chambers may allow the appeal and quash the conviction without hearing argument from the parties or their legal representatives and without their appearing before him.”(the underlining is mine).

In my view the application in terms of s 35 of the High Court Act can only be made where the Attorney-General has given notice to the registrar of the High Court stating that he does not support the conviction. This is not the case here. There is no such notice to the registrar filed of record.

In any case Mr *E Mavuto* a representative of the Attorney -General who appeared in the bail application court and made the alleged concession has responded to this application and is opposing the upholding and quashing of the conviction and sentence in respect of counts 7, 8 and 10.

Mr Mavuto submitted among other things that-

“.....

6. Respondent is of the view that this application is misplaced. It does not comply with any rules or any Act of the High Court. The appellant misconstrued section 35 of the High Court Act. The above mentioned section is applicable when the appeal proper is being heard. In the present case the appeal has not been set neither has it been heard. The proper remedy which was available for the Appellant after bail was dismissed was to appeal to the Supreme Court against refusal of bail pending appeal. It appears the Appellant wants the Judge in chambers to hear the case as an Appeal Court which is not proper. Respondent submits that when bail application was dismissed, the Honourable Judge did not decide on the merits of the case, she only decided whether or not there are prospects of success on appeal. Merits, of the case remain the domain of the Appeal Court.

7. Respondent maintains that the application is not properly before the court. In fact there is no application before the Honourable court.”

It is for these and the above reasons that the application is dismissed.

Scanlen & Holderness, applicant’s legal practitioners
Attorney-General’s Office, respondent’s legal practitioners.