

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

Appeal No. 145/2023

BETWEEN:

STARDY MWALE

APPELLANT

AND

THE ANTI-CORRUPTION COMMISSION

RESPONDENT



CORAM: Mchenga, DJP, Muzenga and Chembe, JJA
On 30th April 2024 and 22nd July 2024

For the Appellant: No appearance

For the Respondent: Ms. G. M. Muyunda, Assistant Director Legal &
Ms. C. M. Nalwenga, Legal and Prosecutions Officer,
Anti-Corruption Commission

J U D G M E N T

MUZENGA JA delivered the Judgment of the Court.

Cases referred to:

- 1. Wang Shunxe v. Attorney General and Wang Quighai – 2021/CCZ/003**
- 2. Nachanga Transport v. The Director of Public Prosecutions – CAZ Appeal No. 252 of 2020**

3. **National Director of Public Prosecutions v. Pro. Cook Properties (Pty) Limited and 37 Gillensie Street Durban (Pty) Limited and Boule Saad Nominees (Pty) Limited (2004) 8 BCLR 844**
4. **BP (Z) Plc v. Interland Motors (2001) ZR 37**
5. **Kelvin Hang'andu & Company (a Firm) v. Webby Mulubisha (2008) 2 ZR 82**
6. **Anuj Kumar Rathi Krishna v. The People – SCZ Judgment No. 19 of 2011**
7. **The Director of Asset Recovery and Others v Green and Others (2005) EWHC 3168**
8. **Asset Recovery Agency v. Joseph Wanjohi & Others – ACEC Application No. 7 of 2019**
9. **Shoprite Holdings Limited and Another v. Lewis Chisanga Mosho and Another – SCZ Appeal No. 86 of 2013**
10. **Sydney Mwansa v. The Director of Public Prosecutions – CAZ Appeal No. 276 of 2021**

Legislation referred to:

1. **The Forfeiture of Proceeds of Crime Act, No. 19 of 2010.**
2. **The Anti-Corruption Act, No. 3 of 2012.**
3. **The High Court Act, Chapter 27 of the Laws of Zambia.**
4. **The Criminal Procedure Code, Chapter 88 of the Laws of Zambia**

1.0 INTRODUCTION

- 1.1 This is an appeal against the Divisional Court of the High Court Ruling dated 1st March 2023 presided by Mr. Justice Musona, Mr. Justice C. Zulu and Lady Justice Wanjelani.

2.0 BACKGROUND

2.1 The background to this appeal is that the respondent commenced civil forfeiture proceedings on 3rd October 2022 against the appellant pursuant to **Sections 29 and 31 of the Forfeiture of Proceeds of Crime Act** and **Section 19(1) of the Anti-Corruption Act** as read together with **Order 30 Rules 15 and 17 of the High Court Act**.

2.2 The appellant filed a motion to raise preliminary issue on points of law on 7th February 2023 for determination of the following issues:

- 1. Whether the applicant in the substantive matter was a public prosecutor as contemplated by Section 29 of the Forfeiture of Proceeds of Crime Act No. 19 of 2010.**
- 2. Whether the action does not amount to forum shopping, multiplicity of actions and an abuse of court process on the part of the applicant, and**
- 3. Whether the application for forfeiture was competently before the court in view of the fact that there is no proof that the property targeted for forfeiture is tainted.**

2.3 The respondent opposed the preliminary objection.

3.0 DECISION OF THE LOWER COURT

3.1 After considering the preliminary objection, the trial court found that the Anti-Corruption Commission was a public prosecutor.

- 3.2 It further held that civil forfeiture proceedings are non-conviction based and as such not tied to any subsisting or existing criminal proceedings and that the same can run parallel.
- 3.3 The court below declined to ascertain or consider the 3rd issue as doing so would compromise or prejudice proceedings before it as it was an issue to be determined by it after full hearing.

4.0 GROUNDS OF APPEAL

- 4.1 Disconsolate with the decision of the lower court, the appellant appeals to this Court on the following grounds:
- i. That the court below erred in law and fact when it held that the Anti-Corruption Commission is a public prosecutor;**
 - ii. That the court below erred in law and in fact when it held that discussing whether or not the property targeted for forfeiture is tainted would be delving into the merits of the case;**
 - iii. That the court below erred in law and fact when it held the substantive matter does not amount to forum shopping, multiplicity of action and abuse of court process because non-conviction based forfeiture proceedings are distinct from criminal proceedings and that the applicant is not a party to the criminal proceedings; and**
 - iv. That the court below erred in law and fact when it ordered costs in favour of the respondents.**

5.0 APPELLANT'S ARGUMENTS

5.1 In support of ground one, learned counsel submitted that the court below erred when it held that the Anti-Corruption Commission (hereinafter referred to as "**ACC**") was a public prosecutor. It was learned counsel's contention that according to **Section 29** of the **Forfeiture of Proceeds of Crime Act** (hereinafter referred to as "**the Act**") only a public prosecutor can commence civil forfeiture proceedings and that according to **Section 2 of the Act**, public prosecutor has meaning assigned to it in the **Criminal Procedure Code** (hereinafter referred to as "**the CPC**").

