

**IN THE COURT OF APPEAL OF ZAMBIA CAZ/08/298/2024
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

**IN THE MATTER OF: SECTIONS 29, 30 & 31 OF THE
FORFEITURE OF PROCEEDS OF
CRIME ACT NUMBER 19 OF 20110**

**IN THE MATTER OF: SECTIONS 71 OF THE FORFEITURE
OF PROCEEDS OF CRIME ACT
NUMBER 19 OF 2010**

**IN THE MATTER OF: SECTION 7 OF THE PROHIBITION
AND PREVENTION OF MONEY
LAUNDERING ACT NO.14 OF 2001 AS
READ WITH AMENDMENT ACT NO. 4
OF 2010**

AND

**IN RE PROPERTY: PROPERTY NO. 9334/1, 9334/2,
9334/3 AND 9334/4 CONTAINING 15
DOUBLE STOREY FLATS IN STATE
LODGE.**

BETWEEN:

ESTHER NYAWA TEMBO LUNGU

APPLICANT

AND

**THE DIRECTOR OF
PUBLIC PROSECUTIONS**

RESPONDENT



Before: Madam Justice C.K. Makungu in Chambers

For the applicant: Mrs. D. Findlay with Mr. C. Chongo & Mr. B. Chipopo of D.

Findlay & Associates

For the respondent: No appearance.

RULING

Cases referred to:

1. *Alex Lawrie Factors Limited v. Morgan (1999) Lexis Citation 1336*

2. *Intelligent Mobility Solutions v. Lamise Trading Limited – CAZ Appeal No. 214 of 2022*
3. *Emeka v. Chuba-Ikpeazu (2017) 15 NWLR Pt. 1589 P.354*
4. *Smith v. Cosworth Casting Processes Limited (Practice Note) (1977) 4 All ER 840*
5. *Attorney General of Hong Kong v. NG Yuen Shui (1983) HK LR 211*
6. *In Re H (Minors) (1996) AC 563*
7. *Bidvest Food Zambia Limited & Others v. CAA Import and Export Limited – SCZ No.56 of 2017*
8. *Director of Public Prosecutions v. Property No. L/9390/M and Chiyesu Lungu 2023/HPEF/26*
9. *Twampane Mining Cooperative Society Limited v. E and M Storti Mining Limited (2011) ZMSC 20*
10. *Raman v. Ngwira – SCZ Appeal No. 163/2015*
11. *Breen v. Amalgamated Engineering Union (1971) 1 ALL ER 1148*
12. *Kalunga Chansa v. Evelyn Hone College – CAZ Appeal No. 134 of 2019*
13. *Ridge v. Baldwin (1964) AC 179*
14. *Buckle v. Holmes (1926) 2 KB 125 at page 127*

Legislation referred to:

1. *The Supreme Court Rules of England 1999 edition (White Book)*
2. *The Forfeiture of Proceeds of Crime Act No. 19 of 2012*
3. *The Court of Appeal Act No. 7 of 2016*
4. *The High Court Act Chapter 27 of the Laws of Zambia*

1.0 INTRODUCTION

- 1.1 This is a renewed application for leave to appeal against the ruling of the High Court dated 20th May 2024.

2.0 BACKGROUND

- 2.1 On 13th June 2023, the respondent initiated Cause Number 2023/HPEF/23 a non-conviction forfeiture action in the High Court – Economic and Financial Crimes Division by way of Originating Notice of Motion pursuant to **sections 29 and 31 of the Forfeiture of Proceeds of Crimes Act No. 19 of 2012 (FPOCA)**. The respondent's main claim was for a forfeiture order for properties No. 9334/1, 9334/2, 9334/3, and 9334/4, State Lodge, Lusaka.
- 2.2 The applicant as an interested party, objected to certain contents of the respondent's affidavit supporting the Originating Notice of Motion. The court upheld some of the objections and expunged parts of the respondent's affidavit for non-compliance with the Evidence (Bankers Books) Act. The respondent then sought leave from the Court to add evidence to the affidavit evidence.
- 2.3 On 11th March 2024, the Court issued a composite ruling granting the respondent's application to adduce additional evidence and summoning two bank officials to produce bank statements related to the applicant and the Esther Lungu Foundation Trust.

