

ADDINGTON KADHANI
versus
SENIOR STAFF OFFICER
and
POLICE SERVICE COMMISSION
and
SALARY SERVICE BEREAU

APPLICANT

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 21 May 2008.

Opposed Application

Mr *Makuku*, for applicant
Mr *Chimombe*, for all the respondents

CHITAKUNYE J: The applicant was a member of the Zimbabwe Republic Police (ZRP). On 20 April 2005 he appeared in the magistrates court charged with the crime of contravening s 3(a)(i) of the Prevention of Corruption Act [*Cap 9:16*]. He was duly convicted and sentenced on 22 September 2005 to 24 months imprisonment of which 6 months were suspended for 5 years on conditions of good behavior. In October 2005 he appealed to the High Court against both conviction and sentence. The actual date of filing the appeal is not reflected on the notice of appeal filed of record. What is clear is that the notice of appeal was signed by his legal practitioners on 4 October 2005.

On 15 March 2006 applicant was granted bail pending appeal by the High Court. After being released on bail, on 20 March 2006 he reported for duty at his place of employment only to be advised that he had been discharged from service with effect from 17 October 2005. On the following day, the 21 March, he noted an appeal against discharge in terms of the Police Act [*Chapter 11:10*]. After noting the appeal he made efforts to have his salary re-instated to no avail. He has thus applied to this court for an order that:

- “1. The first, second and third respondents be ordered to re-instate salary and benefits for the applicant from date of discharge.
2. The second respondent be ordered to make payment for the applicant’s salary and benefits from 1 November 2005 within 7 days of this order.

3. Costs of suit to be paid by first and second respondents.”

The applicant argued that in terms of the Police Act and regulations there to, the mere fact of noting an appeal against the order of discharge suspended the order for his discharge until the Police Service Commission made a determination on his appeal. He further argued that he noted his appeal against discharge within the time limits provided in the regulations as he made it within 24 hours after he learnt of the discharge.

Of the 3 respondents only the second respondent filed an opposing affidavit through its Chairman. In that affidavit second respondent contended that applicant was properly discharged and that he did not appeal against the order of discharge within the time limits provided for in the Police Act. The second respondent contended that applicant was discharged in terms of s 48 of the Police Act. That section states that, ‘If a member, other than an officer, is convicted of any offence and sentenced therefore to imprisonment without the option of a fine, whether or not the execution of such sentence is suspended, the commissioner may (a) discharge the member, in which case the discharge may take effect from the date of his conviction;.....’

The issues as evident from the papers filed of record include the following:

1. Whether or not the applicant filed his appeal against the order of discharge timeously in terms of the Police Act, [*Cap 11: 10*].
2. Whether or not the applicant followed the necessary procedures in filing the appeal in terms of the Police Act and Regulations thereto.
3. What is the effect of noting an appeal against an order of discharge?

In their heads of arguments counsel for both sides appeared agreed on the time within which one had to note an appeal. Section 51 of the Police Act provides that:-

“A member who is aggrieved by any order made in terms of section forty-eight or fifty may appeal to the Police Service Commission against the order within the time and in the manner prescribed, and the order shall not be executed until the decision of the commission has been given”.

The time and manner of noting the appeal are provided for in the Police (Trials and Board of inquiries) Regulations 1965. Section 15(1) of these regulations states that:

“A member who wishes to appeal shall within 24 hours of being notified of the decision of the commissioner, give notice to his officer commanding of his intention to

appeal and shall within 7 days of being notified of the decision of the commissioner, lodge with his officer commanding a Notice of Appeal in writing setting out fully the grounds upon which his appeal is based and any argument in support thereof.”

The applicant argued that he was only notified of the order of discharge on 20 March 2006 when he reported for duty. On the very next day he noted his appeal against the order of discharge. To confirm this he referred to annexure ‘D’ a letter dated 21 March 2006 addressed to the officer in charge CID, Harare Central TFC titled ‘RE: APPEAL AGAINST DISCHARGE: NUMBER 048175 N: DETECTIVE CONSTABLE KADHANI A...’ The second respondent on the other hand contended that the applicant only lodged his appeal on 6 October 2006 well out of time. However, in paragraph 4 of his heads of argument, respondents counsel submitted that:

“On 21 March 2006, the applicant appealed against his discharge. This is confirmed by Annexure E to the application.”