5.2 Learned counsel referred us to **Section 2 of the CPC** which defines a public prosecutor as:

".....any person appointed under the provisions of section eighty-six and includes the Attorney-General, the Solicitor-General, the Director of Public Prosecutions, a State Advocate and any practitioner as defined in the Legal Practitioners Act appearing on behalf of the People in any criminal proceedings;"

5.3 Counsel proceeded to refer us to **Section 86 of the CPC** which provides that:

"86. (1) The Director of Public Prosecutions may appoint generally, or in any case, or for any

specified class of cases, in any district, one or more officers to be called public prosecutors.

- (2) The Director of Public Prosecutions may appoint any person employed in the public service to be a public prosecutor for the purposes of any proceedings instituted on behalf of the People.**
- (3) Every public prosecutor shall be subject to the express directions of the Director of Public Prosecutions."**

5.4 According to counsel, for a person to be properly referred to as a public prosecutor, he or she must be appointed pursuant to **Section 86 of the CPC** or must be a legal practitioner. Counsel argued that the respondent is created by **Section 4 of the Anti-Corruption Act** as a body corporate cannot be a prosecutor in terms of **Section 2 and 86 of the CPC**.

5.5 Learned counsel referred us to **Article 180 of the Constitution** and the case of **Wang Shunxe v. Attorney General and Wang Quighai¹** in concluding that the Director of Public Prosecutions (hereinafter referred to as the "**DPP**") enjoys the monopoly of exercising prosecutorial powers in Zambia and any other person can only do so with the Authority of the DPP. Counsel urged us to reverse

the finding by the court below and hold the respondent not to be a public prosecutor.

- 5.6 In support of ground two, learned counsel for the appellant contended that the court below erred in law and in fact when it held that discussing whether or not the property targeted for forfeiture is tainted would be delving into the merits of the case. Counsel referred us to **Section 29** of the **Act**, the definition of tainted property and a number of authorities, including the case of **Nachanga Transport v. The Director of Public Prosecutions**² and **National Director of Public Prosecutions v. Pro. Cook Properties (Pty) Limited and 37 Gillensie Street Durban (Pty) Limited and Boule Saad Nominees (Pty) Limited**³ among others, in arguing that in order for property to fall within the definition of tainted property, the public prosecutor must come up with evidence of the commission of a serious offence or that the property is a proceed of crime. Counsel submitted that the respondent had not shown that Farm No. 132a is a tainted property.
- 5.7 It was learned counsel's contention that the question as to whether the property was tainted or not was one of law and the lower court

could have determined without delving in the merits of the matter. We were urged to reverse the finding of the lower court subject of ground two.

- 5.8 In support of ground three, learned counsel submitted that the court below erred in law and fact when it held that the substantive matter does not amount to forum shopping, multiplicity of action and abuse of court process because non-conviction based forfeiture proceedings are distinct from criminal proceedings and that the applicant is not a party to the criminal proceedings.
- 5.9 It was counsel's argument that in our jurisdiction forum shopping is frowned upon and that parties to a dispute are not allowed to present their grievances in piecemeal fashion as that amounts to abuse of court process. Reliance for this argument was placed on the cases of **BP (Z) Plc v. Interland Motors**⁴ and the case of **Kelvin Hang'andu & Company (a Firm) v. Webby Mulubisha**.⁵ Counsel argued that the conduct of the respondent of commencing civil and criminal proceedings against the appellant on the same facts amounted to forum shopping and abuse of the court process which exposes the

entire judiciary to embarrassment as there would be a possibility of conflicting decisions. We were urged to allow the appeal.

5.10 In support of ground four, learned counsel contended that the court below erred in law and fact when it ordered costs in favour of the respondents and that it should not have done so.

6.0 RESPONDENT'S ARGUMENTS

6.1 In responding to ground one, learned counsel for the respondent argued that **Section 86** of the **CPC** confers discretion on the DPP to appoint any person as a public prosecutor. It was learned counsel's further argument that the words "**any person**" entails that the provision is not limited to natural persons but include body corporates like the respondent.

