

**IN THE SUPREME COURT OF ZAMBIA**

**APPEAL NO. 169/2006**

**HOLDEN AT LUSAKA**

**(CIVIL JURISDICTION)**

**B E T W E E N:**

**ANTI-CORRUPTION COMMISSION**

**APPELLANT**

**AND**

**XAVIER FRANKLIN CHUNGU**

**RESPONDENT**

**CORAM: Sakala, C.J., Chitengi and Silomba, JJS.**

**On 23<sup>rd</sup> October 2007 and 14<sup>th</sup> May 2008**

For the Appellant : Mr. S.S. Zulu of Zulu and Company  
For the Respondent : Mr. N. Chanda of Nicholas Chanda  
and Company

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**J U D G M E N T**

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Sakala, C.J., delivered the Judgment of the Court.

**Cases referred to:**

1. ***C & S LTD and 2 others Vs Attorney-General [2004]ZR216***
2. ***Zinka V the Attorney-General [1990-1992] ZR73***
3. ***Hakum Chad Mills V. State of Madhya Pradesh [1964] AIR S.C.1329***
4. ***Duly Motors (Z) Ltd Vs. Charity Namwela Mbando Appeal No. 216 of 2000***

5. ***Hopfe V. Canadian Pacific Railway Company [1922] 1 WLR 419***

This is an appeal against the Ruling of the High Court on Review dated 31<sup>st</sup> March, 2006, refusing and dismissing the Application for Review with costs.

The facts leading to this appeal are that on 28<sup>th</sup> February 2003, the Director-General of the Anti-Corruption Commission, published in the *Zambian Gazette* that the recovered property No. F/488a/8/B/2, Whitewood Lane, Kabulonga, Lusaka, the property of X.F. Chungu, recovered during the course of investigations into a suspected offence under **the Anti-Corruption Commission Act, No. 42 of 1996**, shall be forfeited to the State if not claimed within three months of publication of the notice in the *Gazette*.

On 6<sup>th</sup> March, 2003, Messrs Nicholas Chanda and Associates, on behalf of X.F. Chungu, wrote to the Director-General of the Anti-Corruption Commission challenging the *Gazette Notice*. On 24<sup>th</sup> April, 2003, X.F. Chungu commenced proceedings in the High Court by an Originating Summons, challenging the *Gazette Notice*. He sought the following reliefs:

- (a) A declaration that the Applicant is the rightful, legitimate and legal owner of the property situated at and known as

property No. F488a/8/B/2, Whitewood Lane, Kabulonga, Lusaka; and

- (b) An Order reversing the Notices issued by the Director-General of the Respondent, the Anti-Corruption Commission, for the forfeiture of the said properties to the State and the same Notices to be declared null and void and of no legal effect for the purposes and intent.

The Originating Summons was supported by an affidavit. The Court, later, ruled that due to the nature of the reliefs being sought, the matter be deemed to have been commenced by way of a Writ of Summons and Orders for directions were given.

However, sometime in September 2004, the Anti-Corruption Commission, before commencement of the main action, applied to enter judgment in favour of the State pursuant to **Regulation 3 (i) (a),(b),(c) and(d) of Statutory Instrument No. 58 of 2004** on the ground that X.F Chungu had fled the Country to evade the consequences of an investigation.

The application was supported by an affidavit; and there was an affidavit in opposition. The Court, after hearing arguments on the application, dismissed the application to enter Judgment by the Anti-Corruption Commission on the ground that **Statutory Instrument No. 194 of 1986**, under which the property had been recovered had been repealed; and that the application to enter

judgment was made under a wrong Statutory Instrument. Following upon the dismissal of the application to enter Judgment, Counsel for the Appellant applied for an Order to review the Ruling of 30<sup>th</sup> November, 2004 that dismissed the application to enter judgment.

