

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL NO. 196/2020

BETWEEN:

JOHANES KENNETH SIOGOPI
(T/A NAM TRANSPORT CO. A PARTNERSHIP)

APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

CORAM: CHASHI, SIAVWAPA AND BANDA-BOBO, JJA.

On 14th June and 28th July 2022.

FOR THE APPELLANT: MISS M. K. LISWANISO, SENIOR LEGAL AID
COUNSEL

FOR THE RESPONDENT: MISS M. KAPAMBWE CHITUNDU, DEPUTY
CHIEF STATE ADVOCATE WITH MR. F. M.
SIKAZWE, PRINCIPAL STATE ADVOCATE

J U D G M E N T

SIAVWAPA, JA delivered the Judgment of the Court.

Cases referred to

1. *Limus Agricultural Services Co. (Z) Limited v Gwembe Valley Development Limited (in Receivership) (1999) ZR1.*
2. *Anug Kumar Rathi Krishnan v the People HPA/ 11/2010*
3. *National Director of Public Prosecutions v Pro. Cook Properties (Pty) Limited and 37 Gillepsie Street Durban (Pty) Limited and Boulle Saad Nominees (Pty) Limited 2004 (8) BCLR 844 (SCA)*

Legislation referred to

1. *The Authentication of Documents Act, Chapter 75 of the Laws of Zambia*
2. *The Forfeiture of Proceeds of Crime Act No. 19 of 2010 of the Laws of Zambia*

1.0 INTRODUCTION

- 1.1 This is an appeal against the Judgment of the High Court dated 28th February 2020 under the hand of the Honourable Mr. Justice C. Chanda.
- 1.2 By the said Judgment, it was ordered that Truck Registration No.T673 AXK and Trailer Registration No. 452 BVZ Chassis No. Y52R6 x 2000L-255665 and 140 Logs of PTEROCARPUS Chrisothrix (Mukula Tree Logs), be and were accordingly forfeited to the State.

2.0 THE BACKGROUND

- 2.1 On 16th May, 2018, the Respondent herein caused to be filed into the High Court's Kasama District Registry an ex-parte summons and an affidavit in support thereof deposed to by one Kapulo Siachalinga
- 2.2 The Summons was for a restraining order and prohibition of disposal of tainted property pursuant to Sections 27 and 28 of The Forfeiture of Proceeds of Crime Act No. 19 of 2010.
- 2.3 In his affidavit in support of the ex-parte summons, detective Constable Siachalinga avers that on 29th March, 2017 he received information from members of the public that two Trucks bearing Tanzanian Registration marks carrying containers suspected to be loaded with Mukula Tree Logs, had been abandoned along the Mbala-Nakonde Road at Sikalembe Village of Mbala District.

- 2.4 He further states that he and other officers went to the site and found the trucks which were sealed. He called a customs officer who went to the scene. He then opened the trucks with the help of the other police officers and the Customs Officer.
- 2.5 Upon opening the two trucks, his suspicions were confirmed as they were both loaded with Mukula Tree Logs.
- 2.6 On 30th March 2017, he caused the two trucks, with their loads to be driven to Mbala Police Station and that at the time of deposing to the affidavit, no one had claimed the trucks and the Mukula Tree Logs.

3.0 **PROCEEDINGS BEFORE THE HIGH COURT**

- 3.1 On 5th June 2018, the learned Judge of the High Court granted a Restraining Order in respect of Truck Registration No. T673 AXK and Trailer Registration No. 452 BVZ, Chassis No Y52R6X20001-255665 as well as the 140 Mukula Tree Logs.
- 3.2 The Appellant herein filed an ex-parte summons, supported by an affidavit, to join the proceedings on the same date the learned Judge granted the restraining order. The learned District Registrar granted the order on the same date.