6.2 Learned counsel drew our attention to **Section 6 of the Anti-Corruption Act** which spells out the functions of the respondent and concluded that the respondent has prosecutorial powers. It was argued further that in any case, the respondent obtained consent to prosecute the appellant for corrupt practices in a matter pending in the Subordinate Court and that this was reflective of authorisation by the

DPP. Counsel concluded by stating that the respondent was a public prosecutor and that this ground be dismissed.

6.3 In respect to ground two, learned counsel for the respondent submitted that the court below was on firm ground when it refused to determine whether or not the property in question was tainted property as doing so would be delving into the merits of the case. We were referred to the case **Anuj Kumar Rathi Krishna v. The People**⁶ where the Supreme court stated that:

"We are reluctant to go into the merits of the main appeal and we would rather concentrate on the merits of the appeal before us. We hold the view, that it will be prejudicial to both parties if we delve into the merits of the grounds of appeal filed in support of the main appeal."

6.4 Learned counsel drew our attention to **Section 29** of the **Act** in arguing that the property to be forfeited must be tainted and this can only be shown or proved during the hearing of the matter. It was argued that a determination of whether the property is tainted goes to merits of the case and could not be determined at that stage. In support of this argument, we were referred to a number of cases including the **Nachanga Transport** case *supra* and the case of **The**

Director of Asset Recovery and Others v Green and Others⁷.

We were urged to dismiss ground two for want of merit.

- 6.5 In responding to ground three, learned counsel submitted that the court below was on firm ground it held that this action did not amount to forum shopping. It was argued that non-conviction based forfeiture proceedings are distinct from and not dependent on criminal proceedings. Our attention was drawn to **Section 31 of the Act** which provides, in part, that:

"31. (1) Subject to subsection (2), where a public prosecutor applies to the court for an order under this section and the court is satisfied on a balance of probabilities that the property is tainted property, the court may order that the property, or such of the property as is specified by the court in the order, be forfeited to the State.

(4) The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated."(Emphasis theirs)

- 6.6 Learned counsel argued that the outcome of proceedings in this cause will not affect the outcome of criminal proceeding or vice versa because the two are separate. Reliance for this argument was placed

on the cases of **Asset Recovery Agency v. Joseph Wanjohi & Others⁸** and **Shoprite Holdings Limited and Another v. Lewis Chisanga Mosho and Another⁹**, among others cases.

- 6.7 In response to ground four, counsel argued that the lower court was on firm ground when it awarded costs to the respondent as that was in the discretion of the court. Reliance was placed on **Order 40 Rule 6 of the High Court Rules Chapter 27 of the Laws of Zambia**. We were urged to dismiss ground four of the appeal.

7.0 THE HEARING

- 7.1 At the hearing of the appeal learned counsel for the appellant was not before court. Learned counsel for the respondent placed reliance on their arguments and briefly augmented.

8.0 DECISION OF THE COURT

- 8.1 We have carefully considered the record and the arguments by the parties. We shall consider the grounds of appeal in the order in which they were argued.
- 8.2 The issue in ground one is whether the respondent is a public prosecutor for purposes of taking out forfeiture proceedings. Learned counsel for the appellant argued that for a person to be properly

referred to as a public prosecutor, he or she must be appointed pursuant to **Section 86 of the CPC** or must be a legal practitioner. Counsel argued further that the respondent is created by **Section 4 of the Act** as a body corporate and cannot be a prosecutor in terms of **Section 2 and 86 of the CPC**. Learned counsel for the respondent argued in opposition that that **Section 86** of the **CPC** confers discretion on the DPP to appoint any person as a public prosecutor. It was learned counsel's further argument that the words "**any person**" entails that the provision is not limited to natural persons but include body corporates like the respondent.

8.3 It well settled that the DPP wields prosecutorial powers in this jurisdiction and is not subject to direction by any person or authority. Therefore, all prosecution is done for and on behalf of the DPP or under his or her authority. In *casu*, the respondent is conferred with prosecutorial powers in **Section 6 of the Anti-Corruption Act**, subject to the direction of the DPP. It must be noted that respondent is a public body created as a body corporate in **Section 4** of the **Anti-Corruption Act**. Therefore, in the absence of any evidence to the effect that the DPP has issued directives to the respondent not to

prosecute any matters, we have no hesitation in holding that the respondent is a public prosecutor for purposes of taking out proceedings under the **Act** and carrying out prosecutions of matters under its mandate. Therefore, it can properly be referred to as a public prosecutor within the sphere of **Section 2 and 86 of the CPC**. In the premises, we find ground one to be without merit.

