

ADRIAN MOYO
versus
NATIONAL PROSECUTING AUTHORITY

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO 17 MARCH 2020 & 20 MAY 2020

Opposed Application

Applicant in person
Mr T. Chikwati for the respondent

ZISENGWE J: This is an application wherein an order is sought compelling the respondent to institute review proceedings against the decision of a magistrate to discharge one Irene Moyo at the close of the state case. The latter was on trial on stock theft charges.

BACKGROUND

The matter has its origins in the estate of the late Stephen Moyo who lost his life in a motor vehicle accident on 27 July 2004. He died intestate. He was survived by his wife Irene Moyo and a number of children, among them the applicant (Irene Moyo is applicant's step mother). His estate was fairly sizeable and consisted of both movable and immovable assets. It was duly registered with the Master of the High Court under DR 2120/04. The assets in that estate consisted, *inter alia*, of a farm and on it, a herd of cattle. It is common cause that some two months after his death, his widow Irene Moyo, disposed of fifty of those cattle by selling them to a retail outfit operating under the name "Montana meats" in Masvingo. At that stage the estate of her late husband had not been wound up.

Aggrieved by the conduct of Irene Moyo in selling those beasts, the applicant, some four years later, made a report of stock-theft against her to the police. This culminated in her arraignment before Magistrate Mudzongachiso on stock-theft charges. According to the allegations as contained in the charge and state outline her conduct in disposing the fifty head

of cattle amounted to stock theft as she had no right to sell them because they were part of the yet to be wound up estate.

Her defence to the charges as same can be gathered from the record of proceedings was that she urgently needed cash to meet the expenses incurred at the funeral as well as to pay for the children's school fees.

As it turned out the applicant was the sole witness for the prosecution. His evidence was startlingly brief (consisting all of four sentences!) and his cross examination was shorter still, consisting as it did of a single question. At the close of the state case the Magistrate discharged Irene for want of evidence. More particularly, he found that the property which Irene Moyo is alleged to have stolen at law actually belonged to her by operation of Section 68F of the Administration of estates Act as read with the provisions of Act 7 of 1997.

It is that decision to discharge Irene Moyo that prompted this current application (albeit some five and half years later). The applicant, who is a self-actor avers that that decision was wrong and premised on a misapprehension on the part of the magistrate of the applicable legal principles under the administration of Estates Act.

The respondent is the National prosecuting Authority (hereinafter shortened as "NPA"), a constitutional body responsible for the prosecution of criminal cases in Zimbabwe. In this application it was represented by officers attached to its local office. Whereas the opposing affidavit was deposed to by one Chiedza Muhwandavaka who identifies herself therein as a "Provincial Public Prosecutor currently stationed at Masvingo", the matter was argued by a different officer, Mr Chikwati.

In discharging Irene Moyo the magistrate remarked as follows:

"I am most perplexed at this matter. The law relating to these issues before me are governed by the Administration of deceased Estates Act and in particular Section 68F which categorically states that a surviving spouse upon the death of the other inherits the property left behind. The law clearly says that the inheritance is in the surviving spouse's personal capacity. That position was made clear by Act No. 7 of 1997. The only fault here is the accused who is legally the owner of the property prejudiced the master in terms of master's fees which she has to pay anyway. She has ownership of all the property in her individual capacity and cannot steal her own property. She is only advised to adhere to the Administration of Deceased Estates Act to regularise her ownership. She is acquitted of theft"

In attacking this decision to acquit Irene Moyo and the reasons that were given therefor the applicant avers that since she was married to his father in terms of [Chapter 238] in 1979 and not under 5:09 (sic) (he obviously meant The Customary marriages Act,

[*Chapter 5:07*]) Irene was therefore not entitled to the entire net estate of his late father. More specifically he contends that the magistrate erred in disregarding the Master's report which spelt out the manner in which the estate was to be administered. In a word, the portion of the report that the applicant relies on states that since the deceased was married to Mrs Irene Moyo in terms of the then "African Marriages Act [*Chapter 238*]" (now customary Marriages Act [*Chapter 5:07*]) she was entitled to ownership of the house in which she was ordinarily resident and all household effects thereto. In addition she was entitled to the first \$200 000 worth of assets or a child's share whichever was the greater. The remainder of the net estate then stood to be shared equally between the spouse and all the deceased's children.

