

ELLEN LUCIE BORGONOVO
versus
THE MASTER OF THE HIGH COURT
and
A.M. ROSETTEINSTEIN THE EXECUTOR OF THE ESTATE
OF THE LATE RUGGERO BORGONOVO
and
VANESSA ANGELA NGAMIZA

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 11 July 2017

Opposed matter

C Paul, for the applicant
N R Mutasa, for the respondents

MUNANGATI-MANONGWA J: The applicant in this matter seeks condonation for late filing of an application for the review of a decision taken by the first respondent, the Master of High Court on 16 May 2008. On that date the Master had accepted a document written by the late Ruggero Borgonovo on 18 August 1999 as the deceased's last will and testament despite the document's failure to comply with the requisite formalities of valid Will. The document had not been witnessed as required by s 8 (1) (c) and (d) of the Wills Act [*Chapter 6:06*], however in exercising the powers granted to him in terms of s 8 (5) of the Wills Act the first respondent accepted the same as a valid Will for the purposes of the administration of the late Ruggero Borgonovo's estate.

In her opposition, the third respondent raised a point *in limine* that this court has no jurisdiction to hear the application by virtue of the fact that this court cannot entertain an application to condone non-compliance with the provisions of an Act of Parliament in particular s 8 (6) of the Act which specifically states that an appeal against the Master's decision must be filed within 30 days as the time period is peremptory. I dismissed this point on the basis that where there is gross irregularity relief can still lie under the common law where the applicant can seek same through an application for review. Further as submitted by

Mr *Paul*, even if it were to be taken that this court has no inherent power to extend a statutory period within which one has to act, the failure by the legislature to provide for such a mechanism where condonation is requested by a litigant in circumstances where failure to comply arises not out of their fault is unconstitutional. One can envisage a situation where a person is unable to meet the 30 day deadline due to reasons beyond their control for example, being in a coma or being afflicted by mental illness, to shut the legal doors completely against such a person in such circumstances is a travesty of justice. Due to the foregoing I dismissed the point *in limine*.

The granting of condonation completely lies within the court's discretion. In considering the application, the court is enjoined to consider the following;

"Condonation of the non-observance of the rules is by no means a mere formality. It is for the applicant to satisfy the court that there is sufficient cause to excuse him from compliance ... The court's power to grant relief should not be exercised arbitrarily and upon the mere asking, but with proper judicial discretion and upon sufficient and satisfactory grounds being shown by the applicant. In the determination whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides in which the court will endeavour to reach a conclusion that will be in the best interests of justice. The factors usually weighed by the court in considering applications for condonation ... include the degree of non-compliance, the explanation for it, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice."¹:

The considerations are the same whether one is dealing with an application for condonation of late noting of an application for review or an appeal.

In casu, the delay in approaching the court is long, in that the third respondent's legal practitioners indicated to the executor as early as 24 September 2008 that the Master had accepted the will in issue as deceased's last will. In September 2010 the Master rejected the estate account which was premised on the initial Will. In December 2010 applicant's legal practitioners then Venturas & Samkange lodged an ill-fated application which was dismissed by CHITAKUNYE J on 31 May 2013; wherein he ruled that applicant's application was not done procedurally. Meanwhile the applicant had in 2012 filed this application.

I am however convinced that despite the delays the applicant has provided a cogent explanation for the delay. Both Mr Samkange and the executor were not aware of the Amendment Act which empowered the Master to consider in his discretion Wills which

