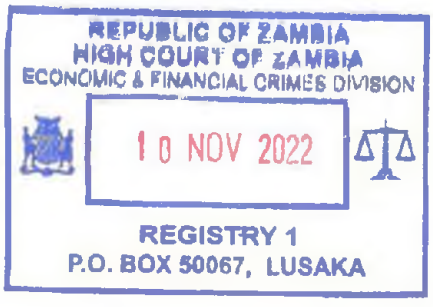
**IN THE HIGH COURT FOR ZAMBIA**
**AT THE ECONOMIC AND FINANCIAL**
**CRIMES REGISTRY**
**HOLDEN AT LUSAKA**
*(CRIMINAL JURISDICTION)*

**HPEF/01/2022**




**BETWEEN:**

**THE PEOPLE**

**V**

**RONALD KAOMA CHITOTELA**

**BEFORE:** **Hon. Mr. Justice E. L. Musona**
**Hon. Mrs. Justice S. Wanjelani**
**Hon. Mr. Justice C. Zulu**

Delivered on the 10th November, 2022.

For the Appellant : Mr. E. Mbewe of the Anti-Corruption Commission.

For the Respondent : Mr. B. Mwelwa of Messrs E. Eyaa and Partners.

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# JUDGMENT

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**MUSONA E. L., J. DELIVERED THE JUDGMENT OF THE COURT**

**Cases referred to:**

1. *Moses Sachigogo v The People (1971) ZR 139.*
2. *Shamabanse v The People (1972) ZR 151.*

**Legislation referred to:**

1. *Section 71 (1) of the Forfeiture of Proceeds of Crimes Act No. 19 of 2010.*
2. *Section 80 of the Anti-Corruption Commission Act No. 3 of 2012.*
3. *Article 18 (5) of the Constitution of Zambia as amended by Act No. 2 of 2016.*
4. *Section 138 of the Criminal Procedure Code Cap 88 of the Laws of the Republic of Zambia.*

**BACKGROUND**

The background to this case is that male Ronald Kaoma Chitotela (hereinafter called the Respondent) appeared before the Subordinate Court at Lusaka charged with nine (9) counts of possession of property suspected of being proceeds of crime contrary to Section 71 (1) of the Forfeiture of Proceeds of Crime Act No. 19 of 2010 of the Laws of Zambia.

While this matter was active before the Subordinate Court, the Anti-Corruption Commission executed an undertaking not to institute criminal proceedings against the Respondent, pursuant to Section 80 of the Anti-Corruption Act No. 3 of 2012. That matter therefore, did not proceed.

Subsequently, the Respondent was again arrested and charged with two counts of being in possession of property reasonably suspected of being proceeds of crime contrary to Section 71 (1) of the Forfeiture of Proceeds of Crime Act No. 19 of 2010 of the Laws of the Republic of Zambia. Save for the number of counts which were reduced from nine (9) to two (2), the two (2) counts embraced the earlier nine counts.

**FACTS OF THE CASE**

The facts of this case in as far as can be discerned from the record are that, the Respondent was caused to appear before the Subordinate Court of the First Class at Lusaka, charged with two (2) counts of possession of property reasonably suspected of being proceeds of crime contrary to Section 71 (1) of the Forfeiture of Proceeds of Crime Act No. 19 of 2010.

When the accused appeared before the learned Magistrate, (now the Respondent) he raised an application pursuant to Article 18 (5) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia, as amended by Act No. 2 of 2016. The application was to the effect that the offences for which the accused stood charged were subject of a consent settlement under Cause No. CRMP/28/2019, and that the said settlement was pursuant to Section 80 of the Anti-Corruption Act No. 3 of 2012.

The said Article 18 (5) of the Constitution of Zambia reads as follows:

> ***"A person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall not again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, except upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal."***

Section 80 of the Anti-Corruption Act No. 3 of 2012 provides as follows;

> ***"(1). In any matter where the Commission is mandated by***

*this Act or any other law to institute civil proceeding or applications, it shall be lawful for the Commission to issue a notice or letter of demand to the person intended to be sued and may, in such notice or letter, inform the person about the claim against that person and further inform the person that, that person could settle the claim within a specified time before the filing of court proceedings.*

*(2) The Commission may negotiate and enter a settlement with any person against whom the Commission intends to bring, or has actually brought, a civil claim or application in court.*

*(3) The Commission may tender an undertaking, in writing, not to institute criminal proceedings against a person who–*

*(a)Has given a full and true disclosure of all material facts relating to past corrupt conduct and an illegal activity by that person or others; and*

***(b) Has voluntarily paid, deposited or refunded all property the person acquired through corruption or illegal activity.***

***(4) A settlement or undertaking under this section shall be registered in court"***

The Respondent argued that count 1 before the trial Magistrate also appeared as court 1 on Cause No. CRMP/28/2019, while count 2 was an embracement of courts 2 to 9 under Cause No. CRMP/28/2019.

In the matter under Cause No. CRMP/28/2019, the Anti-Corruption Commission purportedly made an undertaking that they would not institute any criminal proceedings against the Respondent in respect of the charges before us.