The respondent in a rather perfunctory and dismissive fashion elected to oppose the application almost entirely on the basis that the Prosecutor General, being an independent constitutional appointment, is not subject to the direction or control of anyone. Implicit in such independence (so the argument goes) is that an application such as the present one where someone seeks an order compelling the PG to institute review proceedings is unconstitutional and should therefore fail.

Apart from some vague and utterly superficial reference to the application being devoid of merit, there was no attempt whatsoever to engage the facts or to justify the decision of the magistrate rendering a review unmeritorious. In fact I find myself compelled to reproduce that part of the respondent's opposing affidavit that purports to address the merits or otherwise of the applicant's position. It reads:

- “8. *There are no merits in the record of proceedings (sic) warranting an application for review. The applicant himself does not advance any grounds to sustain an application for review.*
9. *There is no basis to set aside the judgment. The order being sought by the applicant of any legal basis. At best it can be described as confusing and embarrassing.*
10. *The application is a clear abuse of the court process.”*

It goes without saying that such a cavalier approach to litigation by a functionary of the respondent the latter being a critical organ of the state in my view, amounts to a serious dereliction of duty. There was not even the slightest attempt to demonstrate why it was contended that the application was utterly unmeritorious. Such abdication of responsibility cannot escape censure.

Even the bald contention that decisions of the office of the Prosecutor General are by virtue of his independence, not subject to judicial review, is not entirely correct. The independence contemplated in Section 260 of the Constitution is independence from improper, corrupt or unlawful influence. It can never be understood to imply that bearers of that office can act without proper regard to the law, nor does it mean that the jurisdiction of the courts to review his decisions is ousted. It means independence from partisan or other external influences unconnected to the pursuit of justice. That issue has since been decided by the Constitutional Court in *In re Prosecutor General on his Constitutional Independence and protection from direction and control* CCZ13/2017 where it was held that the very s 260 (1) which the applicant sought to rely upon to assert his independence makes it crystal clear that the Prosecutor-General's independence and autonomy in the exercise of his functions and powers are not absolute but are "subject to this Constitution": meaning that the prosecutor general is enjoined at all times to observe both the Constitution and the rule of law. In other words the PG cannot act unlawfully by refusing to do what he is legally obligated to do and thereafter purport to hide behind the shield of the independence of his office. In appropriate cases he may, by a proper order of court upon application, be compelled to perform some positive act.

The shortcomings or inadequacies in the respondent's opposing papers, however, do not *ipso facto* translate to a finding for the applicant. The court is still enjoined to carefully consider the application to see if it is meritorious in the light of the applicable legal principles. In the context of this case, therefore, this application will only succeed if the court is of the view that the review application that applicant wants the respondent to be ordered to launch enjoys prospects of success.

A perusal of the application reveals it is beset with a myriad of problems, chief among them being the delay in bringing this application in view of the relevant time limits imposed by the law. The other problem relates to the appropriateness of the procedure which applicant wants respondent to be compelled to embark on. Thirdly, there is the question of the non-joinder of relevant parties to this application. Each of these will be dealt with in turn.

Non-observance of time limits

As alluded to earlier, Irene Moyo was found not guilty and discharged by the magistrate on 12 November 2014 and the applicant filed this application in 30 January 2020. Needless to say that the application for review (should this current application succeed) is well out of time.

The period within which a review must be filed is eight weeks calculated from the date when the matter that is sought to be reviewed was finalised. Order 33 rule 259 of the High Court Rules, 1971 (the rules) provides as follows:

“Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceeding in which the irregularity or illegality complained of is alleged to have occurred: provided that the court may for good reason extend the time.”

At the time of making this application the applicant must have been alive to the above provision given his attempt to rely on the proviso thereto. He stated as follows in paragraph 4 of his founding affidavit:

“4. This is an application for an order compelling the respondent to seek a review in the outcome of the matter CRB MS 1558/14. If the respondent is ruled out of time, then he should seek the setting aside of the judgment in the interests of justice.”