The application for the Review of the Ruling of 30<sup>th</sup> November, 2004, was supported by an affidavit. There was no affidavit in opposition. Paragraphs 4 to 7 of the affidavit in support of summons for the application for Review read as follows:

- “4. That on 30<sup>th</sup> November 2004, the Honourable Court delivered a ruling on the application by the Defendant for entry of Judgment pursuant to Statutory Instrument No. 58 of 2004 of the Anti-Corruption Commission Act.***
  
  - 5 That in that ruling the Honourable Court ruled that it could not grant the application as the property to which it related were seized in the year 2003 and therefore a Statutory Instrument of 2004 could not be relied upon as its provisions were non existent in 2003.***
  
  - 6. That the Honourable Court should not have refused to grant the application on the ground that Statutory Instrument No. 58 of 2004 did not apply to***
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*property seized in 2003 before it came into force as the Statutory Instrument in force in 2003 and Statutory Instrument No. 194 of 1986 are word for word the same. Now shown to me and marked "NN1" and "NN2" are the said Statutory Instruments.*

- 7. That Statutory Instrument No. 58 of 2004 was relied upon because it is the same with the previous Statutory Instrument and is the more current law."**

The Court considered the affidavit evidence and held that it was quite misleading to argue that **Statutory Instrument No. 58 of 2004** was word for word with **Statutory Instrument No. 194 of 1986** because; firstly: the titles of the two Statutory Instruments, although similar, are not word for word the same. Secondly; **Statutory Instrument No. 58 of 2004** refers, in the body, to "the Director-General;" while **Statutory Instrument No. 194 of 1986** refers to "the Commission". The Court also noted that under **Statutory Instrument No. 58 of 2004** in **Regulation 3 (3)**, there is a new paragraph (d) which includes "a limited company", not included in **Regulation 3 (3) of Statutory Instrument No. 194 of 1986**.

The Court further pointed out, without specifying, that there were many other variations in the words used; that it cannot be said that the two Statutory Instruments are word for word the same; that if they were the same, why did the Appellant not make

the same application under the repealed Statutory Instrument under which the property was seized? The Court then stated as follows:

***“The Court wishes to repeat the grounds contained in the Ruling of which the Court disallowed the application”.***

The Court dismissed the application for Review with costs and as one lacking merits. Hence the appeal to this Court.

The Appellant filed a memorandum of appeal containing two grounds; namely:

1. that the learned trial Judge was wrong at law by finding, on an application for Review of his earlier Ruling of 30<sup>th</sup> November, 2004, that the **Anti-Corruption Commission (Disposal of Recovered Property) Regulations, Statutory Instrument No. 58 of 2004**, cannot be invoked to enter judgment for seizures of property in 2003 under the **Corrupt Practices (Disposal of Recovered Property) Regulations, 1986, Statutory Instrument No. 194 of 1986**; and
2. that the learned trial Judge misdirected himself by finding that the provisions of **Statutory Instrument No. 194 of 1986** which were repealed were not re-enacted by **Statutory Instrument No. 58 of 2004** and by refusing

to apply **Section 14 (2) of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia.**

In the written heads of argument, the Appellant advanced arguments on ground one only; but indicated that the arguments on ground one also covered the arguments on ground two.

The gist of the written heads of argument on ground one, which also cover ground two, is that the issue raised in the ground was fully dealt with in the case of **C & S LTD and 2 others Vs Attorney-General<sup>(1)</sup>**; that although **Statutory Instrument No. 194 of 1986** was repealed by **Section 64 of the Anti-Corruption Commission Act No. 42 of 1996**, which repealed the **Corrupt Practices Act of 1980**, the same Regulations were re-enacted with some modifications by **Statutory Instrument No. 58 of 2004**; and that **Regulation 3 (1) of Statutory Instrument No. 194 of 1986** is a similar **Regulation 3 (1) of Statutory Instrument No. 58 of 2004**.

It was submitted that it was clear that the power to vest recovered property in the State had been retained by **Statutory Instrument No.58 of 2004**; and that the question was whether by reference to an Act which was repealed, the seizures notices were invalid. The case of **Zinka V the Attorney-General<sup>(2)</sup>** and the Indian case of **Hakum Chad Mills V. State of Madhya Pradesh<sup>(3)</sup>** were cited for the proposition that the exercise of the power under

the Repealed Act could validly be exercised under the re-enacted legislation because the exercise of such power was traceable to a legitimate source. Also relied on was **Section 14(2) of Cap. 2 of the Interpretation and General Provisions Act** which provides that where a 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 provisions so repealed should be construed as references to the provisions so re-enacted.