- 3.3 He further averred that the Truck and Trailer subject of the proceedings belonged to NAM Transport, a business name in which he was a partner.
- 3.4 The affidavit evidence was also to the effect that the said truck and trailer had taken some goods to Kasumbalesa in April 2017. Thereafter, he was informed that the truck and trailer had been impounded in Zambia for carrying illegal goods and that the driver, who had just been hired, was at large.
- 3.5 On 16th July, 2018, the Appellant filed into Court an affidavit in opposition to the Originating Notice of Motion for Non-Conviction based Forfeiture Order filed into Court by the Respondent on 16th May 2018.
- 3.6 In the said affidavit, the Appellant largely repeated the facts he had deposed to in the affidavit in support of the application for joinder. He added that management of the partnership, the owners of the Truck and Trailer, had no knowledge of and neither did it authorise the illegal act by its hired drivers.
- 3.7 He also alleged that since the containers had Zambia Revenue Authority seals, only the Respondent would have access to the documents bearing the identity of the owner of the Logs.

4.0 **DECISION OF THE HIGH COURT**

4.1 After hearing the application on the substantive matter for non-conviction forfeiture, on 7th March 2019, the learned Judge delivered the Judgment, the subject of this appeal.

4.2 The effect of the Judgment is as set out in the introduction of this Judgment save to state the rationale for the decision.

4.3 In the Judgment, the learned Judge dismissed the documents exhibited by the Appellants to establish its interest in the Truck and Trailer in terms of Section 31(2) of The Forfeiture of Proceeds of Crime Act No. 19 of 2010. The reason the learned Judge decided as he did was that the said documents were not authenticated as required by Section 2 of the Authentication of Documents Act Chapter 75 of the Laws of Zambia.

4.4 In so deciding, the learned Judge was inspired by the decision in the case of Limus Agricultural Services Co. (Z) Limited v Gwembe Valley Development Limited.¹

4.5 In that Judgment, the Supreme Court of Zambia held as follows;

“If a document executed out of Zambia is authenticated as provided by the Authentication of Documents Act, then it shall be deemed or presumed to be valid for use in this country and if it is not authenticated, the converse is true that it is deemed not valid and cannot be used in the country.”

4.6 The second reason the Court decided as it did was that the Appellant had failed to prove that it did not participate in the commission of the offence.

4.7 The learned Judge premised the above finding on the failure by the Appellant to produce documentary proof that it was engaged by Mbombo to deliver its goods to the Democratic Republic of Congo.

5.0 THE APPEAL

5.1 Dissatisfied with the decision of the High Court, the Respondent, in the Court below, filed into Court a Notice and Memorandum of Appeal on 16th March 2020.

5.2 The Memorandum of Appeal has four grounds of Appeal set out as follows;

1. *That the Court below erred in law and fact when the Court held that the documents exhibited by the Appellant (the Respondent in the Court below) in his Affidavit in opposition of the Application dated the 16th day of July 2018 were not available for use in Zambia as evidence.*
2. *The Court below erred in law and fact when the court held that the Appellant (the Respondent in the Court below) had failed to avail himself of the protection provided under Section 31(2) of the Forfeiture of Proceeds of Crime Act No. 19 of 2010 of the Laws of Zambia.*
3. *The Court below erred in law and fact when the Court held that the Truck Registration No. T673 AXK and Trailer Registration No. 452 BVZ were in Zambia for the illegal haulage of 140 Mukula Logs.*
4. *The Court erred in law and fact when the Court held that the Appellant (the Respondent in the Court below) had knowledge of and was involved in the illegal haulage of the 140 Mukula Logs.*

