

EX-CONSTABLE CHITEMERE FT 083100A
versus
THE COMMISSIONER GENERAL OF POLICE
and
POLICE SERVICE COMMISSION
and
THE MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 27 February & 2 May 2019

Opposed application

G Makina, for applicant
NL Mabasa, for respondents

TAGU J: The applicant seeks a review of the decision of Police Service Commission to dismiss him from the police service and the dismissal of his appeal against discharge by the Police Service Commission on the ground of gross procedural irregularities as contemplated in section 27 (1) (c) of the High Court Act more particularly in that-

- i) The second respondent in determining applicant's appeal against discharge did not give him an opportunity to be heard. The second respondent did not conduct a public hearing as contemplated in section 69 of the Constitution of Zimbabwe when it determined applicant's appeal;
- ii) The applicant was not served with the first respondent's response to appeal;
- iii) The decision of the second res[pondent is one sided; and
- iv) The second respondent did not apply his mind to the facts of the case but he just rubber stamped the decision of the first respondent as he determined several appeals on one day which is impracticable.

The applicant now seeks the following reliefs-

“IT IS ORDERED THAT

1. The failure by the 2nd Respondent to afford Applicant the right to be heard before being discharged from the police service be and is hereby declared to be unlawful and wrongful.

2. The refusal and or failure by the first Respondent to furnish Applicant with reasons for his discharge be and is hereby declared as unlawful and wrongful.
3. The discharge of the Applicant from the Police Service by the 1st and 2nd Respondents is declared unlawful and wrongful and is accordingly set aside.
4. The Respondents are ordered to reinstate the Applicant into the Police Service forthwith without loss of salary or benefits.
5. The Respondents are ordered to pay costs of suit on a client/attorney scale.”

The facts are that the applicant appeared before a Single Trial Officer and was convicted for contravening para 13 (1) of the schedule to the Police Act [*Chapter 11.10*]. He never appealed to the Commissioner General of Police against his conviction. He then appeared before an impartial Board of Inquiry (Suitability) and was discharged from the police service. He further presented his appeal against discharge to the Police Service Commission and his appeal was dismissed. He was advised of the outcome through a radio communication. He now says his rights to be heard by the Police Service Commission was violated in that he was not given an opportunity to present viva voce submission before the Commission. In his heads of argument he submitted that the Police Service Commission Board is unlawfully constituted since the Commissioners were not sworn in by the President. He therefore wants to be reinstated into the Police Service.

The application is strongly opposed by the respondents. The respondents argued that the *audi alteram partem* principle was adhered to when the applicant appeared before the single trial officer as well as when he appeared before the Board of Inquiry (Suitability). As regard to his appeal to the Public Service Commission the respondents submitted that the second respondent deals with appeals on paper and not hearing submissions.

Section 51 of the Police Act [*Chapter 11.10*] 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 respondents argued that the aggrieved member is required to submit his or her grounds of appeal on paper. The appeal is then decided on the written facts that the concerned member would have presented and the second respondent communicates the decision thereafter. The second respondent does not hold inquisitorial sittings or hearings with appellants. The role of the second respondent is to ensure that procedural fairness is observed. In the present case the second respondent noted that procedural fairness was conducted leading to his discharge because he

appeared before a Single Trial Officer and also attended the Board of Inquiry (Suitability) for contravening para 13 (1) of the Schedule to the Police Act [*Chapter 11.10*].

Having heard the submissions and reading written submissions this court is of the view that the applicant is a victim of misadvice from his legal practitioners. I say so for the following reasons.

Section 51 of the Police Act is to the effect that an appeal against the decision of the Commissioner General of Police to discharge a member shall be made in a prescribed manner. The prescribed procedure is then made to come to life through Part V of the Police Regulations of 1965. In particular Section 51 provides that:

“15 (1) A member who is aggrieved by the order made in terms of section 48 or 50 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 Commissioner has been given”

Part V of the Regulations further state that-

“A member who wishes to appeal in terms of Section 50 of the Act shall:

- (a) Within twenty-four hours of being notified of the decision of the Commissioner, give notice to his officer commanding of his intention to appeal;*
- (b) Within seven 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,*
- (2) Upon receipt of notice given in terms of paragraph (a) of subsection (1) the member’s superior shall notify the Chief Staff Officer (Police) by the most expeditious means.*
- 3. Upon receipt of the written notice of appeal described in paragraph (b) of subsection (1), such office shall forward it forthwith to the Commissioner.*
- (4) The Commissioner shall, within fifteen days of receipt thereof forward to Secretary of the Police Advisory Board the written notice of appeal together with the record of proceedings in terms of Section 55 of the Act, or, where applicable a certified copy of indictment on which the member was convicted, and other relevant documents.”*

In casu, all the steps mentioned above were followed to the letter and nowhere do the Regulations or the Police Act provide for a public hearing by the second respondent when dealing with the appeal brought before it. I agree with the respondents that the appeals are heard on paper after the aggrieved member submitted written facts and no inquisitorial sittings are held. The second respondent ensures from the papers submitted that procedural fairness has been observed among other things. In this case, in my view no rules of natural justice were flouted.

The applicant was again informed through the radio signal that discharged him that he was being discharged for being unsuitable for police duties and he signed the acknowledgment

proforma receipt. The applicant never requested in writing reasons why his appeal was dismissed as required in terms of section 5 of the Administrative of Justice Act. If he had done so and the request not acknowledged he should have attached a copy. Further, it cannot be said with any stretch of imagination that the decision to discharge him was one sided. He appeared before the trial officer and the board and he never appealed against the decision of the trial officer. He only took issue with the decision of the Suitability Board to discharge him, but again this was after he was heard. I am therefore of the view that the second respondent in upholding the decision to discharge him and dismissing his appeal applied its mind. The second respondent is an impartial institution that exercises its mandate independently without fear or favour. The applicant cannot therefore be reinstated back into the Police Service because his discharge was done above board and according to the law. The employment relationship has been severely broken that it cannot be resuscitated. The application for review is therefore accordingly dismissed.

IT IS ORDERED THAT

1. The application for review is hereby dismissed.
2. The applicant to pay cost of suit.

Mugiya & Macharaga, law chambers, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners.