

IN THE SUPREME COURT OF ZAMBIA - APPEAL NO. 32/2003

HOLDEN AT KABWE AND LUSAKA
[CIVIL JURISDICTION]

BETWEEN:

C & S INVESTMENTS LIMITED - 1st Appellant

ACE CAR HIRE LIMITED - 2nd Appellant

SUNDAY MALUBA - 3rd Appellant

AND

THE ATTORNEY-GENERAL - Respondent

Coram: Sakala, CJ; Mambilima and Silomba; JJS on the 6th of
August 2003 and 16th November, 2004.

For the Appellant: Mr. R. M. Simeza and Mr. J. Sangwa, of
Simeza Sangwa and Associates.

For the Respondents: Mr. J. Jalasi;
Principal State Advocate.

JUDGMENT

Mambilima JS, delivered the Judgment of the Court.

Cases referred to:

1. *Derrick Chitala vs Attorney-General* 1995-97 ZR 96.

2. *Shilling Bod Zinka vs The Attorney-General* 1990-92 ZR 73.
3. *R vs IRC exp. RossMinster* 1979 3 All ER 385 at page 399.
4. *Hakum Chad Mills vs State of Madhya Pradesh* [1964] AIR S.C. 1329.
5. *Silas Chibwe vs The Attorney-General* [1980] ZR 22.
6. *Jones vs Skimmer* 5 LJ Ch 90
7. *Shamwana & Others vs The People* [1985] ZR 4
8. *Chani vs Jones* [1969] 3 All ER 1700 at 1705

Legislation referred to:

1. *The Dangerous Drugs (Forfeiture of Property) Act No. 7 of 1989.*
2. *The Narcotics and Psychotropic Substances Act, Cap 96 of the Laws of Zambia.*
3. *The Supreme Court of Zambia Act, Cap 25 of the Laws of Zambia.*
4. *The Criminal Procedure Code, Cap 88 of the Laws of Zambia.*
5. *The Prohibition and Prevention of Money Laundering Act.*
6. *The Preservation of Public Security Act, Cap 112 of the Laws of Zambia.*
7. *The Interpretation and General Provisions Act, Cap 2 of the Laws of Zambia.*

8. *The Emergency Powers Act, Cap 108 of the Laws of Zambia.*

In this Judgment, we shall refer to the Appellants as the 'Applicants' and the Attorney-General as the 'Respondent' which is what they were in the Court below. The delay in delivering this Judgment is deeply regretted.

This is, an appeal against the decision of the Court below, dismissing the Applicant's application for Judicial Review.

The Applicants had applied for Judicial Review in the High Court under Order 53 of the Rules of the Supreme Court, seeking in the main, the following reliefs:

1. An order of certiorari to remove into the High Court and to quash; the decisions of the Drug Enforcement Commission of 24th July 2002 to seize six motor vehicles belonging to the 1st and 2nd Applicant and cash amounting to K92,700,000.00 belonging to the 3rd Applicant; and, the decision of the Drug Enforcement Commission of 28th July 2002 to freeze three accounts belonging to the 1st Applicant held with Stanbic Bank Zambia Limited.

2. A declaration that the said decision to seize the Applicant's aforementioned property was illegal, and procedurally improper.
3. An Order of Mandamus to oblige the Drug Enforcement Commission to restore the aforementioned property to the Applicants almost immediately and to allow the 1st Applicant access to the effects of its Bank Accounts.
4. An Order for damages for misfeasance in public office and for loss of business and use.

According to the Notice of Application for leave to apply for judicial review, the 1st Applicant, C & S Investments Limited, is the Registered Proprietor of a motor vehicle, Registration Number AAV 4925 and also holds three bank accounts at Stanbic Bank Zambia Limited. The details of these accounts are:

- (i) *Call Account No. 01220/310482/00.*
- (ii) *Main Account No. 01400/310482/00.*
- (iii) *Dollar Account No. 02400/310482/01.*

These accounts were all frozen on 28th July, 2002.

