“THE DIFFERENCE BETWEEN APPEALS AND REVIEWS”

A PRESENTATION BY

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ON THE OCCASION OF THE

ORIENTATION OF THE NEW HIGH COURT JUDGES,

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INTRODUCTORY REMARKS

The primary function of appeals and reviews is to protect against miscarriage of justice. Both these reliefs are crucial in ensuring that justice is done. More so, they are a primary way in which Judges, as public officials subject to oversight, are held accountable for their performance as they form part of a Judge's daily functions. It is therefore important for every Judge to know the meaning and difference between an appeal and a review. There are a large number of judicial reviews and appeals cases pending and today I will provide an overview of appeals and reviews and the procedures to such proceedings.

WHAT IS AN APPEAL?

This is when a litigant to a decision of the court is not satisfied with reasoning employed by the court in coming to the decision. The litigant will have to appeal against the judgment to a higher court. Feltoe in *A Guide to Criminal Procedure in Zimbabwe* describes an appeal in the legal practice as a particular form of approach which is distinguishable

from other forms of relief such as review. An appeal may take different forms depending on the requirements of the statute which are -

- An appeal in the wider sense, which means a complete rehearing and fresh determination of the merits of the matter, with or without additional evidence or information.
- An appeal in the ordinary sense, which is a rehearing on the merits but (except in very limited circumstances, which will be dealt with below) restricted to the evidence on which the decision appealed against was given, and in which the only determination is whether that decision was right or wrong.

WHAT IS A REVIEW?

This is when a party to the decision is aggrieved by the **process** which led to the decision of the magistrate (for example). Review is not directed at correcting a decision on the merits, it is aimed at the maintenance of legality. *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 (SCA) at 402**.**

In *Johannesburg Consolidated Investments Co v Johannesburg Town Council* INNES CJ described review as:

"…. The process by which … the proceedings of inferior Courts of Justice, both Civil and Criminal, are brought before this Court [i.e. the reviewing superior court] in respect of grave irregularities or illegalities occurring during the course of such proceedings."[1]

THE DIFFERENCES AND SIMILARITIES BETWEEN AN APPEAL AND A REVIEW

The differences between reviews and appeals have been described by a number of authors and Supreme Court judgments. These have been largely to the effect that parties to a case adopt the wrong procedure when seeking redress of the court's decision. In determining which procedure to use, one should begin by enquiring what one's grounds of complaint are. The decision handed down by a magistrate may be erroneous, because he or she has misconstrued the facts before the court or has misinterpreted the law or applied it incorrectly. It is essential that a distinction has to be made between an appeal and review, as wrong procedures result in miscarriage of justice.

[1] Eckards *'Principles of Civil Procedure in the Magistrates Courts'* 5 ed p 279.

Herbstein & van Winsen *Civil Practice of the Supreme Court of South Africa* 4 ed p 932 gives the difference between the remedy of appeal and that of review and explained as follows:

> "**The reason for bringing proceedings under review or appeal is usually the same, to have the judgment set aside**. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review. The first distinction depends, therefore, on whether it is the result only or rather the method of trial which is to be attacked. Naturally, the method of trial will be attacked on review only when the result of the trial is regarded as unsatisfactory as well. The giving of a judgment not justified by the evidence would be a matter of appeal and not a review upon this test. The essential question in review proceedings is not the correctness of the decision under review but its validity."

In short, Herbstein and van Winsen stated that an appeal or review has an effect of setting aside the judgment, which is one of the similarities. An appeal is confined to the wrong conclusion on the facts or law, whilst a review is on the grievance of method of trial.

MAKARAU J (as she then was) in *Khan v The Provincial Magistrate* HH 39/06 gave a remarkable difference between an appeal and review, where she held that:

> "An appeal seeks to attack the correctness of the decision of the inferior court or tribunal while a review seeks to attack the manner in which the decision of the inferior court or tribunal has been arrived at. Grounds of appeal are unlimited and cannot be prescribed as they relate to the errors in law or in fact made by the court whose decision is under attack. On the other hand, grounds of review are limited by law and have to be laid out in the application for review. An error in exercising one's discretion can never be the basis for bringing a review. It is a ground of appeal."