Also relied upon was **Section 15 of Cap. 2** which provides that where any Act, applied Act or Ordinance or part thereof is repealed, any Statutory Instrument issued under or made in virtue thereof shall remain in force, so far as it is not inconsistent with the repealing written law, until it has been repealed by a Statutory Instrument issued or made under the provisions of such repealing written law; and shall be deemed for all purposes to have been made there under.

It was submitted that the trial Judge was wrong at law to refuse to enter judgment for the Appellant on the ground that a wrong Statutory Instrument was cited.

In the brief oral submissions, Mr. Zulu, SC, on behalf of the Appellant, repeated the written heads of argument and pointed out that the matter was straight forward; the issue being whether property recovered in 2003 under a Statutory Instrument then in



existence which Statutory Instrument and the enabling Act were repealed and reenacted in 2004 may be forfeited to the State.

The gist of the written response to the written heads of argument on ground one is that the trial Judge was on firm ground by finding that the **Anti-Corruption Commission (Disposal of Recovered Property) Regulations, Statutory Instrument No. 58 of 2004** could not be invoked to enter judgment for seizures in 2003 under the **Corrupt Practices (Disposal of Recovered Property) Regulations 1986, Statutory Instrument No. 194 of 1986**; that the question for the determination of the Court is whether the **Anti-Corruption Commission (Disposal of Recovered Property) Regulations, Statutory Instrument No. 58 of 2004** can be invoked to enter Judgment for seizures of 2003?

It was pointed out that the seizure of 2003 was done under Regulations then in force: it was argued that the present Regulations under **Statutory Instrument No. 58 of 2004** were at the time non existent; and that our laws, including Statutory Instruments, have no retrospective effect. **Section 19 (1) (a)(b) of the Interpretation and General Provisions Act, Cap.2 of the Laws of Zambia** which provides for the date of commencement of a **Statutory Instrument** and when it comes into force was cited in support of these arguments.

It was contended that the **Statutory Instrument** under which the application was made could not be backdated to the seizure of

2<sup>nd</sup> February 2003; that **Statutory Instrument No. 58 of 2004** is only applicable to seizures which have been made since its publication. The case of **Duly Motors (Z) Ltd Vs. Charity Namwela Mbandu**<sup>(4)</sup> was cited for the proposition that *“as a general rule, legislation does not have retrospective effect unless specifically provided”* The English case of **Hopfe V. Canadian Pacific Railway Company**<sup>(5)</sup> where it was held that *“It is a general rule that where statute is passed altering the substantive law it applies to a state of facts coming into force after the Act, unless the language of the Act is expressly to the contrary”*, was also cited in support.

It was submitted that the trial Judge was on firm ground when he held that *“The application was definitely made under a wrong Statutory Instrument as such it cannot be sustained”*.

The brief written response to ground two of appeal is that the Statutory Instruments had some very fundamental differences in that the **1986 Statutory Instrument** refers to “Commission”; while the **2004 Statutory Instrument** makes reference to “Director-General”; that under **Statutory Instrument of 2004, paragraph (b) in Regulation 3 (2)** has been removed; that a limited company is added under **Regulation 3 (3)(d)** which did not exist in previous Regulations.

It was submitted that the instant case falls outside the ambit of **Section 14(2) of the Interpretation and General Provisions**

**Act**, which deals with **references in any other written law** and does not authorize the use of a piece of legislation that has been repealed and amended in material respects.

In his oral response, Mr. Chanda, on behalf of the Respondent, briefly repeated the written responses.

We have considered the Ruling of the trial Judge appealed against and the arguments of both learned Counsel. On the facts, already cited and which are not in dispute, we accept that the question which was for the determination of the trial Court and which is also for determination in this appeal is whether **Statutory Instrument No. 58 of 2004** can be invoked to enter Judgment for the seizures of 2003; which were made under the repealed **Statutory Instrument No. 194 of 1986**.

We have deliberately reviewed the arguments in some detail. But on account of the view we take of this appeal, we do not propose to discuss the arguments any further. The various provisions of the **Interpretation and General Provisions Act** cited are not in controversy and are self-explanatory.

