

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

HIGH COURT OF ZIMBABWE  
NDEWERE J  
HARARE, 15 May 2014 & 20 December 2017

### **Opposed Matter**

Ms *P. Makurire*, for the applicant  
Ms *C. Saruwaka*, for the respondents

NDEWERE J: The applicant filed a court application in May, 2012. The application was set down as an opposed matter in May, 2014.

In his founding affidavit, the applicant referred to the judgment in HC 7610/06 between the same parties. The judgment was handed down on 21 May, 2008 and the last part read as follows:

“Accordingly, the application is granted as follows:

1. The first, second and third respondents be and are hereby ordered to reinstate 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 of this application.”

In para 8 of his founding affidavit, the applicant said he was entitled to claim the salary and benefits from November, 2005, in terms of the above judgment, but he would, however claim from 2009. He then claimed US\$17 958-00 being back pay from January, 2009 to 30 May, 2012. He also claimed a 13<sup>th</sup> cheque for 3 years, from 2009, totalling \$1314-00. His total claim was therefore for \$19 272-00, plus interest at the prescribed rate.

The application was argued in May, 2014 and after submissions from both applicants and respondents, the court requested clarification on some issues.

The first and second respondents opposing affidavit stated that the applicant was reinstated from 27 November, 2005 to 28 May, 2007. This was because the applicant had appealed to the Commission, in terms of s 51 of the Police Act. The appeal led to the suspension of the dismissal order, hence the reinstatement from 27 November, 2005. The same opposing affidavit, also stated that the applicant's appeal was dismissed on 9 May, 2007 and the applicant could not be paid for the period following the dismissal of his appeal. However the second and third respondents did not attach the appeal decision or the relevant minutes to their opposing affidavit. In his answering affidavit, the applicant denied ever being served with the determination of his appeal. So after the submissions, the court adjourned the matter to enable the respondents to file the appeal decision and proof that the applicant was served with the determination.

Another issue which came up during argument was that the applicant was convicted criminally on the same facts which led to the disciplinary case against him. His lawyers submitted that the criminal conviction had been appealed against at the High Court, but they said they were not aware at what stage the criminal appeal was. So the applicant was also asked to give an update of the criminal appeal process since that too had been omitted from his application papers. The matter was therefore postponed sine die to allow the respondents the opportunity to provide the requested documents to the court.

On 20 July, 2016, the first and second respondent's legal practitioners filed a copy of the letter they wrote to the applicant dated 29 May, 2007, informing him about the dismissal of his appeal to the Commission. They said the original copy is what they dispatched to him and all they had left were the copies. They also attached documents pertaining to the appeal itself. The documents were copied to the applicant's legal practitioners in earlier correspondence which was initially misplaced, but is now part of the record.

The applicant's legal practitioners disputed that their client received the notification of 29 May, 2007 and disputed the authenticity of the record of proceedings.

However, all the court received was their client's bare denial of receipt of the notification document. The question is why would a whole Police system want to fabricate that communication if it did not happen? This is the same system which initially reinstated the applicant pending his appeal and paid him. If the system was just out to frustrate him surely they would have refused to reinstate him pending the appeal process? The applicant himself

did not suggest any reasons why the Police disciplinary system would want to frustrate him by saying they served him with the appeal decision when they did not. The court therefore has no reason to reject the first and second respondent's assertions that they served the applicant with the letter advising him about the dismissal of the appeal. Consequently, the respondents' assertion that the applicant was served with the appeal decision is accepted as the correct position. This means the applicant's appeal against discharge was dismissed on 9 May, 2007. This further means that the applicant has no valid claim against the respondents from 9 May, 2007.

The order which the applicant sought to enforce said the applicant should be paid from November, 2005. It had no final date of payment. According to the respondents, they reinstated his salary from November, 2005 to end of May 2007, after the dismissal of his appeal. In view of the finding that the applicant was duly notified of the dismissal of his appeal, any claim after May, 2007 is not legally sustainable.

During argument, the appellant, through his counsel's submissions, sought to abandon the position he had earlier on taken, the request to be paid from 2009.

In his founding affidavit, in para 8, the applicant stated as follows:

"The arrears salary and benefits must be claimed from 27 November, 2005. However same shall be claimed from year 2009."

This means in his founding affidavit, he abandoned the judgment by CHITAKUNYE J of 21 May, 2008 which said he should be paid from 1 November, 2005. Paragraph 8 above means the applicant abandoned the judgment by CHITAKUNYE J of 21 May, 2008 and came up with another claim of some payment from 2009. That new claim has no legal basis whatsoever. During the hearing, when the applicant realised that the applicant's claim from 2009 had no legal basis, the applicant, through his counsel, tried to go back to his claim as determined by CHITAKUNYE J in his judgment. That cannot be. An application stands or falls on the founding affidavit. The applicant cannot be allowed to go back to the judgment he had abandoned because the first and second respondent's defence to the application responded to the applicant's claim as indicated in the founding affidavit. The applicant cannot now ambush the respondents and say he now wants to be paid from November, 2005 when initially he had said he should be paid from 2009 because the defence which the first and second respondents prepared did not include the abandoned portion of the claim. The applicant could not therefore be allowed to resurrect the abandoned claim after failing to justify his claim from 2009.

Consequently, the applicant's claim for US\$19 272-00 is hereby dismissed, with costs.

*Tizirai-Chapwanya & Makuku*, applicant's legal practitioners  
*Civil Division of the Attorney-General's Office*, respondent's legal practitioners