The essential difference between review procedure and appeal procedure indicates that where the grievance is that the judgment or order of the magistrate is not justified by the evidence, and there is no need to go outside the record to ventilate the particular grievance, then the more appropriate procedure to follow for relief is by way of appeal.[2] Thus, the matter is usually a question of argument on the record alone, whereas in review the irregularity does not appear from the record. In a review it is competent for parties to bring extrinsic evidence to prove the irregularity. *Anchor Publishing Co (Pty) Ltd v Publications Appeal Board* 1987(4) SA 708 (N) 728D-E.

HUNGWE J in *Maphosa v The State* HH323/13 held that:

> "An election to appeal confines the legal practitioner to matters reflected in the record of proceedings. On the other hand, were he to proceed by way of notice of motion seeking a review of the proceedings then counsel would have brought under review other matters which do not appear *ex facie* the record by way of affidavit."

[2] *R* v *Stephens* 1969 (2) RLR 143 (AD).

In *S v Machona & Ors* 1982 (1) ZLR 87 at p 90 it was held that where issues are raised challenging the propriety of the proceedings of an inferior tribunal and the facts which have to be proved in order to support these issues do not appear as established on the face of the record proceedings should be by way of review.

Another distinction between an appeal and review is with regards to the proof *aliunde* the record. Proceedings that are not appealable may for a good cause be reviewable. The question that has to be determined by the High Court by appeal or review is whether it will be necessary to prove facts other than those appearing on the record. For example, allegations that a magistrate accepted a bribe should not be in the grounds of appeal, however, if made, should be raised on review. *Heydenrych v Platt* 1925 SWA 42.

The differences between an appeal and review can be summarised as in the table below:

Appeals	**Reviews**
Have the effect of setting aside the decision	Have the effect of setting aside the decision
Request to change or modify the decision	Request into the legality of the decision
Confined to the facts or law	Confined to the method of trial
Concerned with the correctness of the decision itself	Concerned with the validity of the legal matters of a decision
Grounds of appeal are unlimited and cannot be prescribed	Grounds of review are limited by law and have to be laid out in the application for review
Confined on the four corners of the record	Permissible to prove a ground of review through affidavit. (Except on automatic review)
An appeal is final and conclusive unless a statute gives a further right	A review is not final, it may be reviewed again.

APPEALS AND REVIEWS BEFORE THE HIGH COURT IN TERMS OF THE RULES

Section 26 of the High Court Act provides that, subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe. With this authority, this means that the High Court's powers of review are wider than its appellate powers.[3]

GROUNDS FOR REVIEW

Section 27 provides that the grounds for review on which any proceedings or decision may be brought on review before the High Court shall be:

- absence of jurisdiction on the part of the court, tribunal or authority concerned;

[3] *Jani v The Officer In Charge ZRP Mamina* HH550/15

- interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
- gross irregularity in the proceedings or the decision.

The *locus classicus* on judicial review in England is the decision of the House of Lords in *Council for Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 (HL). LORD DIPLOCK, at 950-951, described the grounds of review as follows:

> "The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By ‘irrationality’ I mean what can by now be succinctly referred to as ‘Wednesbury unreasonableness’ (see *Associated Provincial Picture Houses Ltd* v *Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court’s exercise of this role, resort I think is today no longer needed to VISCOUNT RADCLIFFE’S ingenious explanation in *Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER 48,

[1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

These grounds were adopted by DUMBUTSHENA CJ in *Patriotic Front - Zimbabwe African People's Union* v *Minister of Justice, Legal and Parliamentary Affairs* 1985 (1) ZLR 305 (SC).

CIVIL REVIEW PROCEEDINGS

The High Court, in terms of section 28 of the Act, shall have the power to set aside or correct the proceedings or decision with regard to civil proceedings.