In *Forestry Commission v Moyo* 1997 (1) ZLR 254 (SC) at 259 E-F GUBBAY CJ (as he then was) had this to say:

“... if the application for review has been brought out of time, condonation for the failure to comply with rule 259 must be sought. If authority is required for this self-evident concept, it is to be found in Bishi v Secretary for education 1989 (2) ZLR 240 (H) at 242D; and Mushaishi v Lifeline Syndicate & Anor 1990 (1) ZLR 284 (H) at 288 E-F. The court is entitled to refuse the review or may condone the omission. It exercises a judicial discretion, while taking into consideration all relevant circumstances.”

The court at 260 E - G went on to summarise the factors which are germane to an application for condonation for late filing of a review, and these are:

- (a) That the delay involved was not inordinate having regard to the circumstances of the case;
- (b) That there is a reasonable explanation for the delay;
- (c) That the prospects of success should the application be granted are good; and
- (d) The possible prejudice to the other party should the application be granted.

(See also *Leonard Dzvairo v Kango Products* SC 35/2017; *Director Civil aviation v Hall* 1990 (2) ZLR 354 (S)).

In applying the above broad factors, one cannot help but observe, firstly that there was clearly an inordinate delay in bringing this current application. The inevitable consequence is that this will elicit a direct and similar reaction from the reviewing court were this application

to succeed. Five and half years is too long a delay to bring such an application especially considering that no explanation was proffered for the apparent tardiness.

In the present matter the applicant does not in the least attempt to explain the basis upon which the respondent should rely in its application for condonation for the late filing of the review application should this current application succeed. Put more directly applicant does not bother to explain why *he* only came forward more than five years after the discharge of the Irene Moyo to bring it. It is obviously untenable to suggest (as applicant seems to imply) that the respondent must somehow conjure up some explanation to support the inevitable application for condonation that should precede or accompany the application for review.

The *Forestry Commission v Moyo* case (supra) buttresses the principle that an application for condonation which is not accompanied by reasons for the late filing of the review application should not be entertained: the court posed the rhetorical question: “*How can a court exercise a judicial discretion to condone when the party at fault places before it no explanation for the delay?*”

In *Leonard Dzvairo v Kango Products (supra)* GUVAVA JA referred with approval to the case of *H. J. Vorster (Private) Limited v Save Valley Conservancy* SC 20/14 where it was stated as follows:

“... there was no merit in the application for condonation because the applicant’s predicament was due to its own dilatoriness. Having so found, the court proceeded to dismiss both applications with costs on the legal practitioner and client scale”

It is not clear what the applicant meant by “*If the respondent is ruled out of time, then he should seek the setting aside of the judgment in the interests of justice.*” If by that he meant that condonation should nonetheless be granted (in the interests of justice) notwithstanding the absence of any reasons being proffered for the late filing of the review then that position is untenable not least because it is alien to rules of court.

Prospects of success

The third requirement that the respondent (then as applicant) will need to satisfy in the application for condonation is that it enjoys reasonable prospects of success in the review application. Although the applicant dwelt almost exclusively on the question of the relevant inheritance laws, this should not disguise the true character of what he ultimately seeks. He basically wants the discharge of Irene Moyo in the criminal trial to be set aside. Therefore, the applicant will need to satisfy the court that Irene Moyo should not have been discharged

at the close of the state case but rather placed on her defence. Viewed from a different angle it will be incumbent upon the NPA to show (should this current application succeed) that it had in fact established a *prima – facie* case as against Irene Moyo on the stock-theft charges.

Section 198 (3) of the Criminal Procedure and Evidence Act, [Chapter 9:07] provides as follows:

“(3) *If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge, or any other offence of which he might be convicted thereon, it shall return a verdict of not guilty.*”

In interpreting this provision the court in *S v Tsvangirai & Ors* HH-119-03 summarized the circumstances in which discharge at the close of the state case will be granted as follows:

“Thus the court must discharge the accused at the close of the case for the prosecution where

(a) there is no evidence to prove the an essential element of the offence;

(b) there is no evidence on which a reasonable court, acting carefully, might properly convict;

(c) the evidence adduced on behalf of the state is so manifestly unreliable that no reasonable court could safely act on it. Instances of the last such cases will be rare;

it would only be in the most exceptional cases where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed.”