The 2nd Applicant, ACE Car Hire Limited is the registered proprietor of four vehicles; a Limoussine Lincoln, Registration Number AAV 399; a Mercedes Benz, 110 D Vitto Commuter, Registration Number AAT 423; a Chevroret Astro, Registration Number AAT 3548; and a Daewoo Leganza Registration Number AAT 5373.

The 3rd Applicant, Sunday Maluba, is the owner of the money in the sum of K92, 700,000.00.

On 24th July 2004, all these properties were seized from the 3rd Applicant by the Drug Enforcement Commission, pursuant to Notices of Seizure issued under Sections 24 and 25 of the Dangerous Drugs (Forfeiture of Property Act)⁽¹⁾. According to the Applicants, at the time of the said seizure, they were not persons under investigation. The seizure was effected without giving them any notice and neither were they afforded an opportunity to be heard in relation to the seized property.

The three applicants sought judicial review on the grounds of illegality or procedural impropriety. They contented that the seizure of their properties under Sections 24 and 25 of the Dangerous Drugs (***Forfeiture of Property***) Act⁽¹⁾, was illegal in that, the said Act had been repealed by ***Section 49 of the Narcotic Drugs and Psychotropic Substances Act***⁽²⁾. In the alternative, the Applicants contended that they had a legitimate expectation that they would be heard before the seizures

and the freezing of the bank accounts were effected and be made aware of the nature of the investigations against them. The Applicants pleaded further and in the alternative that if there be no illegality or any legitimate expectation on the facts, they were contending that the requirement of procedural fairness demanded that those in the position of the Applicants should be given a hearing or be made aware of the allegations against them. They contended further that the lack of being given an opportunity to be heard was flamed by bad faith and thus contrary to the rules of natural justice and therefore illegal.

It was the position of the Applicants that the properties which were seized and the frozen accounts were profit making chattels. According to the Applicants, the seizure of the property and the freezing of the accounts, having been done without due regard of the law, indicated bad faith on the part of the officers who effected them, giving rise to an actionable claim in private law for misfeasance in public office.

After considering the application before him and the submissions of Counsel, the learned Judge summarized the issues as:

- "i. was the seizure illegal?"***
- ii. was it unreasonable in the Wednesbury Sense?"***
- iii. can a Court arrest criminal investigations?"***

iv. what would be the effect of this court granting an order to defreeze the assets?"

As to whether the seizure was illegal, the Judge found that the question of illegality did not arise because there was existing legislation; the **Narcotic Drugs and Psychotropic Substances Act** ⁽²⁾, which empowered investigating officers to seize the property. According to the Judge, what was cardinal was whether the actor was a repository of power, and not the citing of a wrong statute or Section. He found comfort in the Provisions of **Section 15(1) of the Supreme Court of Zambia Act**⁽³⁾ and **Section 181 of the Criminal Procedure Code**.⁽⁴⁾ Section 15(1) of the Supreme Court of Zambia Act empowers the Supreme Court, in criminal appeals to dismiss an appeal, notwithstanding that it is of the opinion that a point raised in the appeal might be decided in favour of the Appellant, if it considers that no miscarriage of justice actually occurred. Section 181 of the **Criminal Procedure Code**⁽⁴⁾ allows convictions on minor offences where facts adduced do not prove the main offence that a person was charged with. According to the Judge, both these Acts validate misdirections if, at the end of the day, the misdirections are not prejudicial to the person against whom the decision is made.

The Applicants argued, in the Court below that the word **"property,"** as used in the enabling statute, did not include money. The

learned Judge referred to Section 31 of the Narcotic Drugs and Psychotropic Substances Act, which states; “ ***Any property which a drug enforcement officer or police officer reasonably suspects to be the subject-matter of any offence under this Act, or which has been used for the commission of that offence or illegal property shall be liable to seizure***”. According to the Judge, the word “any” in this Section is used in its generic sense and is inclusive of all property including money.

