

ELIUD SPENCER NHARI v PUBLIC SERVICE COMMISSION

SUPREME COURT OF ZIMBABWE  
McNALLY JA, EBRAHIM JA & SANDURA JA  
HARARE, NOVEMBER 20 & DECEMBER 7, 2001

*T Biti*, for the appellant

*G M Zengeni*, for the respondent

SANDURA JA: This is an appeal against the refusal by the High Court to set aside the appellant's suspension from the Public Service and order that he be paid his full salary and benefits from 12 June 1997 to 14 June 1999.

The relevant facts are as follows. In 1979 the appellant joined the Department of Immigration as a junior employee. Thereafter, in 1991 he became the deputy chief immigration officer, after steadily rising through the ranks.

However, in 1995 the chief immigration officer suspected that the appellant had committed several acts of misconduct in the course of his duties. As a result, in 1996 the appellant was relieved of his post as deputy chief immigration officer and was transferred to the department of national archives in order to facilitate the investigation of the allegations of misconduct.

Thereafter, an inquiry, presided over by a provincial magistrate, was convened in terms of the Public Service (Disciplinary) Regulations, 1992 published in Statutory Instrument 65 of 1992 (“the 1992 Regulations”), and the result was that the appellant was found guilty of certain acts of misconduct.

After consideration of the result of the inquiry, the respondent discharged the appellant from the Public Service with effect from 12 June 1997. However, the appellant’s discharge was set aside by this Court on 14 June 1999, but the charges of misconduct brought against the appellant were remitted for rehearing by a different provincial magistrate. See *Nhari v Public Service Commission* 1999 (1) ZLR 513 (S).

Subsequently, in a letter dated 22 September 1999, which was later corrected by one dated 30 September 1999, the respondent informed the appellant that in terms of s 23 of the 1992 Regulations he was suspended from the Public Service with effect from 12 June 1997, and that in terms of s 9(2)(a)(ii) of the same Regulations, he would be paid a suspension allowance equal to half of his gross salary per month. The appellant was also informed that the misconduct charges levelled against him would in due course be heard afresh by a different provincial magistrate as directed by this Court.

Dissatisfied with the decision to suspend him and pay him half of his salary, the appellant filed a court application in the High Court seeking, *inter alia*, an order setting aside his suspension and directing the respondent to pay him his full

salary and benefits, together with interest on the arrears thereof, from 12 June 1997 to 14 June 1999.

The learned judge in the court *a quo* refused to grant the order sought by the appellant but granted a *mandamus* directing that the hearing of the misconduct charges against the appellant was to commence within thirty days after the date of his order.

Aggrieved by the learned judge's refusal to grant the order sought, the appellant appealed to this Court.

Before dealing with the issues raised by the appellant, I would like to set out the relevant sections of the 1992 Regulations. They are sections 9 and 23.

Section 9, which deals with the effect of a suspension order, reads as follows:

- “9 (1) Where a member has been suspended from service, he shall –
- (a) not attend at his place of work or carry out any duty unless directed to do so by the head of department, head of Ministry or the Commission, as the case may be, in which case he shall carry out such duties as directed;
  - (b) not be entitled to his salary in respect of the period of suspension unless ordered to carry out other duties in which case he shall continue to receive his salary;
  - (c) ...
- (2) Notwithstanding paragraph (b) of subsection (1) –

- (a) where the nature of the allegations do not (*sic*) involve financial prejudice to the Government, and the member is not directed to carry out other duties, the member shall be entitled to an allowance for up to three months, equal to half his gross salary per month, pending the determination of the allegation:

Provided that the Commission may authorize the payment of an allowance –

- (i) where the allegation involves financial prejudice to the Government; or
  - (ii) for a period in excess of three months where the allegation has not been determined; or
  - (iii) in excess of the amount referred to in this paragraph;
- (b) ...”.

It was common cause that the allegations of misconduct levelled against the appellant did not involve any financial prejudice to the government.

Section 23 of the 1992 Regulations reads as follows:

“Notwithstanding anything to the contrary contained in these regulations but subject to an order of a competent court, where the discharge of a member is set aside by a competent court, a member, who had been suspended from service prior to the said discharge, shall revert to being suspended and where he had not been suspended shall be deemed suspended with effect from the date of discharge until the matter is finalised by the Commission.”

