

JOTAM GONESE & ANOR
versus
THE STATE & ORS

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 01 & 15 February 2012

Opposed Application

C. Chinyama, for the applicant
F.I. Nyaunzvi, for all respondents

MATHONSI J: The 2 applicants and 3 Others were arrested in December 2009 on allegations of armed robbery and attempted murder it being alleged that they had robbed Stanbic Bank in Chegutu getting away with substantial sums of money. It was further alleged that in the process of the robbery they had shot one of the employees of the bank on the right hip.

At the time of the arrest the police seized from the first applicant a Volvo S80 motor vehicle registration number ABE 4378, USD 1 691-00, ZAR 2 650-00, BWP 10, Benki Tanzanian Currency 500, Zimbabwean passport, driver's licence and the registration book of the Volvo motor vehicle.

They seized from the second applicant an Isuzu KB motor vehicle, registration number 778-217M, registration book for the Isuzu vehicle USD 29 022-00, ZAR 10 180-00 BWP 11710-00, ZMK 1000-00, 2 Zimbabwean passports, (one current and one expired) and a driver's licence.

The applicants were tried at the regional court in Harare and in a judgment delivered on 20 October 2010 the trial magistrate found all the accused persons not guilty and acquitted them. This prompted the Attorney General to note an appeal to this Court against the decision of the regional court on 24 December 2010. It does not appear as if any leave to appeal was sought before the appeal was filed.

Meanwhile, the applicants started agitating for the release of their property seized by the police at the time of their arrest. In letters written by the police in response to the demand for the release of the seized property between 10 February and 20 May 2011 they gave varying reasons for not releasing the property. In the letter of 10 February 2011 to the

applicants' lawyers, the Officer Commanding CID Homicide, Chief Superintendent P.M. Magwenzi stated the following:-

"I refer you to your letter dated 1 February 2011 and referenced CC/gj in connection with the above subject matter.

Our position is very clear on the Chegutu case, the exhibits you are talking about were recovered from one, Akim Matare including 3 firearms. In terms of the Criminal Procedure and Evidence Act, the exhibits can only be returned to the person to (*sic*) whom they were recovered.

In regard to exhibits for Harare Savemore, we have no problem but we are still waiting for the docket from court. Once we receive it, we will advise you our position.

I thank you for your co-operation".

The erstwhile Superintendent did not address his mind to the fact that 2 months earlier, the trial in the Chegutu robbery had been concluded in favour of the accused persons. He needed to explain why the police still wanted to hold on to the exhibits. He did not

Assistant Commissioner M.M. Musemwa also found himself being called upon to defend the police action of holding onto the exhibits. In his letter of 9 March 2011 to the applicants' legal practitioners he stated:-

"We refer to your letter dated 21 January 2011 on the above subject. Please be advised that all the items that you seek their release to your client were recovered from Akim Matare.

Your client's vehicle was used in the commission of an armed robbery and is being held as an exhibit in the trial of Akim Matare and Others.

In his defence outline your client denied any involvement in the crime and we fail to understand why he now demands the money and the vehicle, leaving the firearms that were in the vehicle.

In terms of the Criminal Procedure and Evidence Act, if the items are to be released they are supposed to be returned to the person from whom they were seized if he can lawfully possess them.

Suffice is to say that all the items would only be disposed of after the trial of the remaining accused persons".

Chief Superintendent Magwenzi returned to the dispute after the Assistant Commissioner's letter. He wrote on 20 May 2011 to the applicant's lawyers as follows:-

"The above matter refers. I acknowledge receipt of your letter dated 18 May 2011 in connection with the above subject matter.

I am aware that Akim Matare was acquitted on both the Stanbic and Savemore armed robbery cases. However, on both cases, the police recovered firearms from Akim Matare including cash, which are still subject to further investigations as four of his accomplices are still on the run. We intent (*sic*) to use the exhibits upon their arrest.