As to whether the seizures were unreasonable in the Wednesbury Sense, the Judge observed that the Respondents were acting within the investigatory powers conferred in a criminal matter, triable by the Subordinate Court, which, if the matter proceeds to trial, the Court will hear witnesses; decide the facts; and apply the law, including the issue as to whether the property ought to have been seized. He stated that he had been deprived of this opportunity more so that both affidavits had been economical on facts. He went on to observe that the affidavits before him, did not state who was the owner of the frozen assets and that the thrust of the Applicants argument, was that any officer of the company could lay claim to the company assets. The Judge concluded by stating that he could not imply the freeze, for unreasonableness, in that that it is settled in common law jurisdictions, that courts cannot be used to stop criminal investigations. The Judge appeared to have been cautious to arrive at a decision on affidavit evidence, which decision may

scope of the law invoked. It was submitted that the Respondent failed to understand correctly, the law that regulated his decision making power, by invoking a law which did not exist. According to Counsel, the body exercising the power thus acted in excess of its jurisdiction and its decision is likely to be quashed. They referred us to the case of ***Derrick Chitala vs Attorney-General*** ⁽¹⁾, in which we held that ***'...by illegality, as a ground for judicial review is meant that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it.'***

In his oral submissions, Mr. Simeza argued, in the alternative that even assuming that the Applicants accepted the lower Court's decision, they would argue that the Respondent misapplied the ***Narcotic Drugs and Psychotropic Substances Act***⁽²⁾ in invoking its provisions which deals with drug related cases, when in this case, the matters related to theft of public funds called ***"economic plunder."*** He argued that there was clearly an error of law on the face of the record.

In reply to the Applicant's submissions on the first ground of appeal, Mr. Jalasi contended that the Judge in the Court below was on firm ground, when he held that there was no illegality on the seizure. He submitted that the use of the Seizure Notice referring to the Provisions of the Dangerous Drugs (Forfeiture of Property) Act⁽¹⁾ was an oversight

which is not fatal, but curable. For this submission, he referred us to a number of cases, among them, the case of ***Shilling Zinka vs The Attorney-General***⁽²⁾ in which this Court upheld the exercise of power by the President under Section 3(2) (c) and (e) of the ***Preservation of Public Security Act***⁽⁶⁾ because it was traceable to a legitimate source. It was Mr. Jalasi's argument that in this case, although a wrong titled Seizure Notice was used, one can legitimately trace the authority to Section 31 of the ***Narcotic Drugs and Psychotropic Substances Act***⁽²⁾ and Section 15 of the ***Prohibition and Prevention of Money Laundering Act***⁽⁵⁾.

In the alternative, Mr. Jalasi submitted that reference to a repealed law which is substantially retained in the re-enacted law is reference to the equivalent provision in the new law. For this submission, he referred us to Section 14(2) of the Interpretation and General Provisions Act ⁽⁷⁾ which states that::

“Where written law repeals and re-enacts with or without modification, any provision of a former written law or the constitution, references in any other written law to the provision so repealed shall be construed as references to the provisions so re-enacted”.

Mr. Jalasi pointed out, that the provisions of Section 24 and 25 of the repealed ***Dangerous Drugs (Forfeiture of Property) Act*** ⁽¹⁾ are almost

exactly the same as Section 31 of the **Narcotics Drugs and Psychotropic Substances Act.**⁽²⁾ Relying on Section 14 (2) of the Interpretation and General Provisions Act, he submitted that the two Sections should be construed as having been issued under the Provisions of the **Narcotic Drugs and Psychotropic Substances Act** and the Notice of Seizure was therefore still valid.