2.4 On 25th April 2024, the applicant, without the Court's leave, summoned the respondent's witnesses who had already testified. When the substantive hearing occurred on 20th May 2024, the applicant attempted to present oral evidence through these witnesses, which the respondent objected to, citing procedural non-compliance. The Court ruled extempore against the applicant's attempt to call the witnesses. Dissatisfied with the ruling, the applicant sought leave to appeal. On 6th June 2024, the Court refused the application.

2.5 The applicant renewed the application for leave to appeal on 20th June 2024 before this Court. The application was made ex-parte but I had directed that it would be an inter partes hearing. On 27th June 2024, the applicant served the renewed ex parte summons for leave to appeal on the respondent, returnable on 9th July 2024. Despite being served, the respondent did not appear on 9th July 2024. Consequently, the Court granted the applicant leave to appeal.

2.6 The respondent then filed a Notice of Motion to reverse the said ruling, arguing that they were not given a chance to be heard. On 12th August 2024, the full Court heard the motion

and issued an ex-tempore ruling, stating that the confusion caused by the ex parte summons justified setting aside the single Judge's ruling of 9th July 2024. The respondent was then ordered to file an opposition within seven days.

2.7 On 16th August 2024, the respondent filed their opposition to the application for leave to appeal. The applicant responded on 27th August 2024, with a combined affidavit supporting the notice of motion to raise a preliminary objection to the respondent's affidavit opposing the renewed summons for leave to appeal.

2.8 Both parties were notified of the hearing scheduled for 4th October 2024. However, on that date only the applicant's advocates appeared before the Court.

2.9 In determining the matter, I will take into consideration the respondent's affidavit in opposition and written arguments filed herein as it is in the interest of justice that I do.

3.0 PRELIMINARY OBJECTIONS

3.1 Before I delve into the substance of the renewed application for leave to appeal, I will address the preliminary objections raised by the applicant on 27th August 2024 by way of notice

and the respondent's preliminary issue raised on 3rd September 2024 in the written arguments.

3.2 The applicant objected to the contents of paragraphs 19, 20, 21, 22, 23, 24, 25, 26, and 27 of the respondent's affidavit opposing the renewed application for leave to appeal, arguing that these paragraphs do not comply with the rules for affidavits.

3.3 The respondent raised a preliminary objection to paragraphs 5, 7, 9, and 11 of the applicant's affidavit supporting the renewed application for leave to appeal to the Court of Appeal, also on the grounds of non-compliance with the rules for affidavits.

4.0 ARGUMENTS IN SUPPORT OF EXPUNGING PARAGRAPHS 12, 13, 14, 15, 19, 20, 21, 23, 24, 25, 26, AND 27 OF THE RESPONDENT'S AFFIDAVIT IN OPPOSITION

4.1 The arguments for expunging the aforementioned paragraphs are detailed in the skeleton arguments dated 27th August 2024. Counsel argued that the contents of paragraphs 12 to 15 and 19 to 27 are not factual but rather expressions of opinion, legal arguments, and speculation. These are inadmissible as they contravene **Order 41 Rule 5**

of the **Rules of the Supreme Court of England (White Book)**.

- 4.2 In furtherance of this argument, counsel drew my attention to the case of **Alex Lawrie Factors Ltd v. Morgan**,¹ where the Court of Appeal explained that affidavits should contain the witness's relevant evidence in their own words, not complex legal arguments inserted by counsel. The court warned against the dangers of drafting affidavits in such a form.
- 4.3 Counsel pointed out that **Order 41 Rule 5** of the **White Book** specifies that only facts that the deponent can prove from their own knowledge are permitted in an affidavit. This rule equates affidavit evidence to oral evidence, stating that affidavits cannot include opinions of the Queen's Counsel or exhibit articles as evidence of legal issues or rights. Additionally, **Order 41 Rule 6 of the White Book** empowers the Court to strike out scandalous, oppressive, or irrelevant matters from the affidavits.
- 4.4 Counsel further submitted that affidavits should not contain extraneous matters such as objections, legal arguments, or conclusions. To support this submission, reliance was placed on the case of **Intelligent Mobility Solutions v.**

Lamise Trading Limited,² where this Court distinguished between affidavits defective in form and those defective in substance and concluded that a defect in substance is incurable, making the affidavit bad and requiring it to be expunged.