We are currently dealing with Akim Matare's lawyers Hamunakwadi, Nyandoro and Nyambuya Legal Practitioners who are claiming the exhibits including the firearms. Please indicate to us what was taken from Gonese.

I thank you for writing to us".

The Chief Superintendent did not explain the legal basis for holding on to the exhibits after the trial and on the forlorn hope of arresting and prosecuting unknown individuals from whom the exhibits were not recovered, they having been recovered from the second applicant. Having found no joy from the police, the applicants then launched this application alleging that all the trials in which the applicants stood accused had been completed in their favour and that for that reason the respondents had no right to hang onto their property. They seek an order compelling the respondent to forthwith release the items on the pain of costs on an attorney and client scale.

The applicants argue that the purported appeal filed by the Attorney General against the judgment of the regional magistrate is a nullity because, not only was it filed in the wrong court, the High Court instead of the Supreme Court, but also in that no leave to appeal was sought and obtained from a judge before the purported appeal.

The application is opposed by the respondents. In their opposing affidavit sworn to by the second respondent they deny that a passport was seized from the first applicant. The second respondent stated in para 4 of the opposing affidavit that:-

"It is admitted that the items mentioned were recovered from the applicant serve for the passport. We are willing to give the items referred to in this paragraph back to the owner as soon as he approaches us for same, though it has to be made clear that the items are still with the court".

It was not explained why the passport is disputed.

In para 5 of the same affidavit it is admitted that the property claimed by the second applicant was also recovered from him. The deponent however adds the following tail piece;

"Take note that the items mentioned as required by second applicant were recovered as a result of indications and our attitude is that we would like to retain these as they afford evidence in the prosecution of the perpetrators of the armed robberies concerned which perpetrators are still at large".

From the papers therefore it is apparent that the respondents are willing to release the items seized from the first applicant. It is the items seized from the second applicant which they would like to retain for use in the possible prosecution of suspects still to be arrested. In this application, the second applicant is not laying a claim to the firearms and in fact says nothing about them.

The question which arises is whether the police are entitled to withhold the exhibits seized from the second applicant, which he now demands, to facilitate further investigations in a matter where the second applicant has himself been acquitted of the offence for which the items were seized from him.

The applicants filed and served their heads of argument upon the Civil Division of the Attorney General's Office on 6 July 2011. The Attorney General's Office represents all the respondents but no heads of argument were filed by that office until 30 January 2012 just a day before the hearing date of the application. Those heads of argument were filed exactly 11 days after that office had been served with the notice of set down of the matter.

Mr *Chinyama* for the applicants took a point *in limine* that the respondents' heads of argument were filed out of time, that the respondents are barred and had no right of audience for that reason. Mr *Nyahunzvi* appearing for the respondents conceded that the heads were filed out of time but submitted that he was of the view that his breach of the rules would be condoned as the applicants legal practitioner had earlier intimated to him that he had no objection in them being filed out of time.

Mr *Nyahunzvi* did not attempt to explain why he had not filed the heads on time or give any reason for the delay. Order 32 r 238(2) of the High Court of Zimbabwe Rules, 1971 require a legal practitioner representing a respondent in an application, exception or application to strike out to file heads of argument with the registrar in accordance with subrule (2a) and to serve such heads of argument on the other parties concerned.

In terms of subrule (2a):

“Head of argument referred to in subrule (2) shall be filed by the respondents' legal practitioner not more than ten days after the heads of argument of the applicant or excipient, as the case may be, were delivered to the respondent in terms of subrule (1).

Provided that:-

- (i) No period during which the court is on vacation shall be counted as part of the ten day period;
- (ii) The respondent's heads of argument shall be filed at least five days before the hearing.

This is a peremptory provision which has to be complied with. Subrule (2b) of rule 238 provides for the barring of a respondent whose legal practitioner has failed to file heads of argument within the prescribed 10 day period. It reads:-

“Where heads of argument that are required to be filed in terms of subrule (2) are not filed within the period specified in subrule (2a) the respondent concerned shall be barred and the court or judge may deal with the matter on the merits or direct that it be set down for hearing on the unopposed roll”.