In his further submissions, Mr. Jalasi referred us to page 45 of the record of appeal, on which is exhibited a Search and Seizure Warrant, issued under Section 24 of the **Narcotic Drugs and Psychotropic Substances Act**, dated 24th July 2002. According to Mr. Jalasi, this Warrant reflected the intention at all times to issue the Seizure Notice under the **Narcotic Drugs and Psychotropic Substances Act** and not the repealed **Dangerous Drugs Act**. He contended that the Seizure Notice cannot be invalidated merely on ground of citing a repealed law, whose nature and form has been retained in substantial form, under a new law.

On the reference to the case of **Zinka vs Attorney-General** by the Respondent, Mr. Sangwa, for the Applicants, submitted that the case is distinguishable from this case because in the Zinka case, there was reference to an existing statute. He also pointed out that the Zinka case was with regard to a situation when the country was in a state of

emergency. According to Mr. Sangwa, the case cannot be relied upon to justify something which was clearly illegal on the face of it.

We have considered the Judgment of the Court below and the submissions of Counsel on the first ground of appeal. It is clear to us that the Notices of Seizure under which the property belonging to the Applicants was seized purport to have been issued under Sections 24 and 25 of the ***Dangerous Drugs (Forfeiture of Property) Act⁽¹⁾***. It is also clear to us that this piece of legislation was repealed by Section 49 of the ***Narcotic Drugs and Psychotropic Substances Act in 1993***. The question therefore, is whether by reference to an Act which was repealed, the seizure notices were invalid.

In our view, the case of ***Zinka vs Attorney-General*** is instructive. In that case, the President purportedly exercised a power under the ***Emergency Powers Act⁽⁵⁾*** which could validly be exercised under the ***Preservation of Public Security Act⁽⁶⁾***. We upheld that exercise of power because it was traceable to a legitimate source. In that case, we referred to a number of cases decided by the Supreme Court of India. One such case was the case of ***Hukum Chand Mill vs State of Madhya Pradesh⁽⁴⁾*** in which the Court stated inter alia that:

"It is well settled that merely a wrong reference to the power under which certain actions are taken by Government would

not per se vitiate the actions done if it can be justified under some other power under which the Government could lawfully do these acts."

We agree with this principle. In this respect therefore, it would not make any difference, whether the power is exercised in times of tranquility or when there is a state of emergency in force. What is cardinal is to show that the power can validly be exercised by the same public authority under another enactment. Mr. Sangwa has, however brought out another interesting argument; that in this case, the statute under which the power was purportedly exercised did not exist as it had been repealed. In our view, the guiding factor, would be whether, the provisions of the statute so repealed, have discarded the power altogether. If the effect of the repeal, is to resurrect the provisions in substantially the same form in another enactment, such new enactment would in our view, be a legitimate source of power.

The Notices of seizure in this case purport to have been issued under the ***Dangerous Drugs (Forfeiture of Property Act*** which was repealed.

Sections 24(1) of the repealed ***Dangerous Drugs (Forfeiture of Property) Act⁽¹⁾*** provided as follows:

"(1) Any movable property which an authorized police officer reasonably suspects to be the subject matter of an offence under this Act, or which has been used for the commission of that offence, or is illegal property, shall be liable to seizure."

Section 31 of the *Narcotic Drugs and Psychotropic Substances Act* provides:

" Any property which a drug enforcement officer or police officer reasonably suspects to be the subject-matter of any offence under this Act, or which has been used for the commission of that offence or illegal property shall be liable to seizure",

The two provisions are almost identical, save for the inclusion of a Drug Enforcement Officer who can also now exercise the power which could only be exercised by a Police Officer. It is clear to us from these provisions that the power to seize property suspected to be connected to an offence, has been retained by the *Narcotic Drugs and Psychotropic Substances Act*⁽¹⁾

Mr. Jalasi also submitted that reference to the repealed law was done inadvertently. He referred us to the **Search and Seizure Warrant**, a copy of which appears on page 45 of the record of appeal. This warrant

purports to have been issued under Section 24 of the **Narcotic Drugs and Psychotropic Substances Act** ⁽²⁾ on the same day that the Notices of seizure were issued, on 24th July, 2002.