4.5 According to the applicant's Counsel, the highlighted paragraphs of the respondent's affidavit are defective in substance and must be expunged in accordance with **order 41 rule 6 of the White Book**.

5.0 SKELETON ARGUMENTS IN OPPOSITION TO THE PRELIMINARY APPLICATION AND IN SUPPORT OF PRELIMINARY OBJECTION RAISED BY THE RESPONDENT

5.1 Counsel for the respondent also relied on **Order 41 Rule 5 of the White Book**. He argued that the said paragraphs in the affidavit in opposition include facts and circumstances derived from the deponent's personal knowledge and information, which he believes to be true and correct. Thus, he claimed that there is no basis for expunging them.

5.2 Counsel further cited the case of **Emeka v. Chuba Ikpeazu**,³ which provides persuasive authority on the appropriate content of affidavits.

5.3 He further contended that paragraphs 5, 7, 9, and 11 of the applicant's affidavit in support contain extraneous matters, including objections and prayers, and should therefore be expunged.

6.0 DETERMINATION OF THE PRELIMINARY ISSUES

6.1 I have carefully considered the arguments presented by both parties regarding the objections to certain paragraphs in the affidavits. **Paragraphs 5, 7, 9 and 11** of the affidavit in support read as follows:

*“5. That I verily believe that at the scheduled hearing of the matter before the court below on 20th May 2024, the honourable court therein rendered a ruling of the same date in relation to an application on behalf of the applicant to examine summoned witnesses Mr. Emmanuel Khondowe, Mr. Miky and Mr. Paul Moyo wherein the court below declined to allow the applicant to examine the said witnesses. A copy of the ruling is now produced and shown to me marked as exhibit **‘ENTL1.’**”*

“7. That I am aware that the respondent did proceed to issue summons to the said witnesses who did attend before the court below on the scheduled date of hearing 20th May 2024

and did testify viva voce in the said matter at the instance of the respondent.”

“9. That I am aware and verily believe that based on the said ruling of 11th march 2024, I did instruct my advocates to issue summons to the witnesses Mr. Emmanuel Khondowe, Mr. Miky Kaisi and Mr. Paul Moyo to be examined and cross – examined on the scheduled date of hearing, who were in attendance on the said date.”

“11. That I am aware and verily believe that the court below was aware that the witnesses Mr. Emmanuel Khondowe was a deponent of affidavits in support and in reply of the main matter filed on behalf of the respondent, and that I intended to have my advocates cross – examine the said witness as to the contents of the said affidavit, whereas Mr. Miky Kaisi and Mr. Paul Moyo were allegedly authors of copies of documents, the originals of which were not produced before court which I intended through my advocates to examine the said witnesses on.”

Paragraphs 12 to 15 and 19 to 27 of the affidavit in opposition read as follows:

“12. That in response to paragraph 11 of the affidavit in opposition, I have been advised by counsel for the

respondent and verily believe the same to be true that despite the court knowing that Emmanuel Khondowe was the deponent, Mr. Kaisi and Mr. Paul Moyo authors of copies of documents, the originals were not produced, the calling of the witness in matters commenced by motion is not a matter of right but with leave of court.”