The prosecution (now the Appellant) felt that what the Defence (now the Respondent) raised was a plea in bar and, in particular, outrefois acquit as provided for under Section 138 of the Criminal Procedure Code Cap 88 of the Laws of Zambia. That section provides as follows:

***"A person who has been once tried by a court of competent jurisdiction for an offence, and convicted or acquitted of such offence, shall while such conviction or acquittal remains in force, not be liable to be tried again on the same facts for the same offence."***

The prosecution (now Appellants) argued that under the plea of autrefois acquit as provided under Section 138 of the Criminal Procedure Code Cap 88 of the Laws of Zambia, one needs to prove that they were tried and acquitted by a court of competent jurisdiction. It was the contention by the Appellant that trial begins with a plea and that no plea was taken under Cause CRMP/28/2019. According to the Appellant, this meant that trial never took place. The Appellant wondered how the said undertaking under Section 80 of the Anti-Corruption Act could result in an acquittal. The Appellant argued that, when the Respondent appeared before the Magistrate under Cause No. CRMP/28/2019, that is when the Appellant made the said undertaking not to institute criminal proceedings against the Respondent. After hearing the arguments from both parties the learned Magistrate rendered a ruling, wherein the Respondent was discharged on both counts.

Dissatisfied with the decision of the learned Magistrate to discharge the Respondent the Anti-Corruption Commission filed an appeal before this Court. The appeal is premised on the following grounds:

1. **The trial court erred on point of law by discharging the Accused person herein when it held that arraigning the accused after a settlement would amount to double jeopardy before invoking Section 277 of the Criminal Procedure code chapter 87 of the laws of Zambia.**

2. **The trial court misdirected itself on a point of law when it held that arraigning the accused was tantamount to double jeopardy as provided for under Section 138 of the Criminal Procedure code chapter 88 of the laws of Zambia when no plea was taken before any other court of competent jurisdiction for purposes of trial.**

3. **The trial court below misdirected itself to go into the merits of the settlement without giving the prosecution an opportunity not withstanding that the defence**

**submission was anchored on section 138 of the Criminal procedure code chapter 88 of the laws of Zambia.**

**4. Other grounds to follow."**

On 10th August 2022, we delivered a ruling in this same matter. One of the issues in that application was a preliminary objection by the Respondent questioning the jurisdiction of this Court to hear this appeal. We noted in our ruling that the preliminary objection questioning the jurisdiction of this court to hear this appeal was actually ground one (1) in the notice of appeal. We stated then, that delving into that preliminary objection would in essence be dealing with the merits and demerits of ground one (1) of this appeal. We deferred that preliminary objection to be dealt with in this appeal, by stating that: ***"we should cross a bridge, but only when we reach it."***

We have analysed the preliminary objection, which questioned the jurisdiction of this court and we have seen no valid basis why the Respondent thought we had no jurisdiction to hear this appeal. For the avoidance of doubt, we have jurisdiction in this matter, and that is why

we proceeded to hear this appeal. We repeat, we have jurisdiction to hear this appeal.

**THE DECISION**

We have noted that the Respondent attempted to raise the defence of autrefois acquit. This was an attempt in misplacement, and claimed that the proceedings under Cause No. SSPD/034/2022 constituted double jeopardy against the Respondent.

In order to successfully raise the defence of autrefois acquit, the Respondent must show that he was tried and acquitted before, of the same charge (s) on same or similar facts. There was no such acquittal. We have looked at the case of ***Moses Sachigogo v The People*** [1] where Mr. Justice Chomba (as he then was) gave the following guidance:

> ***"By Section 249 (a) of the Criminal Procedure Code [which is now Section 277], when a plea of autrefois acquit is raised, "the court shall try whether such plea is true in fact or not". I invoke this section because I consider that the appellant's claim that no case had previously been found to lie against***

*him on the same charges was in substance a plea of autrefois acquit. According to the section referred to this plea should have been adjudicated upon as preliminary legal issue. The endorsement on the record showing that the trial Magistrate had examined the case record in the previous case cannot be equated to the kind of trial mentioned in the Section 249. In any event it would appear that the Magistrate himself was not satisfied with whatever he discovered from the examination of the proceedings in the previous case because he adjourned the case further to obtain better information, which was not done. It would have been preferable in such instances for the court to require a certificate under the hand of an officer of the court, for example, the clerk of court, certifying the result of such previous trial. [....] In making reference to Section 249, Cap. 7, I am not unmindful of the fact that, that section falls under Part VIII which deals with procedure in trials in the High Court. So far as I know the same rule of procedure as is applicable in the High Court should be followed if the plea of autrefois acquit is raised in the Subordinate court.*

***The trial Magistrate in this case failed to adjudicate on the Appellant's plea of autrefois acquit before embarking on the trial. In my opinion he should have made such adjudication according to the practice laid out above. His failure in this connection, in my considered opinion, renders the proceedings in this ease a nullity."***

We are persuaded accordingly.