CRIMINAL REVIEW PROCEEDINGS

The power of a superior court to review the proceedings of an inferior court covers various stages in a criminal proceeding before an inferior court. The stages are prior to conviction, after conviction but before sentence, and after sentence has been passed by an inferior court. The purpose of review is to ensure that every accused person who obtains a sentence above the laid down limit automatically enjoys investigation of his conviction and sentence by a senior judicial officer, who is enjoined to satisfy himself that the proceedings meet the requirement of being in accordance with substantial justice.[4]

[4] Reid Rowland *Criminal Procedure* p 26-4

A magistrate should not live in fear of reviewing judges, constantly looking over his shoulder, but should regard the reviewing judge as the second member of a two man team.[5] It should be noted that a review is not retrial, nor is it an appeal.[6]

CHEDA J in the Namibian High Court shared the same sentiment on attitudes towards reviews where he made the following remarks in *S v Fillipus* NAHCNLD 82/16[7]:

> "It has been my observation, and indeed of some of my colleagues as well, that some magistrates view comments of either Regional Magistrates or High Court Judges as a personal attack on their persons. I would like to disabuse them of this unfortunate misconception. The judiciary is one of those disciplines which is governed by a high code of conduct and whose guiding beacon is the attainment of justice for all manner of people.

[5] *Ibid*.
[6] *Ibid*.
[7] Accessed on NAMLii https://namiblii.org/na/judgment/northern-local-division/2016/10-13 8/03/18

Therefore, there is nothing personal by a reviewing or scrutiny judicial officer which can be made to bear on those below them. For that reason, those judicial officers whose work falls for either scrutiny or review which can be made to bear on those below them is purely for judicial purposes without fear, favour, affection or goodwill. The review procedure is there as a guide to those who the legal system has, for the time being, placed below others, for example Judges and scrutiny Regional Magistrates. It is for that reason that courts *a quo* should view reviews as educational and not as personal attacks on them.

The danger of viewing it as an attack is that those whose work is being reviewed suddenly develop a defensive mechanism which unfortunately clouds the whole object of a review or scrutiny. Those who are impervious to guidance and correction will unfortunately remain where they are, as such attitude does not augur well for the proper administration of justice."

Part IV of the High Court of Zimbabwe Act, [*Chapter 7:06*] enumerates the High Court's statutory powers of review. Section 26 provides that,

subject to the provisions of the Act and any other law, the High Court has review powers over all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities. Section 27(1) provides that subject to the provisions of that Act and any law, the grounds of review are absence of jurisdiction, bias and gross irregularity in the proceedings or decision. Section 27(2) provides that nothing in that particular section shall affect the provisions of any other law relating to review of inferior courts, tribunals or authorities. Section 29(1)(b) provides that for purposes of reviewing any criminal proceedings the High Court may hear any evidence in connection with the proceedings.

In criminal proceedings the High Court, when reviewing any criminal proceedings of an inferior court or tribunal, may direct that any part of the evidence which was taken down in shorthand or recorded by mechanical means be transcribed and that the transcription be forwarded to the registrar of the High Court; hear any evidence in connection with the proceedings, and for that purpose may cause any person to be summoned to appear and give evidence or produce any document or article; and where the proceedings are not being reviewed

at the instance of the convicted person, direct that any question of law or fact arising from the proceedings be argued before the High Court by the Attorney-General or his deputy and a legal practitioner appointed by the High Court. This is all provided for in section 29 of the High Court Act.

If the reviewing Judge finds that the proceedings are in accordance with real and substantial justice, it shall confirm the proceedings. Section 29(2) states that if on review of any criminal proceedings the High Court considers that the proceedings are not in accordance with real and substantial justice it has the power to do various things, including the power to alter and quash the conviction or to set aside or correct the proceedings or "generally give such judgment or make such order as the inferior court or tribunal ought, in terms of any law, to have given, imposed or made on any matter which was before it in the proceedings in question". Section 29(3) specifically provides that no conviction or sentence shall be quashed or set aside in terms of section 29 by reason of any irregularity or defect on the record of proceedings unless the High Court considers that a substantial miscarriage of justice has actually occurred.

