

LAMECK MWANGA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 12 MAY 2017 AND 29 JUNE 2017

Chamber Application

MOYO J: This is an application that was brought to me in terms of rule 265 of the High Court Rules. That rule provides as follows:

“Upon receipt of the application and the submissions by the attorney general, if any, the registrar shall place the matter before the presiding judge, in chambers, who shall grant or refuse the application as he thinks fit. The presiding judge may in his discretion require oral argument on a particular point or points raised and he may hear any such argument in chambers or in court.”

I then dealt with the matter summarily as in terms of rule 265. Applicant has requested for reasons. Here are the reasons.

Applicant was convicted of contravening section 10 of the Copper Control Act [Chapter 14:16] in that he failed to give a satisfactory account of possession of copper as well as smuggling in contravention of section 182 (1) of the Customs and Excise Act [Chapter 23:02].

The applicant pleaded guilty to both charges.

He was sentenced to \$100 or in default of payment 30 days imprisonment in relation to the first count. He was sentenced to a fine of \$200-00 or in default of payment 60 days imprisonment. In addition the 104 kgs of copper and his motor vehicle namely a BMW registration No B 175 AHT were forfeited to the state. The application for condonation of the late noting of an appeal should incorporate a draft notice of appeal to show the judge before whom the application for condonation is placed, what grounds the applicant will advance on appeal in a distinct and concise manner. Even if a draft notice of appeal would not be attached the founding affidavit should have incorporated the distinct grounds for appeal in terms of rule 262. It would appear the applicant is at qualms with the order of forfeiture of the motor vehicle but he does not state in his application where the learned magistrate misdirected himself in arriving at the forfeiture decision. Applicant simply says the learned magistrate did not exercise

his discretion judiciously. He then says there are prospects of success as it is clear that rules of procedure or pre-trial procedure were not followed.

The first anomaly with this application is that due to the absence of a draft notice of appeal, the precise grounds of appeal are not articulated in the application. Even in the affidavit itself the applicant does not tabulate the grounds in point form so that the judge attending to it is clear as to what misdirection was allegedly committed by the learned magistrate.

Section 62(1) of the Criminal Procedure and Evidence Act provides for forfeiture of items used in the commission of the offences.

The applicant used his BMW motor vehicle to smuggle copper. The applicant was asked by the learned magistrate for any reason why the BMW and the copper should not be forfeited to the State and he said;

“Only that it is mine and I want to sell it.”

As much as the grounds of appeal that point to a misdirection on the part of the learned magistrate are not adequately given, the applicant does not give grounds for interference with the forfeiture order which would amount to a misdirection on the learned magistrates part. It is trite that this court would not ordinarily interfere with the decisions of the lower courts unless if a misdirection is clearly shown on the part of that court. In these papers there’s absolutely no misdirection that is pointed at on the part of the court *a quo*, except that the applicant is somehow dissatisfied with the order by the court *a quo*. It is my considered view that where an applicant cannot point to a misdirection by the court *a quo* but just because he feels that another court may have sentenced him differently, then he seeks to mount an appeal solely on that basis such an applicant obviously cannot be held to have prospects of success. Prospects of success are derived from well laid grounds of appeal which clearly point to a misdirection on the part of the court *a quo* warranting interference by the higher courts and not merely that applicant is unhappy with the order by the court *a quo* and wants to mount a challenge against it for the sole reason that he hopes somehow the appeal court might sympathise with his cause.

I do not hold the view that that would constitute prospects of success. Prospects of success are present only where the grounds of appeal are laid out distinctly and concisely and pointing directly in no uncertain terms on the misdirection by the court *a quo*. To simply decide to launch an appeal by throwing everything in with the hope that somehow one may manage to

convince the appeal court cannot be held to constitute prospects of success. I say applicant throws everything in because in paragraph 24 of his affidavit he now talks of his right to legal representation. I do not understand how this imputes a misdirection on the learned magistrate. Neither is this shown in the application. I say so for I expected the applicant to concisely state that:

The learned magistrate misdirected himself by failing to do the following --- and then lay down precisely how the learned magistrate fell short of the required standard.

The applicant would go on and state that had the learned magistrate done a, b, or c then the result would have been different in the following respects. I expect the applicant to go further and show that on appeal the applicant would show that had certain factors have been alluded to by the learned magistrate then the court *a quo* would have arrived at a different conclusion and therefore the appeal court would be at large to interfere with the order of the court *a quo*.

I believe that where a magistrate has exercised his discretion and there is an attack on his failure to exercise it judiciously then the draft notice of appeal or the founding affidavit should clearly and precisely show that.

It is for these reasons that I found that the application does not spell out clearly where and how the learned magistrate misdirected himself. The learned magistrate did enquire on the reason why the motor vehicle should not be forfeited and the applicant did give an answer which did not give reason for the trial court not to order forfeiture.

I accordingly dismissed the application for the reasons herein stated.