“13. *That in response to paragraph 12 of the affidavit in support, I aver that the applicant did not seek leave or give sufficient reasons as to why she needed to call the witness.”*

“14. *Further to paragraph 12 above, the applicant did not demonstrate to the court how insufficient the affidavit evidence before court is.”*

“15. *That in response to paragraph 13 of the affidavit in support, I have been advised by counsel for the respondent and verily believe the same to be true that the court declining the applicant’s advocates to examine the summoned witnesses, the applicant was not denied an equal opportunity to be heard and that she had a fair hearing as she had an opportunity to traverse the evidence through an affidavit in opposition.”*

“19. *That in response to paragraph 18, I have been advised by counsel for the respondent and verily believe the same to be true that the grounds of appeal exhibited have no prospects of success and that the applicant was afforded a fair hearing.”*

“20. *That the contents of paragraph 19 are admitted to the extent that the matters sought to be determined before the court below are contentious but dispute that the matter ought to be challenged through the examination of witnesses.”*

“21. *That further to paragraph 19, the applicant was not given the opportunity to summon witnesses because she did not seek leave of court.”*

“22. *That in response to paragraph 20 of the affidavit in support, I have been advised by counsel for the respondent and verily believe the same to be true that the proposed grounds of appeal do not relate to the application of the Forfeiture of Proceeds of Crimes Act No. 19 of 2010 and that the issues raised in the ground of appeal have been dealt with by the superior Court.*

“23. *That in response to paragraph 21 of the affidavit in support, I aver that there is nothing novel in this appeal as*

the law states how matters commenced by motion are to be disposed of.”

“24. *That in response to paragraph 22 of the affidavit in support, I wish to state that the applicant will not be prejudiced should the appeal be denied as she had a fair trial and hearing where she was given an opportunity to traverse and adduce evidence that the property is not proceeds of crime.”*

“25. *That with regards to paragraph 23 of the affidavit in support, I aver that in as much as it is the applicant’s Constitutional right to appeal, leave to appeal will only be granted where the grounds of appeal have prospects of success.”*

“26. *That in response to paragraph 24 of the affidavit in support, I aver that the application is frivolous and intended to waste the court’s time as the applicant was given equal right to be heard and afforded an opportunity to challenge contentious issues.”*

“27. *That with respect to paragraph 26 of the affidavit in opposition, I have been advised by counsel for the respondent and verily believe the same to be true that the appeal has no prospects of success and that the applicant*

has not met the criteria for granting the order sought for leave to appeal to the Court of Appeal against the ruling of 20th May 2024.”

6.2 **Order 41 Rule 5 of the White Book** provides that:

“An affidavit may contain only such facts as the deponent is able of his own knowledge to prove.”

6.3 Additionally, **Order 41 Rule 6** of the same book provides:

“The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.”

6.4 Cases such as **Alex Lawrie Factors Ltd v. Morgan** and **Emeka v. Chuba Ikpeazu** supra elucidate that affidavits should be limited to the deponent’s own evidence and not include extraneous matters, legal arguments or conclusion in law or fact. Further, the offending paragraphs of an affidavit must be struck out.

6.5 I am of the firm review that paragraphs 12 to 15, 19, 22 to 27 except paragraph 21 of the affidavit in opposition contain elements that are not purely factual but rather opinion-based and argumentative, thus contravening Order 41 Rule

5 of the White Book. Consequently, these paragraphs are hereby expunged from the affidavit.

6.6 I find that paragraphs 5, 7 and 9 of the applicant's affidavit in support, are statements of fact which are permissible. Therefore there is no reason to expunge them from the affidavit. However, paragraph 11 contains extraneous matters in form of speculation and conclusion. As a result, this paragraph is expunged from the affidavit in support.

7.0 RENEWED APPLICATION FOR LEAVE TO APPEAL TO THE COURT OF APPEAL

7.1 I now turn to address the substantive application which is for leave to appeal against the lower court's ruling dated 20th May, 2024.

7.2 The application is supported by an affidavit sworn by the applicant, who is the registered proprietor of properties No. 9334/1, 9334/2, 9334/3, and 9334/4 State Lodge, Lusaka.

7.3 The gist of her affidavit is that on 11th March 2024, the lower Court delivered a ruling granting the respondent permission to summon two bank officials from Zambia National Commercial Bank (ZANACO) and First National Bank (FNB) to produce bank statements. These witnesses later attended Court and gave evidence.