At this stage I think that I should mention that the 1992 Regulations were repealed by the Public Service Regulations 2000, which were published in Statutory Instrument 1 of 2000 and which came into effect on 3 January 2000 (“the 2000 Regulations”).

Section 66(4) of the 2000 Regulations reads as follows:

“In the case of a member against whom an allegation of misconduct is made and in respect of whom any action has been taken prior to the date of commencement of these regulations in terms of the Public Service (Disciplinary) Regulations, 1992, any such action shall be deemed to have been taken in terms of the corresponding provision of these regulations, and the provisions of these regulations shall thereafter apply accordingly.”

It was common cause that the 2000 Regulations did not have any provision corresponding to s 23 of the 1992 Regulations. What that means will be dealt with later in this judgment.

However, in order to complete the picture, I should add that subs (4) of s 66 of the 2000 Regulations was later repealed by s 23 of the Public Service (Amendment) Regulations, 2001 (No. 1) (“the 2001 Regulations”) published in Statutory Instrument 58A of 2001, which came into force on 23 February 2001. A new subsection (4) was substituted and it reads as follows:

“(4) In the case of a member against whom an allegation of misconduct is made and in respect of whom any action has been taken prior to the date of commencement of these regulations in terms of the Public Service (Disciplinary) Regulations, 1992, any such action shall be continued in terms of these regulations.”

Although s 23 of the 1992 Regulations was repealed on 3 January 2000 it is relevant to the determination of this appeal because the appellant’s suspension with effect from 12 June 1997 was based on the provisions of that section.

The argument advanced on behalf of the appellant was as follows. On 14 June 1999 this Court set aside the appellant’s discharge from the Public Service. The Court, therefore, restored the *status quo ante*, and the appellant reverted to the position which he occupied before he was discharged. As he was in receipt of his full

salary and benefits before the discharge, the order issued by this Court on 14 June 1999 meant that the appellant should be paid his full salary and benefits from 12 June 1997 to 14 June 1999. In view of the fact that s 23 of the 1992 Regulations brought about his suspension from the Public Service which deprived him of the salary and benefits which he had already earned, it contravened s 16(1) of the Constitution of Zimbabwe because it deprived him of his property without compensation. The section is, therefore, of no force or effect and the appellant is entitled to his full salary and benefits from 12 June 1997 to 14 June 1999.

I find this argument very persuasive indeed.

It was common cause that prior to 12 June 1997 the appellant was in receipt of his full salary and benefits. He had not been suspended from the Public Service. Accordingly, when this Court set aside his discharge, he immediately reverted to his former position, and would have been paid his full salary and benefits from 12 June 1997 to 14 June 1999 had it not been for the provisions of s 23 of the 1992 Regulations.

The section provided that where the discharge of a member was set aside by a competent court and the member had not been suspended prior to his discharge, he was deemed suspended with effect from the date of the discharge until the matter was finalised by the Commission. As a result of this provision, the member automatically lost the right to his earned salary and benefits in terms of s 9(1)(b) of the same Regulations.

Undoubtedly, the section deprived the appellant of the salary and benefits already earned by and due to him for the period extending from 12 June 1997 to 14 June 1999. I am satisfied that this was a deprivation of his property without compensation, in contravention of s 16(1) of the Constitution.

In the circumstances, s 23 of the 1992 Regulations was unconstitutional and of no force or effect.

It therefore follows that the appellant's suspension from the Public Service with effect from 12 June 1997 falls away, and that he is entitled to his full salary and benefits from 12 June 1997 to 14 June 1999.

Finally, I wish to make two points. The first is that even if the appellant's suspension in terms of s 23 of the 1992 Regulations had been valid, it would have lapsed on 3 January 2000 when the 2000 Regulations, which repealed the 1992 Regulations, came into force; and the second point is that the legislature must have realised that s 23 of the 1992 Regulations was unconstitutional. That is why, in my view, it repealed the section and did not include any corresponding provision in the 2000 Regulations.

In the circumstances, the appeal is allowed with costs. The order of the court *a quo* is set aside and the following is substituted:

- “1. The applicant's suspension with effect from 12 June 1997 is set aside with costs.

2. The respondent shall pay to the applicant his full salary and benefits from 12 June 1997 to 14 June 1999, together with interest at the prescribed rate on the arrears thereof, taking into account what has already been paid to him in respect of that period.”

McNALLY JA: I agree.

EBRAHIM JA: I agree.

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