6.0 APPELLANT'S ARGUMENTS

- 6.1 The Appellant filed its Heads of Argument in support of the appeal on 21st October 2020 arguing grounds one and two and grounds three and four together.
- 6.2 In support of the first and second grounds of appeal, the Appellant argues that, having accepted the documents at the stage of applying for joinder by the Appellant, the learned Judge erred when he dismissed the same documents in the Judgment on the basis that they were not authenticated in compliance with The Authentication of Documents Act, Chapter 75 of the Laws of Zambia.
- 6.3 He further argued that the Appellant's interest in the Truck and Trailer was established at the time that the Appellant was joined to the proceedings on the basis of the same documents thereby satisfying the requirements of Section 31(2) of The Forfeiture of Proceeds of Crime Act.
- 6.4 In grounds three and four, the Appellant takes issue with the finding by the learned Judge that the Truck and Trailer were in Zambia for the purpose of illegal haulage of 140 Mukula logs found thereon.
- 6.5 The Appellant argued as above on the basis that the Respondent had not led any evidence to prove the finding by the learned Judge.

6.6 The Appellant further disputes the finding that it had full knowledge of or approved the illegality.

7.0 **RESPONDENT'S ARGUMENTS**

7.1 The Respondent filed its Heads of Argument on 14th June 2022 with leave of the court having been out of time. The Respondent argued the four grounds separately.

7.2 In discounting the Appellant's arguments in ground one, the Respondent has argued that Section 3 of The Authentication of Documents Act is mandatory in nature. It relied on the cases of Anug Kumar Rathi Krishnan v the People² and Limus Agricultural Services Co (Z) Limited v Gwembe Valley Development Ltd.

7.3 The two cases decided that failure to have foreign executed documents authenticated pursuant to Section 3 of the Act renders them invalid for use in Zambia.

7.4 The Respondent disputes the assertion by the Appellant that allowing it to join the proceedings implied admission of the documents in issue.

7.5 In ground two it is argued that the learned Judge was not at fault when he found that the Appellant had failed to avail itself of the protection under Section 31(2) of The Forfeiture of Proceeds of Crime Act because the documents The

Appellant relied upon to access the said protection offended against the Authentication of Documents Act.

7.6 In arguing ground three, the Respondent has sought to ride on the lack of tangible evidence supporting the argument that Mbombo had hired the Appellant's Truck and Trailer to deliver shoes to Kasumbalesa.

7.7 The Respondent has relied on the case of National Director of Public Prosecutions v Pro. Cook Properties (Pty) Limited and 37 Gillepsie Street Durban (Pty) Limited and Boulle Saad Nominees (Pty) Limited³ which held as follows;

“Property will be an instrumentality of an offence if it plays a reasonably direct role in the commission of the offence. In a real or substantial sense, the property must facilitate or make possible the commission of the offence”.

7.8 Having so argued, the Respondent has asserted that having been found loaded with 140 Mukula logs without authorising documents, the Truck and Trailer became tainted Property pursuant to Section 2 of The Forfeiture of Proceeds of Crime Act and liable to forfeiture.

7.9 In ground four, the Respondent has re-iterated the argument that there was no proof that the Truck and the Trailer were in Zambia on a legal mission. On that premise, the Respondents are of the view that the learned Judge was on firm ground to hold that the Appellant was aware of and involved in the illegal haulage of the 140 Mukula Tree logs.

8.0 OUR ANALYSIS AND DECISION

A. FORFEITURE OF PROCEEDS OF CRIME ACT

8.1 After carefully considering the Judgment, the grounds of appeal and the arguments on the Record of Appeal, our view is that the issue in dispute is whether or not the Appellant successfully claimed the protection provided under Sections 12(2) and 31(2) of The Forfeiture of Proceeds of Crime Act No. 19 2010.

8.2 For ease of reference, we reproduce the two sections hereunder:

Section 12(2);

“Where a person applies to the Court for an order under this sub-section in respect of the person’s interest in any property and the Court is satisfied that:-

- (a) the applicant has an interest in the property;***
- (b) the applicant was not in any way involved in the commission of the offence in respect of which the forfeiture of the property is sought, or the forfeiture order against the property was made; and***
- (c) the applicant***
 - (i) had an interest before the serious offence occurred***
 - (ii) acquired the interest during or after the commission of the offence, bonafide and for fair value and did not know or could not reasonably have known at the time of the acquisition that the property was tainted property.***

the Court may make an order declaring the nature extent and value, as at the time when the order is made, of the applicant’s interest.”

