

CONSTABLE T MANAMIKE
versus
THE TRIAL OFFICER (SUPERINTENDENT ZHOU)
and
COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 19 JANUARY 2018 AND 25 JANUARY 2018

Opposed Application

N Mugiya for the applicant
L Musika with *P Taruberekera* for the respondents

MATHONSI J: The applicant is a police constable based at Zimbabwe Republic Police Zaka in Masvingo. He was brought before the court of a single officer at Masvingo East District Headquarters charged with contravening paragraph 35 of the Schedule to the Police Act [Chapter 11:10] as read with sections 29 and 34 of that Act that is, acting in an unbecoming manner prejudicial to the good order or discipline or likely to bring discredit to the police force.

The allegations were that he had, on 23 September 2016, solicited for a bribe from an accused person he had escorted to Zaka Magistrates Court on a charge of contravening a section of the Domestic Violence Act [Chapter 5:16]. He may have picked upon a wrong person, a virtually stone broke person, because it is said that the accused person had only \$4-00 in his ecocash account which he was forced to part with unceremoniously leaving him penniless to the extent of having to ask for and was given a dollar by the applicant for transport to take him and his complainant wife back home in Jerera after court. Quite ruthless indeed. The bribe was to facilitate the withdrawal of charges against that accused person even though his complainant wife had long withdrawn the case.

Although he pleaded not guilty to the charge the applicant was, on 14 March 2017, convicted following a full trial. He was sentenced to undergo five days imprisonment at Fairbridge Detention Barracks in Bulawayo. The applicant was displeased and immediately gave notice to the trial officer of his intention to appeal to the Commissioner General. On 21

March 2016, that is on the seventh day after the trial was completed the applicant approached the District Headquarters with his notice and grounds of appeal. He says that upon arrival he found the District Clerk charged with the responsibility of receiving such process away. He then handed his appeal to Constable Chisoma at that office who signed for it in his police notebook. He says he returned to that office the following day on 22 March 2017 to pick up his stamped copies which were then stamped and handed over to him by the District Clerk then in attendance.

The applicant's appeal was however dismissed by the second respondent on the basis that it was a "legal nullity" having been filed out of time. The second respondent did not see the need to consider the merits of the matter reasoning at pp1 – 2 of his judgment:

"Appellant noted an intention to appeal against sentence hence execution of sentence was stayed. The appeal is however a legal nullity as it was lodged outside the stipulated time frames. Appellant was convicted and sentenced on the 14 March 2017. He prepared and lodged his Notice of Appeal on the 22 March 2017. He ought to have lodged his appeal within seven (7) days after conviction and sentence hence he was one day out of time. He ought to have submitted his Notice of Appeal on or before the 21 March 2017 as stipulated by the section 11 (1) of the Regulations."

It is that decision which the applicant has brought on review in this application on the ground that it was a gross irregularity to hold that the appeal was noted out of time. The applicant maintained that the appeal was timeously filed with the relevant office on 21 March 2016 which filing was acknowledged. He attached an extract from his police book where the submission of the appeal is recorded. The page in question contains two endorsements. The first one was made on 21 March 2016. It read;

"Constable Manamike handed his appeal against conviction and sentence to Constable Chisoma.
DHO 080294A
DTO 070388H"

That endorsement is signed by both the applicant and Constable Chisoma.

The second endorsement was made on 22 March 2016 and reads;

"Constable Manamike handed his appeal against conviction and sentence documents to D C Marasha.
DHO 080294A
DTO 034943Y
"

Again the second endorsement is signed by both the applicant and detective constable Marasha. As far as the applicant is concerned the appeal was submitted on time and the fact that the District Clerk who is detective constable Marasha was out of the office and was only able to date stamp the notice upon his return on 22 March 2016 cannot invalidate the appeal as it does not detract from the fact that it was handed in on the seventh day, that is 21 March 2016. Therefore the second respondent was wrong to make a finding that the appeal was a nullity. I must state that whoever was making those entries in the police book was living a year behind because the events must have occurred in March 2017.

The respondents opposed the application. The first respondent stated in his opposing affidavit that the appeal was filed out of time. Responding specifically to the statements by the applicant that the appeal was handed in on 21 March 2017 but only stamped on 22 March 2016 when Marasha returned to the office, the first respondent stated in paragraph 2.5;

“This is denied. Applicant handed his Notice of Appeal to the District Clerk Assistant Inspector Marasha on the 22nd of March 2017 at 1054 hours. Upon receipt of the Notice, it was signed for and stamped as can be clearly seen on Annexure ‘A’. The entries in Annexure ‘D’ of the applicant’s founding affidavit are contradictory and there are no entries as to the time when the handover took place as is a requirement in completion of the police notebook. In the entry of the 21st of March 2017, the notice of appeal is handed over to constable Chisoma by applicant and the entry on the 22nd of March 2017, applicant hands over his appeal to Assistant Inspector Marasha. It is therefore confusing how applicant would hand over the appeal which had already been handed over to constable Chisoma. One would be prompted to conclude that Annexure ‘D’ was concocted for the purposes of this application.”