According to Maxwell Simbowe, an Investigations Officer in the Drug Enforcement Commission, the deponent of the Respondents' affidavit in opposition, the property in question was seized during the execution of the warrant. Since the Warrant was issued under the **Narcotic Drugs and Psychotropic Substances Act**,⁽²⁾ we accept the Respondent's position that reference to a repealed law was done inadvertently.

Mr. Simeza argued, in the alternative, that the Respondent misapplied the law in that he invoked provisions which deal with drug related matters when in this case, the matters related to theft of public funds called '**economic plunder**'. On perusal of the record of appeal, we find that there was no pleading to that effect in the Notice of Application to apply for Judicial Review before the lower Court. The Appellant's position in the lower Court, was that the seizure was done outside the law.

From the foregoing, we find no merit in the first ground of appeal.

Coming to the second ground of appeal, Counsel for the Applicants referred us to the definition of **"Property"** in Section 2 of the *Narcotic Drugs and Psychotropic Substances Act* where **Property** is defined as **"any movable or immovable property and legal documents evidencing title to, or interest in, such property."**

Counsel also referred us to the definition of **'Money'** in the Oxford Reference Dictionary, where **"Money"** is defined as, **"the current medium of exchange in the form of coins and banknotes"**. It was Counsels' submission that the Respondent could not seize money/cash on the strength of a seizure notice meant for forfeiture of property. According to Mr. Simeza, even if he had to agree with the Court, seizure of money under the Act was illegal.

Mr. Jalasi, in reply referred us to, among others, the case of *Silas Chibwe vs The Attorney-General*⁽⁵⁾ in which the Court held that the expression 'Public Security' was inclusive and not exclusive. According to Mr. Jalasi, this case and others illustrate that, Courts, when interpreting provisions of statutes which define certain words tend to adopt an interpretation which is inclusive rather than exclusive.

We have considered the submissions of Counsel on the second ground of appeal. The Judge in the Court below observed that the use of the word **"any"** is used in a generic or extensive fashion, and is inclusive

of all property. According to Stroud's Judicial Dictionary, '**property**' is the generic term for all that a person had dominion over. The dictionary quotes Langdale MR in the case of Jones vs Skinner⁽⁶⁾ when he said

"property' is the most comprehensive of all terms which can be used, in as much as it is indicative and descriptive of every possible interest which a party can have."

Section 31 of the ***Narcotic Drugs and Psychotropic Substances Act*** refers to "**Any property...**". It is, our considered view that these terms cannot exclude money. Were it so, there would have been express provision to that effect. The Judge in the Court below was therefore on firm ground to have decided that the definition of '**property**' in the Act includes money. The second ground of appeal cannot also succeed.

On the third ground of appeal, Counsel for the Applicants submitted that the learned Judge misdirected himself by referring to extrinsic matters in drawing comparisons between the case at the bar and the post September 11 legislation in the United States of America intended to combat economic crime. According to Counsel, this clearly manifested what was going on in the Judge's mind so that he failed to objectively consider the matter before him and that he was clearly biased and considered the Applicants as economic terrorists and plunderers.

Mr. Jalasi's reply was that the Judge was at liberty to have recourse to the law of other jurisdictions and reference to such laws is not evidence of bias. According to Mr. Jalasi, these remarks were made "**obiter dictum**" and did not form the basis of the holding. Mr. Jalasi further submitted, relying on the case of *Shamwana and 7 Others vs The People*⁽⁷⁾ that the Judge made a finding, on the basis that it is settled in common law jurisdictions that Courts cannot be used to stop a criminal investigation, as this would be contrary to public interest.