Section 31 (2)

“Where a person claiming an interest in property to which an application relates satisfies the court that the person –

- (a) has on interest in the property; and***

- (b) *did not acquire the interest in the property as a result of any serious offence carried out by the person and*
(i) *had the interest before any serious offence occurred; or*
(ii) *acquired the interest for fair value after the serious offence occurred and did not know or could not reasonably have known at the time of the acquisition that the property was tainted property*

the Court shall order that the interest shall not be affected by the forfeiture order and the Court shall declare the nature and extent of the interest in question.”

- 8.3 It is worthy to note that both Sections 12 and 31 reproduced above provide for a third party to apply to the Court to claim an interest in the property which is the subject of an application for forfeiture.
- 8.4 The language used in the two sections and the objectives for the application are similar except that whereas Section 12 is based on a conviction; Section 31 is based on non-conviction.
- 8.5 We however, pick out one feature common to both sections; that is; the need for the Court to be satisfied that the Applicant has an interest in the property which is the subject of an application for forfeiture order.
- 8.6 The issue then is, what does an Applicant need to say and produce to the Court to satisfy it that the Applicant has an interest in the property?

8.7 In general terms, in civil litigation, any evidence that tips the balance of probability in favour of a party should be resolved in that party's favour.

8.8 In this case, the Appellant, apart from the indisputable fact that none of its representatives was directly involved in the commission of the offence, documents were produced as proof that the tainted property belonged to the Appellant.

8.9 It will be noted that there is nowhere in the Judgment of the Court below where the documents proving interest are discredited or believed to be unauthentic. The only reason the documents were dismissed by the Court is that they did not comply with the Authentication of Documents Act Chapter 75 of the Laws of Zambia.

8.10 We therefore, assume that had the documents been authenticated, the learned Judge would have been satisfied that the Appellant had interest in the tainted property.

B. THE AUTHENTICATION OF DOCUMENTS ACT

8.11 The question we pose here is, did the documents produced by the Appellant require to be authenticated in terms of Section 3 of the Act?

8.12 The documents exhibited to Johannes Keneth Siogopi's affidavit in opposition to the originating Notice of Motion for an order of forfeiture, are

- (1) *An Extract from the Registrar of Business Names from the Republic of Tanzania*
- (2) *Motor vehicle Registration Cards for the Truck and the Trailer*
- (3) *A Bill of Lading*

8.13 In dismissing the above stated documents, the learned Judge relied on the case of Limus Agricultural Services (Supra). The learned Judge did not however, consider the definition assigned to the term 'document' by the Act. We accordingly reproduce the definition assigned by Section 2 of the Act as;

".....any deed, contract, power of attorney, affidavit, or other writing..."

8.14 It was therefore, important for the learned Judge to consider the documents before him in light of the above definition of a document to determine whether the same fell within the definition.

8.15 In our view, the documents in issue are not captured by the definition in the Act because, other than the documents specified therein, for other documents to fall within the purview of the definition, they ought to be in writing. A print out from an official register, a registration document and a bill of lading are not documents for the purposes of the Act and as such, need no authentication.

8.16 We also advert to the section of the Act which informed the decision in Limus Agricultural Services, which opens as follows; ***"Any document executed outside Zambia...."***

From our point of view, executing a document implies signing it appropriately and the listed documents in the definition are validated by the signatures of the parties thereto or their deponents.

This view is supported by the definition assigned to the word **"Authentication"** in Section 2 of the Act which states as follows;

"Authentication", when applied to a document means the verification of any signature thereon."

8.17 In our view, the Appellant firmly established its interest in the tainted property through the above stated documents which did not require authentication.