In ***S v Prandini*** **HH 94/10** KUDYA J summarised the provision of section 29 as:

> "The provisions of s 29, *supra*, may be divided into two parts. There are those matters which are brought for review by magistrates in terms of ss 55, 57 and 58 of the Magistrates Court Act [*Cap 7:10*] and those which come to the notice of the High Court by some other means as provided in subs (4) of s 29, *supra*. The present proceedings fall into the latter category. Ordinarily criminal reviews seek to alter or quash a conviction; or reduce or set aside a sentence. The present matter is rare in that a complainant seeks the court to declare that an acquittal was not in accordance with real and substantial justice. In my view, this is permitted by s 29(1) (c), *ibid*, which gives the High Court a discretion to direct the Attorney-General and a legal practitioner appointed by it to argue on any question of law or fact emanating from the proceedings.
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> Section 29(2) empowers the High Court to determine whether the proceedings are in accordance with real and substantial justice. If it

finds that they conform to accepted norms of both adjectival and substantive law it approves of the proceedings. If the proceedings run foul of either the procedural or substantive legal requirements, the court has a wide choice to draw from to correct the proceedings. The choices set out in s 29(2)(b) are predicated on a conviction and not on an acquittal. This is because both subparas (i) and (ii) of subs (2) of s 29 revolve around a conviction and sentence. An acquittal does not fit into this mould. The eight provisos to s 29(2)(b) are triggered by either a conviction or sentence."

It should be noted that inasmuch as a review does not deal with the merits where review in a criminal matter takes place as a matter of course, the reviewing Judge or court will examine the merits of the case as well as the propriety of the procedure, though, in the nature of things, the number of cases that have to be reviewed, the fact that the record will most likely not be a complete transcript, and the lack of argument from either party, the examination will probably be less thorough than on appeal.

CIVIL APPEALS

The High Court has jurisdiction to hear and determine an appeal in a civil case from the judgment of any court or tribunal from which in terms of any other enactment an appeal lies to the High Court.[8] The High Court has the power to confirm, vary, amend or set aside the judgment appealed against.[9]

Also, if the High Court thinks it is in the best interests of justice, it may order the production of any document or exhibit necessary for the determination of the case[10], or call or examine any witness who would have been a compellable witness at the trial or proceedings to attend and be examined by the High Court,[11] receive evidence of any competent witness except a compellable witness[12], or remit the case to the court or tribunal of first instance for further hearing[13].

Further, where any question arising at the appeal involves prolonged examination of documents or accounts or any scientific or local investigation which cannot, in the opinion of the High Court, be

[8] Section 30 of the High Court Act.
[9] Section 31(1)(a) of the High Court Act.
[10] Section 31 (1)(b)(i) of the High Court Act.
[11] Section 31(1)(b)(ii) of the High Court Act.
[12] Section 31(1)(b)(iii) of the High Court Act.
[13] Section 31(1)(b)(iv) of the High Court Act.

conveniently conducted before it, it may order the reference of the question in terms of the Rules for inquiry and report to a special commissioner appointed by it[14]. The High Court may appoint any person with special expert knowledge to act as an assessor in an advisory capacity in any case where it appears to the High Court that such knowledge is required for the proper determination of the case;[15] issue any warrant necessary for enforcing any order or sentence of the High Court;[16] take any other course which may lead to the just, speedy and inexpensive settlement of the case;[17] or make such order as to costs as the High Court thinks fit.[18]

CRIMINAL APPEALS

The High Court has jurisdiction to hear and determine an appeal in any criminal case from the judgment of any court or tribunal from which an appeals lies to the High Court in terms of section 34(1) of the High Court Act.

[14]Section 31(1)(b)(v) of the High Court Act.
[15] Section 31(1)(b)(vi) of the High Court Act.
[16] Section 31(1)(b)(vii) of the High Court Act.
[17] Section 31(1)(b)(viii) of the High Court Act.
[18] Section 31(1)(b)(viiia) of the High Court Act.

An aggrieved litigant may appeal against punishment for failure to obey a subpoena, against punishment for failing to surrender oneself, against punishment for failure to obey a court order, against conviction, against sentence, or against conviction and sentence.

The Attorney-General may appeal to the High Court on a point of law or against acquittal if the Attorney-General is dissatisfied with the judgment of a court in a criminal matter in terms of section 61 and 62 of the Magistrates Court Act.