In considering the third ground of appeal, we have looked at the context in which the learned Judge referred to the Post September 11 legislation in the United States of America. We find that he did so, after observing that Judges as "**princes of reason**" must not lightly gloss over the fact that we are in an electronic age where assets can easily be dissipated. The Judge observed that to hear an applicant before seizure, in the electronic world, could be counter productive. The Judge then went on to draw an analogy with the Post September 11 legislation in the United States of America where according to the Judge, when an account is frozen, it is the owner of the account, if he is absent from the United States who will explain the source of money and not his advocate.

We have noted that the Applicants had pleaded, in the Court below, that the seizure of their property and the freezing of the bank accounts was done without affording them an opportunity to be heard.

In our view, the plea for a right to be heard was one of the issues before the Judge, and therefore not an extraneous matter. It is prudent, for a Judge seized with a matter, to research extensively on the subject matter of a case so as to be enlightened on the issues involved. Such research cannot be limited to a Judge's own jurisdiction. While cases cannot be decided on the basis of foreign law, the legal situation prevailing in other jurisdictions is helpful to enable a Court to look at issues objectively, from a wider base. It would appear to us that the Judge referred to the Post September 11 Legislation in the United States in the context of the right to be heard before a seizure is effected. We do not find any evidence of bias on his part as a result of his reference to the Post September 11 Legislation. The third ground of appeal also fails.

On the fourth and last ground of appeal, Counsel submitted that nowhere, in the Applicants' Originating process, under the reliefs sought or in their oral submission, was it suggested that the Applicants wanted to arrest criminal investigations. According to Counsel, the Applicants were simply asking for the restoration of their properties and cash while the Respondent continued with investigations. Counsel submitted that the Applicants property is still under the custody of the Respondent and that the seizure should not be allowed to be indefinite as this amounts to an infringement of the Applicants' property rights.

Mr. Sangwa, in his oral submissions stated that there has been no demonstration as to the connection between the seized property and the purpose for which the seizure notice was issued. For this submission, he referred us to the Judgment of ***Lord Denning in the case of Chani vs Jonus*** ⁽⁸⁾ when he stated that to justify the taking of an article, when no man has been arrested or charged, five requisites must be satisfied. Among them are that the Police must have reasonable grounds to believe that the article in question is either the fruit of the crime or the instrument used to commit the crime or implicated in it and; the Police must not keep the article longer than is necessary.

In reply, Mr. Jalasi submitted that it is settled law in Zambia that civil proceedings cannot be used to arrest criminal investigations. He submitted further, that in the absence of malice, bad faith and unreasonableness, this Court has no jurisdiction to challenge the discretion of the investigating authority.

On the question of investigations having been too long, Mr. Jalasi submitted that this Court is restricted to what is on record and that Counsel's submission on this point amounts to giving evidence at the bar.

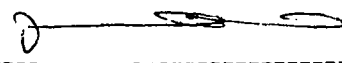
As we understand it, the fourth ground of appeal attacks the learned Judge's conclusion that there were no cogent reasons to arrest

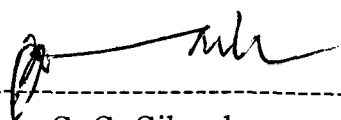
criminal investigations by the Respondent. The Respondent's position, according to his affidavit in opposition, was that the seizure of the goods and the freezing of accounts were carried out during the course of criminal investigations. Clearly, any Order to release the property would have an impact on the criminal investigations. We do not find that it was far fetched for the Judge to conclude, in these circumstances, that there was an attempt, through these civil proceedings, to arrest criminal investigations.

As to the submission that the investigations have gone beyond the statutory prescribed limit of six months, our view is that this is an issue which is not part of the record before us. It is open to the Applicants to move the High Court to seek appropriate reliefs over the same. The fourth ground of appeal also fails.

From the foregoing, we find the whole appeal to be without merit and it is dismissed. In the circumstances of this case, we also make no Order on costs.



E. L. Sakala
CHIEF JUDTICE

I. C. Mambilima
SUPREME COURT JUDGE

S. S. Silomba
SUPREME COURT JUDGE.