These principles clearly must have eluded the applicant for he dwelt almost exclusively on the question of the provisions of the Administration of Estates Act. He fell short of alleging, let alone proving, that the respondent had established a *prima facie* case warranting placing Irene Moyo on her defence.

The sole evidence at the disposal of the court was that of the applicant and it is perhaps necessary to reproduce it here in its entirety as same appears from the record of proceedings:

“I reside at number 1987 Bluff Hill Harare and I am aged 43 years. Accused is my step mother. The beasts should not have been sold but were for the deceased estate. It’s true she was married to the deceased. Well, ownership should have been done through a deceased estate and one would be given property with which the property was acquired during the pendency of their marriage which I only want (sic) it to have the matter resolved amicably”

In cross examination the following exchange took place:

Q: *I have no question for I sold the beasts after I made a decision to raise funds for the expenses and funeral expenses.*

A: *Well, no meeting was held.*

There was no re-examination. Thereafter the state closed its case. Apart from the marriage certificate which was produced by Irene Moyo when she gave her defence outline, showing the marriage between her and applicant's father, no other documentary exhibits were produced.

It is on that evidence that the court was to decide whether to place Irene Moyo on her defence or not.

I will first deal with the applicable provisions which relate to succession and inheritance. Section 68F (2) (d) of the Administration of Estates Act and Section 3(b) of the Deceased Estates Succession Act [*Chapter 6:02*] (which are the applicable provisions in the current scenario) essentially provide the same thing namely that under customary law, in instances where the deceased dies intestate and is survived by one spouse and one or more children, then the surviving spouse should get ownership of or, if that is impracticable, a usufruct over, the house in which the spouse lived at the time of the deceased person's death, together with all the household goods and effects thereto as well as a child's share (each child inheriting in equal shares) or to the specified amount (which according to the Master's report must have been \$200 000 at the time) whichever is the greater. The applicant confused himself by failing to appreciate that paragraph 2d of Section 68F forms a part of that Section. He seems to labour under the impression that the magistrate by referring to section 68F, he necessarily excluded s 68F (2) (d) which, of course, does not make sense.

Therefore, whether or not the surviving spouse will inherit the entire net estate after the allocation of the house to her is dependent on the size of the residue; i.e. whether that value exceeds the specified amount. Even if one were to accept, therefore, that the magistrate erred by taking as given that the Irene Moyo was entitled to inherit the entire net estate in the circumstances of this estate, that would not necessarily be the end of the enquiry: this court will still have to decide if the evidence led in that trial justified placing Irene Moyo on her defence. Put differently; the fact that the magistrate's decision was based almost entirely on his understanding of the law relating to inheritance from a deceased estate does not preclude this court from evaluating the rest of the evidence to see if it merited placing Irene Moyo on her defence.

In my view the evidence adduced before the magistrate, fell far short of what was required to do so. The following are a few of the shortcomings of the state case. Firstly and perhaps most importantly Irene Moyo's explanation for selling the cattle was basically that she needed to raise money as a matter of urgency to pay for school fees for the children, and that she needed to settle expenses incurred during the funeral. She stated as follows:

"I was married to my husband in 1979 and we had nothing. We then bought a house and left the house and renting it as we were in a flat. We generated income then went to the farm. We then reared beasts which we would sell and send children to school. My husband died through an accident. I then instructed that beasts be sold to cater for funeral expenses and pay children's school fees. That is how the allegations arose."

Although she did not say this in as many words, she was obviously raising the defence of claim of right. Feltoe in "A guide to Criminal Law in Zimbabwe" explains this defence in the following manner:

"A claim of right is a "decently clothed" ignorance or mistake of the law. If ignorance or mistake of law is decently clothed, that is where X either knows or suspects that his action would normally be illegal but because of some extraneous factual basis, he believes that his action will not be unlawful in present circumstances."

This defence only applies in respect of property crimes, such as theft, robbery or malicious injury to property. Some examples of where this defence will apply are as follows.

X takes property from C mistakenly thinking that this property is X's own property which C has stolen from him. X is not guilty of theft because he had no intention to steal: he thought he was recovering his own property, and had a lawful right to take it."