We have also looked at the case of ***Shamabanse v The People.*** [2] In that case the first and second accused were originally charged before a Senior Resident Magistrate with theft of money. At case to answer stage, they were put on their defence on the alternative charge of obtaining money by false pretences, but acquitted on the original charge. They unsuccessfully pleaded autrefois acquit and were subsequently convicted of the alternative offence. On appeal to the High Court on the ground that the plea of autrefois acquit should have been upheld, Scott, J., had this to say at page 153, lines 19 to 30:

***"I shall say at once that the plea of autrefois acquit is not of valid application to the circumstances of this case,***

***because both on the authorities and under our law it is envisaged that there have been previous and earlier proceedings followed by later proceedings at which the plea has been or can be raised. Section 20 (5) now Article 20(5) of the Constitution refers to a person again being tried for an offence and Section 128 of the Criminal Procedure Code also speaks of a person not being liable to be tried again on the same facts for the same offence. In the instant case there was only one set of proceedings, one trial: the accused were not being tried again, but were purportedly being called upon for their Defence...to an offence of which they would be convicted though not charged therewith."***

In the present case we have gone through the whole record from the court below. On the outset, we should state that there was grave misapprehension of the provisions of Section 80 of the Anti-Corruption Act No. 3 of 2012. The Respondent does not seem to understand the applicability of that Section 80 of the Anti-Corruption Act. It is cardinal to know at what stage, that Section 80 of the Anti-Corruption Act may be used.

We bear in mind that this was not a civil matter, but a criminal matter. The applicable provision is, therefore, Section 80 (3) of the Anti-Corruption Act. For the avoidance of doubt, we have reproduced Section 80 (3) of the Anti-Corruption Act which provides:

> ***"(3) The Commission may tender an undertaking in writing, not to institute criminal proceedings against a person who–***
>
> ***(a) Has given a full and true disclosure of all material facts relating to past corrupt conduct and an illegal activity by that person or others; and***
>
> ***(b) Has voluntarily paid, deposited or refunded all property the person acquired through corruption or illegal activity."***

We have found that Section 80 (3) of the Anti-Corruption Act is not couched in legal jargon. It is put in simple every day usage of the English language. It says, ***"....not to institute criminal proceedings...."*** The synonym of ***"not to institute criminal proceedings...."*** is:

1. not to commence;
2. not to begin;
3. not to start.

It is easy to note from the above that the intention of the legislature was to allow the Anti-Corruption Commission to make an undertaking (not to institute/not to commence/not to begin or not to start criminal proceedings) before criminal proceedings are instituted/commenced, began or started. It is therefore, clear that the intention of the legislature was not to use this section 80 of the Ant-Corruption Act after criminal proceedings have already been instituted/commenced/began or started. If the intention was to use that section even after criminal proceedings have already been instituted/commenced/began or started, the legislature should have stated so.

As the law stands, the Anti-Corruption Commission cannot use or make a purported undertaking not to prosecute while the matter has already gone to court.

Section 80 (3) of the Anti-Corruption Act cannot be used to terminate criminal proceedings. The operation and applicability of Section 80 (3) of the Anti-Corruption Act cannot be invoked when the matter has already gone to court. The operation and applicability of Section 80 (3) of the Anti-Corruption Act should be distinguished from a nolle prosequi which is a formal notice by the State used to terminate proceedings.

There is no law which allows the Anti-Corruption Commission to invoke Section 80 (3) of the Anti-Corruption Act, while the matter has already been taken to court. In the case in casu, when the present matter was taken to the Subordinate Court the Respondent erroneously and without legal footing relied on the undertaking which was executed in a different matter under Cause No. CRMP/28/2019. We have already noted that the undertaking in Cause No. CRMP/28/2019 was otiose, and of no legal effect, because it was executed while the matter in that Cause No. CRMP/28/2019 was already in court. That purported undertaking did not promise not to institute criminal proceedings in respect of the facts of that case because the case was already in the Subordinate Court. It was not only

inconceivable, but, also incongruous for the Respondent to seek to rely on that undertaking. What must be noted is that, the undertaking related to Cause No. CRMP/28/2019 and not to the current SSPD/034/2022.

We are alive to the fact that, the undertaking was registered in court in terms of Section 80 (4) of the Anti-Corruption Commission Act, but the view we take is that, registration of that undertaking did not make it applicable to this case. But the view we take is that the mere purported registration of that undertaking did not make it applicable to this case.

The double jeopardy which the Respondent attempted to plead in the Subordinate Court is a misconception of the law.

We have seen no double jeopardy in this case because trial under Cause No. CRMP/28/2019, never commenced and never ended in a verdict. There was no trial.

The sum total of our decision is that, the appeal by the Anti-Corruption Commission succeeds. The ruling by the court below is thus reversed and we refer this matter back to the Subordinate Court to be heard de novo before another Magistrate of competent jurisdiction.

**DELIVERED AND SIGNED IN OPEN COURT AT LUSAKA THIS 10TH DAY OF NOVEMBER 2022.**

**HON. MR. JUSTICE E. L. MUSONA**
**HIGH COURT JUDGE**

**HON. MRS. JUSTICE S. M. WANJELANI**
**HIGH COURT JUDGE**

**HON. MR JUSTICE C. ZULU**
**HIGH COURT JUDGE**