In my view the first respondent’s confusion is feigned. He deliberately decided to read the annexure in isolation. The applicant explained in his sworn statement that Chisoma was not the District Clerk and therefore could not stamp the notice according to police rules. He however accepted the appeal and signed a statement in the police book acknowledging receipt. The applicant explained that the official stamping of the appeal could only be done by the District Clerk who is Marasha and he did so upon his return on 22 March 2017. It is not without reason that the respondents did not dispute that explanation and did not deny that those two characters Chisoma and Marasha exist and are officers then manning that office.

Indeed the respondent did not even begin to dispute that the signatures of the two officers are appended on the applicant’s police book to signify acknowledgment of the information

entered in it. If indeed Constable Chisoma had not received the appeal as alleged and Assistant Inspector Marasha had also not appended his signature on the applicant's police book obviously the respondents would have said so. Better still they would have elicited affidavits from the two officers denying any involvement. This was not done and yet the matter turns on whether the appeal was submitted on 21 March 2017 which would be timeously or on 22 March 2017 which would be out of time.

In my view, if the applicant handed his appeal on 21 March 2017 at the appropriate office but it could not be stamped for the reason that he has given, it cannot possibly be said that the appeal was a nullity by reason of being filed a day out of time as the second respondent concluded in his judgment. It is not the applicant's fault that in its scheme of things the police service only allows Marasha to stamp the appeal. The applicant did everything humanly possible to comply with the provisions of section 11 (1) of the Police (Trials and Boards of Inquiry) Regulations, 1965. It provides;

“A member who wishes to appeal to the Commissioner General against any conviction or sentence imposed on him in terms of s34 of the Act shall note his appeal within seven days of the date of conviction or sentence by lodging with the officer a written statement setting out clearly and specifically the grounds on which the appeal is based --.”

Whichever way one interprets that provision and reckons the time whether to include or exclude weekends and public holidays when the applicant handed his notice of appeal to Constable Chisoma on 21 March 2017 the seven day *dies inducae* had not expired. This is because the conviction and sentence were handed down on 14 March 2017 meaning that the appeal was handed in on the seventh day. The appeal should have been determined on the merits as a valid appeal was noted.

In terms of section 31 (7) of the Police Act [Chapter 11:10];

“A member convicted and sentenced under this section may appeal to the Commissioner General within such time and in such manner as may be prescribed against the conviction and sentence and where an appeal is noted, the sentence shall not be executed until the decision of the Commissioner General has been given.”

Clearly therefore an appeal to the Commissioner General suspends the decision appealed against.

I now turn to consider the issue of costs. The order that the applicant was seeking is as per the draft order that was filed which reads:

“IT IS ORDERED THAT

1. The conviction and sentence of the applicant by the 1st and 2nd respondents be and is hereby set aside.
2. The prosecution of the applicant in terms of the Police Act on the same allegations be and is hereby permanently stayed.
3. The respondents are ordered to pay costs of suit on attorney-client scale.”

The applicant’s founding affidavit is itself a modest document of exactly two pages in which after making the single relevant point that the appeal was noted on time the applicant went on to indulge himself on extraneous issues like saying that the appeal was dismissed without “conducting a public hearing as envisaged in section 69 of the constitution.” He was convicted “on a charge which does not exist” which have since become the drafting signature of the applicant’s present counsel, where relevance usually becomes the first casualty. Invariable the court is subjected to several pages of repetitive documents which have nothing to do with the issue at hand.

As it is the applicant filed lengthy heads of argument and went on to file even lengthier supplementary heads of argument throughout which none of the issues for determination are canvassed. They are not useful at all and even the basis of the order sought is not addressed at all. In fact no legal foundation is established for the order that is sought which I am unable to grant at all.

In my view a case has only been made for the remittance of this matter to the Commissioner General for a determination of the applicant’s appeal on the merits. This is not what the applicant sought. He has therefore not made out a case entitling him to an award of costs in his favour. Therefore although costs usually follow the result, this is a case where in the exercise of my discretion I am unable to award costs.

In the result, it is ordered that;

1. The decision of the 2nd respondent dated 13 July 2017 be and is hereby set aside.
2. The matter is hereby remitted to the Commissioner General of Police for a determination of the applicant’s appeal noted on 21 March 2017 on the merits.

3. Each party shall bear its own costs.

Mugiya and Macharaga Law Chambers, applicant's legal practitioners
Civil Division Attorney General's Office, respondents' legal practitioners