It was common cause that **Statutory Instrument No.194 of 1986**, under which the seizures were made, was repealed and that the application to vest the property in the State was made under **Statutory Instrument No. 58 of 2004**.

The trial Judge held that **Statutory Instrument No. 58 of 2004** could not be invoked to enter Judgment for seizures of 2003 because **Statutory Instrument No. 58 of 2004** was not in existence at the time of the seizures and because our laws including **Statutory Instruments** have no retrospective effect. The trial Judge concluded that the application to enter judgment was made under a wrong **Statutory Instrument**. In our view, this was a misdirection. The seizures of 2003 still remained lawful despite the repeal of **Statutory Instrument No. 194 of 1986**. The issue at the material time was the disposal of recovered property. The relevant law then was **Statutory Instrument No. 58 of 2004**.

The application by the Appellant to enter Judgment in favour of the State was made under **Regulation 3 (1) (a)(b)(c ) and (d) of Statutory Instrument No. 58 of 2004** which reads:

*“Any recovered property which comes into the possession of the Anti-Corruption Commission shall, subject to the other provisions of these Regulations, vest in the State if such recovered property cannot be returned because –*

*(a) the rightful owner who is the subject of an investigation in respect of an offence alleged or suspected to have been committed under the Act, has left Zambia for the purpose or apparent purpose, of evading the consequences of such investigation or of*

*the trial of a prosecution brought against that person;*

- (b) the rightful owner or the person in possession thereof absconds;*
- (c) the rightful owner cannot be traced or ascertained;  
or*
- (d) the person in possession thereof admits involvement in the alleged corrupt act and agrees to the surrender of such recovered property to the Commission because of such involvement”.*

These provisions need no elaboration. Above all, the case for the Appellant was that the Respondent was on the run. Paragraphs 6 and 7 of the affidavit in support of summons to enter Judgment pursuant to **Statutory Instrument No. 58 of 2004** of the **Anti-Corruption Commission Act No. 42 of 1996** stated as follows:

- “6. That it is a notorious fact that the Plaintiff has since run away from the country for the sole purpose of evading the consequences of the investigations against him and as a result sub regulations 3 (1)(a)(b)(c) and (d) apply to him.*

**7. That to this date the Plaintiffs whereabouts are still unknown as he is on the run.”**

These paragraphs were merely denied in the affidavit in opposition.

**Regulation 3 (2) (a)(b)** sets out what has to be done before the recovered property can vest in the State, namely: three months notice to be given and the property remaining unclaimed for three months. It was common cause that notice was given. We have examined **Regulation 3 of Statutory Instrument No. 58 of 2004**. With the exception of the addition of “Anti-Corruption Commission” in 3 (1) and the addition of (d) in 3 (3) which introduces “a limited company”; the Regulation is similar and word for word as the repealed **Regulation 3 of Statutory Instrument No. 194 of 1986**. We find no fundamental differences.

The case for the Appellant was that it was clear that the power to vest recovered property in the State had been retained by **Statutory Instrument No. 58 of 2004**. We agree with this contention.

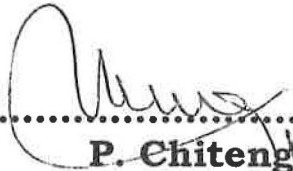
Our understanding of the repealed and re-enacted legislation is that forfeiture of the recovered property is automatic once the State has met the requirements as set out in the reenacted legislation cited above.

In our view, the application to enter Judgment was not made under a wrong **Statutory Instrument**. On the facts and the law, the application to enter Judgment was unnecessary and superfluous.

In conclusion, therefore, the Ruling of the trial Judge dated 31<sup>st</sup> March, 2004 refusing an application for Review of his Ruling of 30<sup>th</sup> November, 2004 and the Ruling of 30<sup>th</sup> November itself are set aside. The appeal stands allowed with costs to be taxed in default of agreement.



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**E.L. Sakala**  
**CHIEF JUSTICE**



.....  
**P. Chitengi**  
**SUPREME COURT JUDGE**



.....  
**S.S. Silomba**  
**SUPREME COURT JUDGE**