**DHERERAI MANYONI**

**VERSUS**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE
NDOU AND MATHONSI JJ
BULAWAYO 24 OCTOBER 2011 AND 27 OCTOBER 2011

Appellant in person
*Mr E. Mungoni* for the respondent

Criminal Appeal

**MATHONSI J**: The appellant was jointly charged with one Dumisani Sibanda at the Plumtree magistrate's court with contravening section 182 of the Customs and Excise Act [Chapter 23:02], that is, smuggling and section 185 of the Criminal Law (Codification and Reform) Act; [Chapter 9:23], that is escaping from lawful custody.

The appellant was convicted on the two counts while his co-accused was convicted of count two only. In count 1 he was sentenced to a fine of P3300 or in default of payment 60 days imprisonment while in count 2 he was sentenced to a fine of US$150 or R1500 or in default of payment 10 days imprisonment.

Aggrieved by both the convictions and the sentences, the appellant appealed to this court on the grounds inter alia that in both counts the state had not proved its case beyond a reasonable doubt and for that reason he should have been found not guilty and acquitted.

The state case was that on 8 June 2009 the appellant and his co-accused had smuggled 810 litres of petrol into the country from Botswana. After their arrest, they had, on 9 June 2009 escaped from lawful custody.

The evidence led on behalf of the state from a number of police officers based in Plumtree was that the appellant and his co-accused had been intercepted at a roadblock at Plumtree town. Upon being search they were found in possession of 2 x 200 litres drums and an unknown number of small containers all full of what the police perceived to be petrol. As

they could not produce proof that they had paid duty for the alleged petrol, they were arrested and detained overnight at Plumtree police station.

The witnesses testified that the following day, the appellant and his co-accused were released from the cells and advised to go back to the border where they were to pay the required duty and/or fine at Zimra. They were being escorted by two police officers who however had boarded another vehicle. It was stated that the two took advantage of that to outstrip the escorts and escape from lawful custody.

There was no evidence whatsoever that what the appellant was carrying in the containers amounted to 810 litres. This is so because the witnesses only saw two drums and several other containers. The quantity of the liquid in the 200 litres drums was not verified and so was the quantity in the "several" containers. More importantly there was no reliable evidence that what the appellant was carrying in those containers was petrol.

Those witnesses who say they attempted to verify the contents say they only knew it was petrol by merely looking at it Patriot Shiku said he knew it was petrol and not paraffin because "petrol is highly flammable than paraffin. The colours of petrol and paraffin are different."

This is clearly far from being satisfactory especially as the appellant alleged that he was carrying 600 litres of paraffin and produced a receipt showing that on that day he had bought 600 litres of paraffin from Botswana. The biggest handicap the state faced was that the police did not retain the fuel as an exhibit.

We therefore agree with the concession made by Mr *Mungoni* for the state that the conviction of the appellant in the first count of smuggling was improper. This is a case where the police took a lot for granted and assumed, without putting together the evidence, that because the appellant had fuel containers in a vehicle which was coming from the border between Botswana and Zimbabwe at a time when people were generally sourcing petrol from Botswana, it had to follow that he was carrying petrol.

The appellant testified that he had declared the paraffin at the border and the Zimra officials had told him that paraffin was exempted from paying import duty. He produced a

declaration form. The Zimra official who testified at the trial, Bissie Ngorima, did not discount the possibility that the appellant may have been excused from paying duty. That witness actually confirmed that there are instances where a traveller is allowed to go without paying anything. Most of the witness's evidence was restricted to what is supposed to happen when clearing a traveller and not what actually happened as he did not attend to the appellant on the day in question.

Regarding the second count of escaping from lawful custody, the state case was also hopeless. It was common cause that the appellant had been detained at Plumtree police station on suspicion of smuggling fuel. It was common cause that he was released from custody on 9 June 2009 and allowed to get into the vehicle he was using and drive away. No police officer was with him in that vehicle.

The officer in charge, Robson Sifelani, testified that after hearing the circumstances of the case on the morning of 9 June 2009, he had decided not to prosecute the suspects but that they were to go and pay duty for the undeclared fuel. He then ordered the release of the suspects.

Again we agree with Mr *Mungoni* that when the appellant was released and allowed to drive away, it was not explained to him that he was still under arrest. The appellant told the trial court that he and his driver proceeded to the border after their release, where he was told that he was not required to pay import duty on paraffin and that he then proceeded with his journey.

We are of the view that there is a reasonable doubt as to whether the appellant knew that he was under arrest given that the police allowed him to go in the manner that he did and without an officer accompanying him. That doubt must certainly benefit the appellant.

