

MOOBOLA v MUWEZA (1990 - 1992) Z.R. 38 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., SAKALA AND CHAILA, JJ.S.
30TH APRIL AND 19TH JUNE, 1991
(S.C.Z. JUDGMENT NO. 3 OF 1991)

Flynote

Succession - Intestate Succession Act. 5 of 1989 - Application of - Act prospective in its operation - Widow entitled to share in estate even if did not apply - Act setting quantum of widows share - Such only relating to administration and distribution of estate yet to occur - Such only relating to prospective operation of the Act.

Headnote

The deceased died the day before the Intestate Succession Act. 5 of 1989 had been enacted, and just over two months before it came into effect. The appellant, who alleged that she was his lawful wife, contended that the Act applied to the deceased's estate. Section 48 of the Act provided that the Act did not affect any rights, duties or obligations of an administrator under any law relating to the administration of estates existing immediately before the commencement of the Act or of beneficiaries in respect of any person who died before the commencement of the Act. It appeared that the applicant would, if she was the deceased's lawful wife, be entitled to inherit a portion of his estate, even if customary law applied. In terms of the Act as a widow she would have been entitled to a 20% share.

Held:

- (1) That the Act was concerned with the administration and distribution of a customary intestate estates. Section 48 precluded the acquisition of newly created substantive rights or the imposition of newly created disadvantages in an ongoing administration as well as in one which was finalised at the time of the commencement of the Act and could only be regarded as prospective in its operation.
- (2) Further, that the fact that the Act had fixed a *quantum* to existing rights claimed by a widow in respect of an estate which had not yet been administered did not mean that there was to be retrospective operation. Since the whole of the administration and distribution of the estate of the deceased was to take place in the future, after the Act had come into effect, and when only its prospective operation would be called upon.

Case referred to:

- (1) Master Ladies Tailors Organisation and Another v Minister of Labour and National Service[1950] 2 All E.R. 525.

Legislation referred to:

1. Intestate Succession Act. 5 of 1989, ss. 2, 48.

Other works referred to:

Halsbury's Law of England 3rd ed. vol. 35, 36.

For the appellant: J.L. Kazoka, Kazoka and Co.

For the respondent: J.C. Chali, Mwanawasa and Co.

Judgment

NGULUBE, D.C.J.: delivered judgment of the Court.

This is an appeal against the dismissal of the appellant's claims in the following circumstances: the appellant claimed that she was the lawful

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widow and relict of one Dr Saul Muluba Moobola (hereafter called "the deceased"). He (the deceased) died intestate and being indigenous the customary laws would apply to his estate unless it was caught by the Intestate Succession Act. 5 of 1989 (hereafter called "the Act"), which was a law enacted to alleviate the plight of, especially, widows and children who would otherwise be at the mercy of the vagaries of the largely ambiguous and malleable customary inheritance practices. The respondent is the administrator of the deceased's estate and his position is that he does not recognise the appellant as the lawful widow. The dispute over this fact has not been resolved on the merits, as will shortly appear. The facts are that the deceased died on 20th May, 1989, that is to say, one day after the Act under discussion was enacted. The Act came into effect on 28th July, 1989. The respondent obtained a grant of the letters of administration sometime in July, 1989. The appellant issued the originating summons on 16th August, 1989, in which she asked for two things, namely, that it be ordered that she was entitled to a widow's 20% share of the estate under the said Act and further that certain personal chattels and property belonging to her in her own right and which were lying in the family home be surrendered to her and not be administered by the respondent as part of the deceased's death so that it should not apply to this estate and the appellant ought not to be heard under this Act. After hearing arguments, the learned trial judge upheld the objection and dismissed the whole of the summons. The appellant has appealed to this Court.

In the first instance, it is clear - and Mr *Chali* very properly concedes - that it was wrong to dismiss the whole action when there were two distinct claims and the objection could not conceivably apply to her claim for the return of personal property and its exclusion from the assets of the estate. It is obvious that this part of the appeal has to be allowed and this part of the action remitted below for the hearing to continue on the merits.

The major issue is whether the appeal should also be allowed on the claim under the Act so that it too should be remitted below for the hearing to continue on the merits. The problem arises from the timing between the death of the deceased and the commencement of the operating of the Act. Mr *Chali* has argued that, having regard to the wording of s. 48 of the Act, this Act could not be made to apply to the estate of the deceased nor to the rights of the appellant in such estate. Section 48 reads:

"Except as is expressly provided, nothing in this Act shall affect:

- (a) Any rights, duties or obligations of an administrator under any law relating to the administration of estates existing immediately before the commencement of this Act; or
- (b) The rights, duties or obligations of beneficiaries in respect of any person who died before the commencement of this Act."

The arguments and the decision below centred on the question whether or not the Act has retrospective effect and since it was found not to have such effect the

application could not be entertained where the death occurred before the commencement. In view of the wording of s. 48 which we have quoted, it seems to us to be beyond debate that the Act is in its direct operation prospective. Mr *Kazoka* argued that, because the

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whole of the administration and distribution of the estate would take place after the commencement, the Act must apply to the estate in this case. Mr *Chali*, on the other hand, contended that the Act could not apply so as to affect the rights of beneficiary where the deceased died before the commencement.