The letter of 6 October 2006 the second respondent had said reflected the date of appeal was only a reminder as it states in part ‘I refer to my letter dated 21 March 2006 that was referred to the commissioner of police through normal channels, in which I was appealing against discharge’. The respondents counsel seemed to contend that even with this concession the applicant was still out of time as the order was made on 17 October 2005 and so the time within which applicant should have noted his appeal should be calculated from that date. That contention is ill conceived. The regulations are very clear that the time within which to note an appeal is from when a member is notified of the order of discharge. Section 15 (1) of the Police (Trials and Board of Inquiry) Regulations 1965 states that:

“A member who wishes to appeal shall within 24 hours of being notified of the decision of the commissioner, give notice to his officer commanding of his intention to appeal and shall within 7 days of being notified of the decision of the commissioner, lodge with his officer commanding a Notice of Appeal in writing setting out fully the grounds upon which his appeal is based and any argument in support thereof.”

Clearly from the above the date of notification of the commissioner’s decision is pivotal. In the opposing affidavit the second respondent did not at all allude to when applicant was notified of the order of discharge. In fact there was no denying that applicant only came to know of the order of discharge on 20 March 2006; that being the case the time within which to appeal was as from that date. It would be folly of anyone to seriously suggest that the time limits start from when the decision is made irrespective of whether a member has been notified

or not. It is only reasonable that time limits must run from when one has been made aware of the decision. In any case such would be contrary to s 15 (1) cited above.

Another issue raised was the manner of noting the appeal. Applicant argued that in terms of the police regulations, a member appeals through their officer commanding who in turn transmits the appeal to the commissioner and eventually to the Police Service Commission. In regard to this he referred to sections 15(2) and 15(4) of the regulations. Those regulations show that s 15 (2) enjoins the officer commanding upon receipt of the notice within 24 hours to notify the Chief Staff Officer by the most expeditious means. Section 15(3) enjoins the chief staff officer upon receipt of the written notice of appeal to forward it forthwith to the commissioner. Section 15(4) provides that:

“The commissioner shall, within fourteen days of receipt thereof, forward to the secretary of the Police Service Commission the written notice of appeal together with the record of proceedings in terms of s 50 of the Act or, where applicable, certified copy of the indictment on which the member was convicted, and other relevant documents.”

This is what the applicant said he did. He lodged his appeal with his Officer Commanding who in turn was expected to forward the appeal to his seniors and eventually to the Commissioner. The commissioner was to forward it to the Police Service Commission. I did not hear the respondents to seriously dispute that that was in fact the procedure. The respondents did not effectively deny that applicant did as per this procedure. Since the applicant had apparently complied with the procedure it was encumbered upon first and second respondents to ensure that the appeal was processed and determined.

It has been shown that the applicant notified his Officer Commanding of his intention to appeal within 24 hours after being notified of the order of discharge. He in fact noted his appeal and grounds thereto at the same time. In noting the appeal he followed the correct procedure.

The next issue is on the effect of noting the appeal on the order of discharge. Where a member has notified his officer commanding of his intention to appeal and has noted the appeal as in this case s 51 states that *inter alia*, ‘...the order shall not be executed until the decision of the commission has been given’.

It is apparent that the respondents purported to execute the order by terminating applicant’s salary and other benefits before applicant had been notified of the order of

discharge. That in my view was wrong. The purpose of granting a member time within which to appeal and providing that the noting of an appeal suspends the execution of the order is so that a member does not suffer the consequences of execution when they intend to appeal. The respondents' conduct of executing before advising applicant was thus wrongful. It should not in my view be a bar to applicant obtaining the remedy he would have had execution not been done. Denying applicant such remedy would only act to encourage respondents in such wrongful conduct.

I am of the firm view that the noting of the appeal suspended the operation of the order of discharge. The applicant was thus entitled to have his salary and other benefits, stopped as a result of this order of discharge, re-instated.

Accordingly the application is granted as follows:-

1. The first, second and third respondents be and are hereby ordered to re-instate salary and benefits for the applicant from date of discharge.
2. The second respondent be and is hereby ordered to make payment for the applicant's salary and benefits from 1 November 2005 within 7 (seven) days of this order.
3. First and second respondents to bear costs for this application.

Tizirai-Chapwanya legal practitioners, applicant's legal practitioners.
Civil Division of The Attorney General's Office, respondents' legal practitioners.