In the result, the conviction of the appellant on both counts is quashed and the sentences set aside.

*Criminal Division, Attorney General's Office*, respondent's legal practitioners

Ndou J agrees.....

**ESTATE LATE COLLEN MOYO** **APPLICANT**
**(Represented by MATHABISA NKOMO in his Capacity as EXECUTOR TESTAMENTARY)**

**VERSUS**

**SEHLUSELWE SIBANDA** **1ST RESPONDENT**

**AND**

**NJABULO MABUYA (NO)** **2ND RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 25 OCTOBER 2011 AND 3 NOVEMBER 2011

*Mrs N. Tachiona* for the applicant
*Ms T. Mpofu* for the 1st respondent

Opposed Matter

**MATHONSI J:** The first respondent instituted summons action in HC 1720/11 against the applicant and his co-executrix, Joyce Sibongile Moyo, in the estate late Collen Moyo as well as the second respondent herein, seeking the following relief:

> "(a) A declaration that the will of the late Collen Moyo executed in March 2006 be declared null and void in terms of section 16(1) of the Wills Act [Chapter 6:06] as the will was executed prior to the deceased's marriage to the plaintiff and prior to the birth of Carlos Mgcini Moyo.
> (b) An order that the estate be wound up in terms of the Deceased Estates Succession Act [Chapter 6:02].
> (c) Alternatively if the court should find the will to be valid an order declaring the minor child Carlos Mgcini Moyo entitled to inherit an equal share of the estate to that of his siblings in terms of section 18 (1) of the Wills Act [Chapter 6:06].
> (d) Costs of suit."

In her declaration, the first respondent averred that she had an unregistered customary law union with the late Collen Moyo who died in 2009 and that the deceased had paid lobola

for her in November 2007. She stated that the two of them were blessed with one male child Carlos Mgcini Moyo, born on 7 February 2007.

The first respondent averred that when she tried to register the late Collen Moyo's estate she discovered that there was a will that he had left but had been executed before their marriage. For that reason the Will became void by reason of the subsequent marriage and that it was also invalidated by the fact that it excludes her son Carlos. She therefore prayed accordingly.

The applicant and Joyce Sibongile Moyo contested that claim and filed a plea in the following:

> "The First and Second Defendant's plead is as follows;
> **Ad Paragraph 1-4**
> No issues
>
> **Ad Paragraph 5-8**
> Defendants deny that any lobola was paid for Plaintiff's hand in marriage, customary or otherwise, although all family members of the deceased acknowledged her cohabitation as a "marriage" although legally it was not and still is not.
>
> **Ad Paragraph 9-10**
> Defendants deny that Plaintiff was recognised as a wife at the wake of the deceased's funeral, although they admit that Plaintiff forced herself to be recognised as such Defendants deny that anybody changed locks, but allege that Plaintiff left on her own volition, stealing documents belonging to the deceased the very day his corpse lay in state in preparation for burial.
>
> **Ad Paragraph 11-15**
> Defendants deny that a customary union is a "marriage" as envisaged in the Wills Act capable of making a will void be reason of it being a subsequent marriage. In fact whether the deceased (paid) for her lobola or not has no bearing on the Will. Defendants admit that Carlos Mgcini Moyo's subsequent birth entitled him to benefit from the estate of his late father in terms of the Wills Act, but allege that he has already benefited from funds in excess of R106 000-00 that Plaintiff fraudulently collected on behalf of the deceased's other children from a previous marriage, with his late wife under the pretext that she was their guardian. These mon(ies) were to be collected by either of the Defendants in their official capacities and used for the benefit of the children who are not Carlos Moyo. This amount is equivalent to what he would benefit under the Wills Act. Misappropriation of the money by Plaintiff enriched Carlos Mgcini

Moyo's estate at the same time depleting the estates of the other children who are Zibusiso Keith Moyo and Khanyile Moyo.
WHEREFORE, Defendants pray for the dismissal of Plaintiff's claim wit h costs."
(The underlining is mine)

The applicant then made this application in terms of Order 11 Rule 75(1) of the High Court of Zimbabwe Rules, 1971 seeking an order for the dismissal of the action as being frivolous or vexatious. The relevant provisions of Order 11 of the Rules read as follows:

"75: **Application for dismissal of action**.
(1) Where a defendant has filed his plea, he may make a court application for the dismissal of the action on the ground that it is frivolous or vexatious.
(2) ---
(3) ---"
79: **Powers of court on application**
(1) Unless the court is satisfied, whether the plaintiff has given evidence or not, that the action is frivolous or vexatious, it shall dismiss the application, and the action shall proceed as if no application had been made.
(2) If the court is satisfied that the action is frivolous or vexatious, it may dismiss the action and enter judgment of absolution from the instance with costs.
(3) Where the court is of opinion that the defendant has no good grounds for alleging that the action was frivolous or vexations, it may order that the defendant pay the plaintiff's costs as between legal practitioner and client.
(4) Where on the hearing of an application made under this Order in a case in which there is more than one defendant, it appears that as against one defendant the action is frivolous or vexatious, but it does not so appear as against another defendant, the court may order that as against one defendant the action be dismissed and judgment of absolution from the instance with costs be entered, but that against another defendant the plaintiff be at liberty to proceed with the action."

The contents of subrule (4) of rule 79 allow a dismissal of the action against one of the defendants and not against another defendant so as to allow the action to proceed against the defendant whose claim is not frivolous or vexatious. In my view, by parity of reason, where the plaintiff's action comprises of more than one claim which claims are clearly divisible, if one such claim is frivolous or vexatious while the other is not the court should be at liberty to dismiss that which is frivolous or vexatious while allowing the other claim which is not, to proceed.

The first respondent opposed the application denying that the action is frivolous or vexatious. More importantly she denied that she collected money from the deceased's insurance policy in South Africa which was due to the children of the deceased not borne of her and that the share of the deceased's legacy apportioned to her son compiles with the provisions of the Wills Act.

The first respondent's action contains essentially 3 claims namely:

(a) a declaration that the will of the late Collen Moyo is null and void by reason that it was executed prior to her customary marriage and the birth of Carlos Mgcini Moyo,

(b) an order directing that the estate be wound up in terms of the Deceased Estates Succession Act [Chapter 6:02]; and

(c) the alternative claim that Carlos Mgcini Moyo is entitled to a share of the estate equal to that of his siblings.

I propose to consider those claims individually. In terms of Section 16(1) of the Wills Act, [Chapter 6:06]

> "(1) Subject to this section a will shall become void upon the subsequent marriage of the testator.
> (2) ---
> (3) A Will made by a man who is married under a system permitting polygamy shall not become void if, while still so married to one or more wives, he marries another wife.
> (4) -
> (5) A Will shall not become void upon the subsequent marriage of the testator to the extent that the will disposes of property which would not have gone to the spouse or issue of the subsequent marriage if the testator had died intestate."

Section 2 of the Wills Act defines marriage "to include a marriage solemnised in terms of the Customary Marriages Act [Chapter 5:07]" Subsection (5) of section 16 makes it clear that even where a man is married in terms of Chapter 5:07, his subsequent marriage to another wife does not invalidate an extant will.

The Wills Act therefore does not recognise an unregistered customary union. Section 68(3) of the Administration of Estates Act [Chapter 6:01] has raised the status of a spouse in a

customary union to the same level as that of a spouse in a registered marriage. *Ndlovu v Ndlovu and Others* HB 10/11 at pages 4-5. However that is only in respect of intestate succession. Where the deceased left a Will, his estate devolves according to that Will and the Wills Act does not recognise a customary union for purposes of invalidating a will made before such customary marriage was solemnised.

Therefore there is no basis in law for seeking a declarator that the will of the late Collen Moyo was null and void by reason of his subsequent marriage to the first respondent according to customary law, if indeed such union existed.

The subsequent birth of a child sired by the testator of a Will also does not render the will of the testator void. The rights of such child are governed by section 18 of the Wills Act. For that reason the first respondent's action in respect of the claim for a declaration that the Will is void by virtue of the subsequent customary marriage and the birth of Carlos has no merit.

In *Rogers v Rogers and Another* 2006 (2) ZLR 256 (H) at 260 G-H and 261 A KAMOCHA J, quoted with approval the following passage in Corbett, Hofmeyer and Kahn, The Law of Succession in South Africa, 2nd ed at pp 484-485:

> "The general principle is that, save in exceptional circumstances or under statutory authority, the courts will not authorise a variation of the provisions of a will which are capable of being carried out and are not contrary to law or public policy. No matter how capricious, unreasonable, unfair, inconvenient or even absurd they may be the courts have to give effect to them--- this general principle is based on another general principle, that a court cannot make or remake a will for the testator and cannot change the manner of devolution of the estate provided for by the testator. The testator's wishes and the scheme provided for in the will must be implemented."