This is one provision of the rules which legal practitioners have tended to flout repeatedly. Quite often heads of argument are filed as legal practitioners please in complete defiance of the rules. Yet the rules make it clear that a party who fails to comply with the rule is automatically barred. Law officers serving at the Attorney General’s office are legal practitioners as we well and are required to comply with the rules. They cannot be treated differently and the moment the bar set in the respondents were enjoined to seek condonation.

There is a catena of cases to the effect that for condonation to be granted, there must be a substantive application for it. Condonation is not there merely for the asking. *Forestry Commission v Moyo* 1997(1) ZLR 254 (S) at 260C –H and 261A; *Director of Civil Aviation v Hall* 1990(2) ZLR 354(S) at 357 D-G.

Condonation is the exercise of judicial discretion and as such the court cannot exercise such discretion where the party at fault does not place before it an explanation for the delay. Therefore in the absence of a substantive application for condonation the respondents cannot be indulged *Ncube v CBZ Bank Ltd & Ors* HB 99/11 at p4.

It is for that reason that I refused to hear Mr *Nyahunzvi* and proceeded in terms of r 238 (2b) to deal with the merits.

On the merits, I have already stated that the police are holding onto the items belonging to the second applicant for use in the possible prosecution of suspects yet to be arrested while they are willing to release those items belonging to the first applicant. No further prosecution is contemplated against the second applicant. The state purported to note an appeal against their acquittal.

I do not agree with Mr *Chinyama*’s submission that the said appeal is a nullity because it should have been made to the Supreme Court. It would seem that his argument is based on the old s 61 of the Magistrates’ Court Act [*Cap 7:10*]. The present s 61, introduced by s 6 of Act 9 of 1997 provides that an appeal by the Attorney General against an acquittal

by a magistrates lies in the High Court. However, such appeal can only be made “with the leave of a judge of the High Court”.

It is common cause that no leave was sought and obtained from a judge. For that reason there is really no appeal against the acquittal. While it is true that there is no time limit for such appeal it must follow that the appeal must be made within a reasonable time. To the extent that no appeal has been made, the prosecution of the applicants has been concluded in favour of the applicants.

The items were seized from the second applicant in contemplation of a trial where they were to be used as exhibits. It does not make sense that following their acquittal the police would still want to use them to conduct further investigations. There can be no legal basis for doing so especially after bundling the appeal.

It cannot be said that the second applicant is not lawfully entitled to possess the items as envisaged by s 61 of the Criminal Procedure & Evidence Act [*Cap 9:07*] in which case they would have been forfeited to the state. Neither can it be reasonably argued that they are required as exhibits of a trial because no one has been arrested and is awaiting such trial. As the magistrate did not make a disposal order in terms of s 61, this is a case in which the clerk of court should have acted in terms of subs (3) of s 61 of the Act and handed the articles over to the applicants.

I therefore come to the conclusion that the applicants have made out a good case for the relief sought and make the following order; that

1. The first, second, third and fourth respondents are directed to release to the first applicant the Volvo S80 motor vehicle registration number ABE 4378, USD 1 691-00, ZAR 2 650, BWP 10, Benki Tanzanian Currency 800-00, Zimbabwean passport, driver’s licence and registration book of the Volvo motor vehicle referred to herein.
2. The first, second, third and fourth respondents are directed to release to the second applicant the Isuzu KB motor vehicle registration number 778-217M, the registration book of the Isuzu KB motor vehicle, USD 29 022-00, ZAR 10 180-00, BWP 11 710-00, ZMK 1000-00, 2 Zimbabwean passports (one current, one expired), satchel with personal clothing and driver’s licence.
3. The first, second, third and fourth respondents shall jointly and severally, the one paying the other to be absolved, pay the costs of the application on an ordinary scale.

Chinyama & Partners, applicant's legal practitioners
Nyahunzvi F.I. respondent's legal practitioners