8.18 It follows that the other requirement under Sections 12(2) and 31(2) of the Act namely; the Applicant having interest before the commission of the crime was met by the Appellant.

C. INVOLVEMENT IN THE COMMISSION OF THE CRIME BY THE APPELLANT

8.19 Having adjudged the documents invalid for use in Zambia, the learned Judge considered the question whether the Appellant was involved in the commission of the offence.

8.20 In his view, upon proof by the Respondent that the property was tainted, the burden of proof shifted to the Appellant to

prove its interest and non-participation in the commission of the offence.

8.21 First and foremost, we think the learned Judge proceeded on the wrong premise on the burden of proof as neither section 12(2) nor 31(2) impose the burden of proof on the applicant. As earlier indicated, the applicant is only required to satisfy the Court as to the applicant's interest in the property.

8.22 Most importantly however, once the Applicant satisfies the Court of its interest in the property, having not acquired the interest from any serious offence and that the interest accrued before the commission of the offence in question, unless the claimant is the one who committed the offence in issue, the question of knowledge does not arise.

8.23 According to Section 31(2) (b) (ii) of the Act, the question of knowledge actual or implied, of the commission of the offence arises if the applicant acquired the interest for fair value after the commission of serious offence.

8.24 This was not the case in this appeal as the interest claimed by the Appellant was acquired long before the offence was committed.

8.25 We however, are alive to the fact that in his Judgment, the learned Judge found that the Appellant specifically sent the

tainted property into Zambia for the purpose of illegally collecting the 140 Mukula Tree logs found on the Trailer.

8.26 We find the finding to that effect not backed by any evidence on the record. We say so, because the evidence by the Appellant that the Truck and Trailer had been dispatched to Kasumbalesa in the Congo DR to deliver a consignment of shoes is backed by the Bill of lading.

8.27 The Bill of Lading appearing at page 72 of the Record of Appeal names the Shipper as JIN RUO HAQ SHOES CO. LTD and the Consignee as MBOMBO, a Congolese (DRC) who was to be notified of the shipment. The Bill of Lading also shows that the goods were packed in a Forty Foot Container and shipped on 21st January 2017.

8.28 According to the Appellant's witness, in the Court below, the Truck and Trailer, on which the container laden with 140 Mukula Tree logs were, dispatched to Congo DR between end of February and March. The police officer who applied for the non-conviction forfeiture confirmed that the Mukula logs were in a container.

8.29 In our considered view, the Bill of Lading, contained sufficient information to satisfy the Court that the tainted property was transiting through Zambia on a legal business trip to Congo DR and that on the way back the driver engaged in illegal activities.

8.30 From the record, there is nothing pointing to the Appellant's involvement, knowledge or sanctioning of the Commission of the offence. We do not think that imprecision on the dates of the trip to Congo DR and the lack of documents of delivery of the goods to MBOMBO convicts the Appellant of complicity in the Commission of the offence.

8.31 We are of the view that the Appellant discharged its burden on a balance of probability to show that it was not party to the commission of the offence and as such entitled to benefit from Section 31(2) of the Act for the interest not to be affected by the forfeiture order.

9.0 **CONCLUSION**

9.1 Having found that the documents proving the Appellants' interest in the tainted property did not require authentication, we hold that the learned Judge erroneously rejected the said documents.

9.2 In view of the above, we hold that the Appellant adequately established its interest in the tainted property. We accordingly set aside the order of forfeiture issued by the Court below.

9.3 We subsequently order that the properties subject of the forfeiture order namely; Truck Registration No. T673 AXK

and Trailer Registration No. 452 BVZ be released to the Appellant forthwith.

9.4 We order each party to bear their own costs.



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J. CHASHI
COURT OF APPEAL JUDGE



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M. J. SIAVWAPA
COURT OF APPEAL JUDGE



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A.M. BANDA-BOBO
COURT OF APPEAL JUDGE