- 7.4 Based on the abovementioned circumstances, the applicant also applied to examine summoned witnesses namely, Mr. Emmanuel Khondowe, Mr. Milky Kaisi, and Mr. Paul Moyo. However, the Court rejected her application on 20th May, 2024.
- 7.5 That she is dissatisfied with the ruling of 20th May 2024 and wishes to appeal to the Court of Appeal.
- 7.6 She went on to aver that the grounds of appeal raise issues of a party's right to a fair hearing, including the right to appeal before an adverse decision affecting their constitutional right to property is made.
- 7.7 The intended appeal also questions the application of the **Forfeiture of Proceeds of Crime Act No. 19 of 2010**, specifically whether such matters should be determined solely on affidavit basis and whether cross-examination of witnesses is prohibited where serious criminal allegations are involved. The applicant believes these are novel and significant matters of public interest that need to be addressed to ensure the right to a fair trial and fair hearing, especially in matters under the Forfeiture of Proceeds of Crime Act.

8.0 AFFIDAVIT IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

8.1 The respondent filed an affidavit in opposition dated 16th August 2024, sworn by Emmanuel Khondowe, a Senior Investigations Officer at the Drug Enforcement Commission (DEC), working under the Anti-Money Laundering Investigations Unit (AMLIU).

8.2 He deposed that the Court below in the ruling dated 11th May 2024, in paragraph 6.13.8 referred to the provisions of the law and guided on how a party to a motion can call a witness to give oral evidence.

8.3 That he has been advised by counsel and believes the same to be true that the ruling of the Court dated 11th May 2024 did not indicate that the applicant could just call witnesses without leave of the Court. The said ruling allowed the respondent to call the Bank officials after the respondent made an application seeking leave of the Court to call the witnesses. The applicant never sought leave of the Court before summoning her witnesses.

9.0 SKELETON ARGUMENTS IN SUPPORT OF RENEWED SUMMONS FOR AN ORDER FOR LEAVE TO APPEAL TO THE COURT OF APPEAL

- 9.1 The applicant relied on the skeleton arguments dated 20th June 2024, wherein the counsel for the applicant referred to **Order X rule 2 (1)** and **Order X rule 4 (5)** of the **Court of Appeal Rules, 2016** as provisions granting the Court jurisdiction to hear this application. Reliance was also placed on the case of **Smith v. Cosworth Casting Process Ltd,**⁴ in which it was held that leave to appeal is generally granted by the Court of Appeal unless there is no prospect of success evident from the grounds of appeal.
- 9.2 Counsel argued that the grounds of appeal demonstrate a likelihood of success, particularly as the intended appeal seeks to determine whether the applicant had a legitimate expectation of a fair hearing, where she could examine witnesses and challenge their evidence. The evidence from the witnesses she intended to call is relevant and has a direct bearing on the matter.
- 9.3 In the first intended ground of appeal, the applicant contends that she had a legitimate expectation of a fair hearing before a decision adversely affecting her rights was

made by the Court. The Court's ruling of 11th March 2024, which granted the respondent the right to call witnesses and adduce evidence, created an expectation that the same opportunity would be extended to her. She believed that, based on this ruling, she did not need leave to examine witnesses. She only needed to issue summonses to compel their attendance. Reliance was placed on the case of **The Attorney General of Hong Kong v. NG Yuen Shui**,⁵ where it was stated that legitimate expectations can include expectations beyond enforceable legal rights, provided they have a reasonable basis.

- 9.4 The second intended ground of appeal is that the lower Court did not exercise its discretion judiciously, as the evidence sought to be admitted was relevant. The witnesses included the deponent of the affidavits in opposition and reply, and key figures in the investigations against the applicant. The other two witnesses were authors of documents relied upon by the respondent, which the applicant had challenged since the authors had not testified in Court. Counsel argued that this evidence would have clarified doubts regarding the documents, as the originals

were not produced. The respondent failed to call the authors as per the Evidence Act of the Laws of Zambia.

9.5 Prohibiting the applicant from examining the summoned witnesses, especially in light of serious allegations of criminality, prejudiced the applicant. In support of this argument, counsel cited the case of **In Re H (Minors)**,⁶ where it was stated that the more serious the allegation, the stronger the evidence needed to establish it on a balance of probability.