In *S v Tamayi & Ors* 1982 (1) ZLR 267 (S) the accused persons had taken cattle belonging to another because they thought that the family of that person had had something to do with the death of their relative. They took the cattle as compensation. They were found not guilty because of claim of right. See also *S v Ellis* 1961 R&N 468 (FS), *S v Chihanya* 1981 ZLR (G)

From Irene Moyo's defence outline, it is clear that she was contending, firstly that the cattle that she sold jointly belonged to her and her late husband and secondly that she genuinely believed that she was entitled to dispose the cattle to offset the funeral expenses and to meet school fees requirements.

An accused who raises the defence of claim of right is required to lay a foundation for that defence by leading evidence in that regard (*S v Kaiwona &Ors S-182-93, S v Davy 1988 (1) ZLR 386 (S)*). In the present case Irene Moyo did lay such a foundation by stating as she did that she had contributed towards the acquisition of the property in question and that she believed she was entitled to dispose of the same. Although a defence outline is not evidence per se, it is nonetheless important evidential material that the court can have regard to. The state case on the other hand was woefully abysmal and ineffectual. It did not justify placing her on her defence for her to simply repeat what she had already stated in connection with the cattle that formed the subject matter of the charges.

Put in context, therefore, if indeed she was not bona fide in those assertions, cogent evidence should have been placed before the magistrate to that effect. Indeed it is not uncommon for the widow or widower of a deceased person to offset some of the immediate debts arising from the sickness and/or funeral expenses attendant to the death of the deceased from part of the assets owned by the deceased (See also Section 46 of the Administration Of Estates Act)

Secondly, the Master's report which the applicant places heavy reliance on was not produced in the criminal trial. How then would the magistrate have relied on same? The applicant seems to have laboured under the mistaken belief that the magistrate was aware of the existence of that report and should have somehow taken judicial notice of it which of course is incorrect. In a criminal trial the court's decision is based squarely on the evidence placed before it and of course, the law not on speculation and suppositions.

Similarly, the applicant in his answering affidavit refers to his police statement which supposedly contains details of the alleged crime. He erroneously presumes that it too was placed before the magistrate. All the material evidence tending to point to the guilt of Irene Moyo needed to be placed before the court regard being had to the fact that the onus rests on the state to prove its case against the accused.

Interestingly, the applicant in his evidence during the criminal trial before the magistrate indicated that all he wanted was for "the matter to be resolved amicably" That is a far cry from suggesting, let alone proving that Irene Moyo acted with criminal intent.

To sum up on this point, therefore, the prosecution of the case was lacklustre in the sense that the prosecutor patently neglected to extract from the applicant all the relevant information needed to support a conviction. That rather laissez-faire approach to prosecution which yielded the inevitable discharge cannot now be attributed to the magistrate.

Prejudice to the other party

Moving on now to consider the possible prejudice to the other party as one of the considerations in an application for condonation. “Other party” in this context should essentially be understood to mean Irene Moyo. Almost six years have gone by since her discharge on the stock-theft charges and sixteen years have flown past since the incident which gave rise to the charges. She surely must have moved on with her life and put this debacle behind her back by now. In my view, her constitutional right to a trial within a reasonable time (Section 69(1) of the Constitution) finds relevant application. Dragging her to court supposedly for a resumption after a six year hiatus amounts an infringement of this right. The expression “within a reasonable time” should be understood not only to mean from the time of arrest to time of commencement of the trial but includes the duration of the trial itself. Ultimately, therefore, I believe the delay in bringing this application and consequently the intended application for review itself will unduly prejudice her.

On the basis of the above I am of the considered view that the application for review does not enjoy prospects of success as it is highly unlikely to surmount the first hurdle namely the application for condonation.

Over and above the above, there is yet another problem that confronts this application namely the conflation of the procedures of appeal and review.

The review/appeal dichotomy

The applicant wants to have the respondent compelled to seek a review of the decision of the magistrate to acquit Mrs Irene Moyo. The question that immediately springs to mind is whether that would be an appropriate procedure to adopt in the circumstances. In general a review is concerned with the procedure followed in arriving at a decision. It is not directed at correcting a decision on the merits.