¹ Herbstein & van Winsen's The Civil Practice of the Supreme Court of South Africa 4 ed by van Winsen, Cilliers and Loots at pp 897-898 a

would in other words be non-compliant. The legal practitioners wrongly held on to the mistaken view that the second Will was a nullity as it neither revoked nor cancelled the previous Wills. It is common cause that an application was then made to set-aside the amended account done by *Mr Rossetteinstein* which was dismissed. This application which was filed by the applicant's erstwhile legal practitioners proved problematic due to absence of the necessary averments and had to be rescued by the filing of a supplementary affidavit which this court authorised in case number HC 8326/14. The applicant had the unfortunate experience of being caught up in a web of blunders by senior legal practitioners who in the execution of their duties missed certain crucial legal issues. In her favour however is that she had sought legal counsel and the mayhem that followed is not of her making. In saying this, I am conscious of the sentiments expressed in the matter of *Kodzwa v Secretary for Health & Another*² where the court stated that there is a point beyond which a litigant cannot escape the consequences of her representative's actions but I believe that the circumstances of this case are different. The executor *Mr Rossetteinstein* in his neutral capacity firmly believed that the document was not a valid will and had proceeded to file an account in terms of the joint will initially made by the applicant and the late Ruggero Borgonovo and this act cannot be read against the applicant as an executor makes independent decisions.

I consider that applicant's review application has prospects of success in view of the fact that the Master did not give the applicant an opportunity to be heard when or before considering the subsequent Will. Moreso, where there are allegations that the deponent to the Will had made certain oral pronouncement on a particular bequest pertaining to the immovable property which is at the centre of the whole dispute. I believe the Master's discretion could not have been exercised judiciously without the applicant having had an opportunity to be heard. That applicant was not heard amounts to a gross irregularity.

Further, as a joint will was involved and there is reference to joint assets, and the parties were married in community of property, it would be improper for the applicant not to be given an opportunity to defend her rights. It is therefore just and proper that the applicant be given the platform to have the decision of the Master scrutinised in a review. This is one case where it is with reluctance that leave is granted due to the compelling circumstances of the applicant. As stated in the foregoing extract from *Herbstein & van Winsen* the court should in the exercise of its discretion endeavour to reach a fair and just decision in the

² 1999 ZLR 313 (S)

interests of justice. I find that the applicant has been candid and honest with the court admitting to blunders (see supplementary affidavit) where they occurred. The principles of justice, the importance of the matter and the efforts of the applicant to push the matter to finality coupled with the rendered explanation were so compelling hence my decision to grant condonation. This is against a background where the third respondent has not (as per the papers on record) sought to accelerate conclusion of the administration of the estate by bringing to court any application of late. It is due to the foregoing reasons that condonation is therefore granted.

Despite applicant's success I raised the issue of costs, Mr *Paul* for the applicant offered costs to third respondent on an ordinary scale. Despite this offer, this is a case where the applicant cannot escape censure albeit arising from her chosen lawyers' conduct. I rely on the case of *Zimbabwe Online (Pvt) Ltd v Telecontract (Pvt) Ltd*³ wherein the following sentiments were aired

“Whilst the courts will not lightly accede to a prayer for an award of costs on a legal practitioner and client scale, such an award will be granted where the unsuccessful party's conduct has been completely unreasonable and reprehensible..... The unsuccessful party's conduct could be rightly described as vexatious or reckless or frivolous, any one of which could be a ground for the award of costs on the higher scale”

These remarks pertain to an unsuccessful litigant. However, I am of the view that they apply conversely *in casu*.

The applicant's advisors were in my view reckless. For senior lawyers not to be conversant with a 10 year old amendment is unforgivable. In that regard a punitive order of costs is called for. The third respondent has had to be taken on a long winding route due to the blunders by the applicant's advisors. She has had to defend these proceedings and has been put out of pocket not of her own accord. This is a case where there is justification that the third respondent recovers her costs in full.

Accordingly the following order is made.

1. The applicant's late lodging of an application to review 1st respondent's decision to accept Annexure 'A' to the application as the Will of the late Ruggero Borgonovo is condoned.
2. Applicant shall lodge her review papers within 7 days of this order.

³ 2012 (1) ZLR 197 (H)

3. Applicant to pay 50% of 3rd respondent's costs on an attorney-client scale.
4. The estate through the Executor to pay the remaining 50% of 3rd respondents' costs on an attorney-client scale.

Wintertons, applicant's legal practitioners
Costa and Madzonga 3rd respondent's legal practitioners