8.4 In support of ground two, learned counsel for appellant submitted that the court below erred in law and in fact when it held that discussing whether or not the property targeted for forfeiture is tainted would be delving into the merits of the case. On behalf of the respondent, learned counsel submitted that the court below was on firm ground when it refused to determine whether or not the property in question was tainted property as doing so would be delving into the merits of the case.

8.5 We recently stated in the case of **Sydney Mwansa v. The Director of Public Prosecutions**¹⁰ in **paragraph 7.4** that:

“Therefore, a forfeiture of tainted properties will not be made unless the offence in issue is a serious offence. It does not matter whether a person has sufficient resources to enable him or her acquire such properties. The issue is whether the property is tainted in connection to a serious offence. It may be possible that a person

may have the means to procure the property in issue due to their current resources but still involve themselves in criminal activities, the proceeds of which they use to procure wholly or partially some properties. Those properties can be a subject of forfeiture, notwithstanding."

8.6 Therefore, whether or not the property subject of forfeiture proceedings is tainted cannot be determined at interlocutory stage. It cannot only be considered after the court has received all the evidence, analysed the same, made findings and reached a verdict. The learned trial court can thus not be faulted in holding as it did. On this score, we agree with learned counsel for the respondent that this ground equally, lacks merit.

8.7 Turning to ground three, learned counsel for the appellant submitted that the court below erred in law and fact when it held that the substantive matter does not amount to forum shopping, multiplicity of action and abuse of court process. It was agued further that in our jurisdiction forum shopping is frowned upon and that parties to a dispute are not allowed to present their grievances in piecemeal as that amounts to abuse of court process. In opposing ground three, learned counsel submitted that the court below was on firm ground

when it held that this action did not amount to forum shopping. It was argued further that non-conviction based forfeiture proceedings are distinct from and not dependent on criminal proceedings.

8.8 We stated in the **Sydney Mwansa** case *supra* in **paragraph 7.3** that:

"The focus is now not only to punish the perpetrators of various criminal activities, but to also go for properties which are tainted, that is properties in connection with or used in or in connection with the commission of the offences. In short taking away the joy or motivation for committing these offences by going after the properties. That is the spirit and intent behind the enactment of the forfeiture law. Having stated the foregoing, we now revert to consider the grounds of appeal."

8.9 Therefore, according to the **Act**, the State is at liberty to choose the forms or methods for ensuring the ends of justice are met. There is no restriction in the Act on the choice by the State to charge a person with a criminal offence and also proceed by way of civil forfeiture proceedings. This is clearly contemplated in **Section 31(4)** of the Act as it provides that a civil forfeiture order is not affected by the outcome of criminal proceedings. The two options are mutually exclusive and the decision in one, cannot affect the decision in the other. It is therefore possible that a person charged with a criminal offence may be acquitted in the criminal matter but his or her properties forfeited

in civil forfeiture proceedings. The learned court below was on firm ground, as civil forfeiture is not fettered or dependent on the outcome of criminal proceedings, if any. The two can run concurrently.

8.10 We therefore do not agree that it amounts to abuse of court process for the State to choose to pursue civil forfeiture as well as a criminal offence arising from or connected to the acquisition of the property. Ground three must also fail.

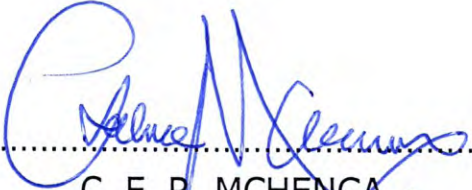
8.11 In the last ground, learned counsel takes issue with the costs Order made by the lower court. As correctly argued by learned counsel for the respondent, costs are awarded at the discretion of the court. In this case, the lower court after dismissing the appellant's preliminary objection, awarded costs to the respondent. The trial court was perfectly entitled to make the Order as to costs.

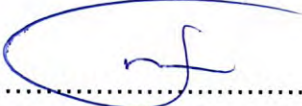
8.12 However, because of the pertinent and novel issues raised by this appeal, we order that each party bears their costs in the court below and in this court relating to the Ruling subject of this appeal.

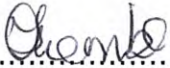
9.0 CONCLUSION

9.1 Having found no merit in all the grounds of appeal, we dismiss the appeal.

9.2 We order each party to bear their own cost in the court below and in this court relating to the Ruling subject of this appeal.


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C. F. R. MCHENGA
DEPUTY JUDGE PRESIDENT


.....
K. MUZENGA
COURT OF APPEAL JUDGE


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Y. CHEMBE
COURT OF APPEAL JUDGE