As we see it, care should always be taken not to allow the ambiguous nature of the word 'retrospective' to cloud the interpretation of a statute such as this. As the learned authors of *Halsbury's Laws of England*, 3rd ed., vol. 35, put it at para. 543:

"It has been said that the word 'retrospective' is somewhat ambiguous and that a good deal of confusion has been caused by the fact that it is used in more senses than one. In general, however, the courts regard as retrospective any statute which operates on cases or facts coming into existence before its commencement in the sense that it affects, even if for the future only, the character or consequences or transactions previously entered into or of other past conduct. Thus a statute is not retrospective merely because it affects the existing rights; nor retrospective merely as part of the requisites for its action is drawn from a time antecedent to its passing."

Before we consider the legal arguments we should point out that there were factual issues to be resolved at a trial. Quite apart from the independent claim concerning her personal belongings, it had to be established if in fact she was the lawful widow, a fact denied by the respondent. Once the latter fact was established, the Court would have had to consider whether, under the relevant customary law, the widow has the rights of a beneficiary and is therefore entitled to a share in the estate of her late husband. If this is the case (and we have no reason to doubt that this is one of the customs of the people of Namwala) then the widow would be entitled to a share in any event, whichever law is applicable. Indeed, the respondent in this affidavit seemed to acknowledge that a widow would have such rights but blamed the appellant's parents for refusing to attend a meeting to discuss the estate and for alleging that there was no marriage.

As already noted, s. 48 of the Act makes it clear that the rights of a widow as a beneficiary of someone who died before its commencement cannot be affected by anything contained in this Act. The word "affect" is an ordinary English word and the section can be understood to mean, among other things, that the previously existing rights of such a beneficiary cannot be violated, invalidated or altered to his disadvantage. Section 48 was necessary, in our considered opinion, to cover those situations where the administrator had already discharged his functions or taken some steps under the customary law previously applicable and when it would be necessary to offer him protection and to relieve him of any adverse claims or liabilities which may have just arisen or been created by the statute. Similarly, s. 48 was necessary to offer like protection to beneficiaries who had already taken a benefit or assumed duties or obligations. It would also operate to bar such beneficiaries from reopening administrations which have been finalised with a view to take advantage of the better terms offered by the Act. The appellant's claim, if she establishes that she was the lawful widow, would amount to no more than that her

existing rights should now be quantified as a definite and fixed 20% of the estate rather than the previously indeterminate share to

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be fixed at the mercy of customary practices. In this regard, we do not consider that the Act has created any new substantive rights but it has merely specified the *quantum* of the entitlement already due to a widow in the position of this appellant.

The Act is concerned with the administration and distribution of a customary intestate estate. As we have endeavoured to illustrate, the wording of s. 48 precludes the acquisition of newly created substantive rights or the imposition of newly created disadvantages in an ongoing administration as well as in one which was finalised at the time of the commencement of the Act. As the Act is concerned with administrations and distributions after its commencement, it can only be regarded as prospective in its operation and the question of retrospective operation does not even arise. This brings us to the question whether the application of the *quantum* fixed by the Act to the share of a widow whose rights as a beneficiary are not affected results in any retrospective operation of the Act. Mr *Chali* in effect argued that this would be the result because the deceased died before the commencement and s. 48 meant that she was stuck with whatever share the customary law would produce. Mr *Chali's* position was that this new Act should not even apply to such estates and this view was upheld by the Court below. We respectfully disagree with this view. Section 2 of the Act makes it clear that it shall apply to all persons domiciled in this country who are subject to customary law. As already discussed, s. 48 makes provision for administrators and beneficiaries in respect of estates whose administration was either completed or pending at the time of the commencement of this new Act. There is no suggestion in s. 48 that applications cannot be made by a beneficiary in the appellant's position. What is more, there is nothing in s. 48 which precludes the intended prospective operation of the Act where no new substantive rights are claimed and no new disadvantages are sought to be imposed. We are, of course, aware that Mr *Kazoka* sought to attack the decision below on an argument that the Act was intended to have a retrospective effect. We do not agree with him either. However, he had an alternative submission which was on firmer ground. The appellant's claim under the Act is in fact supportable on the basis that it attracts the operation of the Act in the prospective manner in which it was so clearly intended to operate. The fact that the Act has fixed a *quantum* to existing rights claimed by a widow in respect of an estate which has not yet been administered does not mean that there is to be retrospective operation. In this regard we cite *Master Ladies Tailors Organisation and Another v Minister of Labour and National Service* [1]. We also draw attention, once again, to para. 643 in *Halsbury's Laws of England* already quoted. In any case, the presumption against retrospection does not apply to legislation dealing with matters of procedure, and provisions introducing new remedies, as opposed to new substantive rights, have generally been classed with provisions as to procedure so that they generally apply both to proceedings subsequently commenced in respect of existing causes of action and to existing proceedings: see, generally, para. 647, *Halsbury's Laws of England*, 3rd ed., vol. 36. It follows from the foregoing that we are persuaded by Mr *Kazoka's* alternative submission based on the fact that the whole of the administration and distribution of the estate of the

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deceased in this case is to take place in the future, after the Act has come into effect, and when only its prospective operation will be called upon, as we have attempted to

adumbrate.

For the foregoing reasons, the appeal on the second aspect must also be allowed. The whole appeal succeeds. The ruling below is set aside and this case is remitted below for the hearing to proceed on the merits. The costs of this appeal follow the event.

Appeal allowed.