In Herbstein & Van Winsen “*Civil practice of the High Courts & Supreme Court of Appeal of South Africa*” (Fifth edition) at page 1271 the following is stated:

D Distinction between appeal and review

- (a) *The reason for bringing proceedings under review or on appeal is usually the same, viz to have the judgment set aside. Where the reason for wanting this is that the court came to a wrong conclusion on the facts or the law, the appropriate procedure is by way of appeal. Where, however, the real grievance is against the method of the trial, it is proper to bring the case on review. The first distinction depends, therefore on whether it is the result only or rather the method of trial which is to be attacked. Naturally, the method of trial will be attacked on review only when the result of the trial is regarded as unsatisfactory as well. The giving*

of a judgment not satisfied by the evidence would be a matter of appeal and not a review, upon this test. The essential question in review proceedings is not the correctness of the decision under review but its validity”

In *Khan v Provincial Magistrate* HH 39/O6 MAKARAU J (as she then was)

summarises the main differences between the two procedures as follows:

“An appeal seeks to attack the correctness of the decision of the inferior court or tribunal while a review seeks to attack the manner in which the decision of the inferior court or tribunal has been arrived at. Grounds of appeal are unlimited and cannot be prescribed as they relate to the errors in law or in fact made by the court whose decision is under attack. On the other hand, grounds of review are limited by law and have to be laid out in the application for review. An error in exercising one’s discretion can never be the basis for bringing a review. It is a ground of appeal”

In casu, the applicant is aggrieved by the decision of the magistrate to acquit Mrs Irene Moyo. He does not in the least allege any procedural irregularity in arriving at that decision. It is therefore clear, this is quintessentially a matter for appeal if the decision was indeed wrong which as pointed out, wasn’t. The decision was correct albeit for different reasons.

Sight must not also be lost of the provisions of Section 198(4) (b) of the Criminal Procedure and Evidence Act which are to the effect that if the Prosecutor General is dissatisfied with the decision of a Magistrate to discharge an accused at the close of the state case he may with the leave of a judge of the High Court *appeal* against the decision to the High Court (See *PG v Mtetwa & Anor* HH 82-16).

As it turned out, applicant got himself all tied up in knots as he clearly conflated the concepts of appeal and review. This is evidenced by his apparent summersault from the use of the term “review” in the founding affidavit to “appeal” in paragraphs 14 and 15 of his answering affidavit. Be that as it may what is clear from his founding affidavit is that he wants the respondent to be compelled to file a review against the decision of the magistrate which is obviously irregular.

Another important aspect which has not escaped my attention (although this is by no means the decisive factor) is the failure by the applicant to cite in this application persons directly affected by the order that he seeks, namely Irene Moyo and the Magistrate. In *Rodger and Others v Muller and Ors* HH 2-2000, PATEL J (as he then was) had this to say regarding the failure to cite parties who ordinarily are expected to be affected by the outcome of litigation:

“While I accept that the non-joinder of a party is not necessarily and invariably fatal to the continuance or determination of any matter, it is trite that Rule 87(1) does not absolve a litigant to cite all relevant parties. The discretion of the Court in this regard must be exercised so as to ensure that all persons who are might be affected by its determination of the issues in dispute be afforded the opportunity to be heard before that determination is actually made.”

Surely both Irene Moyo and the magistrate who presided over the criminal trial have an interest in the outcome of this application even though it is meant to be a precursor of the intended review application. They have an interest in whether or not the respondent should be compelled to file the contemplated review. The interest of the former are self – evident; she runs the risk of being hurled before the criminal court for a resumption of a case which was terminated years ago. As for the magistrate, it is his decision that will eventually be reviewed were this application to succeed. The failure therefore to cite the aforementioned parties is fatal to this application.

DISPOSITION

In the final analysis, therefore, this application is fraught with serious irregularities hence the applicant’s quest to have the respondent compelled to resurrect the criminal case against Irene Moyo after its unceremonious demise in 2014 should fail.

Costs

No prayer for costs was made by the respondent and none will be given.

Accordingly, The application is hereby dismissed with no order as to costs.

National Prosecution Authority, respondent’s legal practitioners