I find myself in total agreement with that pronouncement. On 22 March 2006, the late Collen Moyo executed a Will in accordance with all known procedure for doing so. The Will in question is clear in effect and unambiguous in its wording. It reads as follows:

> "This is the LAST WILL and TESTAMENT of me COLLEN MOYO, ID 08-226669F 53 residing at number 7 Pershore Avenue, Southwold Bulawayo.

1. I herby revoke, cancell and annul all Wills, Codicils and other Testamentary Acts, heretofore made (and) passed by me and desire that the same shall be null, void and of no effect.
2.. I hereby give and bequeath my immovable property being house number 7 Pershore Avenue, Southwold Bulawayo to my two (2) children namely Zibusiso Keith Moyo and Khanyile Moyo in equal shares. I also bequeath house number 8395 Nkulumane Township Bulawayo to my other daughter Valentine Musengi.
3. I hereby nominate, constitute and appoint Mathabisa Nkomo, my brother-in-law to be the executor of this my last Will together with my sister Joyce Sibongile Moyo to be the coexecutrix dative (sic) hereby giving and granting unto them all such powers and authority as are required or allowed in the law especially that of assumption and it is my intention that they shall not be required to furnish security for the fulfilment of their duties.
4. I bequeath my other properties to my three children, Khanyile Moyo, Zibusiso Keith Moyo and Valentine Musengi to be shared between them in equal shares."

At the time of his death, the late Collen Moyo had not contracted a marriage recognised by the Wills Act and nothing else has been advanced as to why the court should not give effect to the wishes of the testator. That Will remains valid and effectual. Therefore the first respondent's claim that a declaration be made that the estate be wound up in terms of the Deceased Estates Succession Act, is without foundation.

As stated by Beadle CJ in Wood NO v Edwards 1968(2) RLR 212 at 213 A –F the same considerations which apply in determining whether or not to grant summary judgment to a plaintiff should apply in deciding whether to stay or dismiss a plaintiff's action for being frivolous or vexatious. The learned Chief Justice went on to say:

> "If the court is satisfied that the plaintiff has not an arguable case, then his action may well be characterised as 'frivolous and vexatious' and an unnecessary waste of costs, and the court would be justified in the exercise of the discretion, which it undoubtedly has, to order that the plaintiff's action be dismissed."

There is an alternative, and final claim made by the first respondent in the summons, namely that a declaration should be made that her son Carlos is entitled to a share equal to those bequeathed to the other children of the deceased. A determination of that issue involves consideration of the provisions of section 18 of the Wills Act which deals with the

rights of a child born after the testator has made a Will where the Will makes provision for the inheritance of the other children.

Mrs *Tachiona* for the applicant submitted that because the first respondent obtained money from the deceased's employers in South Africa, part of which belonged to the deceased's children who are not Carlos, then Carlos should be taken as having got ten his share. She further argued that because of that, no other claim subsists, in favour of Carlos.

I agree with Ms *Mpofu* for the first respondent that those are issues which should be decided by the trial court having had the benefit of evidence. The applicant has undertaken a laborious exercise of evaluating one of the houses in order to advance the argument that Carlos should not get anything more. That may be fair enough but it is an indication that there is an arguable case as to whether Carlos should get anything more from the estate. This is more so as there is a dispute of fact as to whether the first respondent received the money, the quantum and if she did, whether that should prejudice Carlos.

I am therefore of the view that while the first two claims are frivolous or vexatious, there is an arguable case which should be taken to trial in respect of the last claim.

Regarding the issue of costs, I conclude that while the applicant has been more than 50% successful, he has not been entirely successful as to deserve an award of costs. Conversely, he has not faired badly as to attract an award for costs against him. The fairest result would be for the loss to lie where it falls.

Accordingly I make the following order, that

(1) The first respondent's action seeking a declaration that the Will of the late Collen Moyo is void by reason of the subsequent customary marriage between her and the deceased and the birth of Carlos Mgcini Moyo is hereby dismissed and absolution from the instance is entered.

(2) The first respondent's action seeking a declaration that the estate of the late Collen Moyo be wound up in terms of the Deceased Estates Succession Act [Chapter 6:02] is hereby dismissed and absolution from the instance is entered.

(3) The first respondents action seeking a declaration that Carlos Mgcini Moyo is entitled to a share equal to that of his siblings namely Zibusiso Keith Moyo, Khanyile Moyo and Valentine Musengi is hereby referred to trial.

(4) Each party shall bear its own costs.

*Bulawayo Legal Projects Centre*, applicant's legal practitioners
*Zimbabwe Women Lawyers Association*, 1st respondent's legal practitioners