9.6 Counsel further submitted that the intended appeal raises novel matters of public importance. The case of **Bidvest Food Zambia Limited & Others v. CAA Import and Export Limited**⁷ was cited, where the Supreme Court explained what constitutes a point of law of public importance. Additionally, the case of **Director of Public Prosecutions v. Property No. L/9390/M and Chiyesu Lungu**⁸ was referenced, which highlighted the importance of addressing varied arguments under the Forfeiture of Proceeds of Crime Act (FPOCA) to achieve a common understanding of its provisions.

9.7 Counsel contended that this situation, stemming from the application of the FPOCA, is novel and its determination is

in the public interest. It would settle the issue of examining witnesses summoned by an interested party or any other party in hearings involving serious allegations of criminality, which could result in depriving a property owner of their property.

9.8 Counsel further submitted that the applicant has demonstrated that she meets the criteria for granting leave to appeal to the Court of Appeal and prayed that the application be granted.

10.0 SKELETON ARGUMENTS IN OPPOSITION

10.1 The respondent filed skeleton arguments dated 16th August 2024 wherein it is argued as follows: As for ground one of the intended grounds of appeal, the Court was on firm ground in not allowing the applicant to adduce oral evidence without leave of the Court. **Order XXX rule 20 and 21, as read with Order 3 rule 2 of the High Court Act**, were cited which generally provide that matters commenced by motion should be disposed of by affidavit evidence.

10.2 He also referred to **Order XXX Rule 20 of the High Court Rules** which outlines the procedure for admitting oral evidence, with an exception of allowing oral evidence with

the Court's leave in cases to be determined by affidavit evidence. **Order XXX rule 21 of the High Court Rules** grants the Court discretionary powers to allow witness examination or document reception in evidence when the Court considers it reasonable.

- 10.3 The respondent went on to submit that he had applied for and was granted leave by the Court to summon bankers to produce bank statements. The applicant was permitted to cross-examine those bank officials, demonstrating that the trial was fair. However, the applicant summoned the respondent's witnesses without seeking leave, thereby contravening the provisions of the law.
- 10.4 Counsel took the view that the Court did not create a legitimate expectation that the applicant would be equally allowed to call witnesses. The Procedural rules must be strictly adhered to for consistency and uniformity. In support of this submission, the cases of **Twampane Mining Cooperative Society Limited v. E and M Storti Mining Limited** and **Raman v. Ngwira**¹⁰ were cited.
- 10.5 Regarding the second ground of appeal, the arguments under the first ground of appeal were repeated.

- 10.6 Counsel further argued that the applicant was allowed to present relevant evidence through an affidavit in opposition, thus being granted a fair hearing. The affidavit evidence before the lower Court was sufficient for the applicant to address disputed facts.
- 10.7 The applicant's reliance on the 11th March 2024 ruling is unfounded because that ruling guided the respondent on how to proceed upon leave to call witnesses being granted.
- 10.8 Counsel referred to **Order 59/14/18** of the **White Book** regarding circumstances under which leave to appeal can be granted and that the general test is that the grounds of appeal must have a realistic prospect of success.
- 10.9 Counsel finally submitted that the applicant has not demonstrated that the appeal has realistic prospects of success or that the case raises issues of public interest requiring legal clarification. Hence, the appeal lacks merit.

11.0 ARGUMENTS IN REPLY

- 11.1 In reply to the respondent's arguments that the appeal has no prospects of success and that the Court did not create a legitimate expectation for the appellant to have an equal opportunity to call intended witnesses in its ruling of 11th

March 2024, the applicant's counsel submitted that the applicant's understanding of the ruling is that leave to summon the witnesses is not necessary as the lower Court guided on the procedure to be followed. Reference was made to the case of **Attorney General of Hong Kong v. NG Yuen Shui**³ where it was stated that:

“When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.”

11.2 The case of **Breen v. Amalgamated Engineering Union**¹¹ was also cited wherein it was stated as follows:

“If he is a man who has some rights or interest or some legitimate expectation of which it would not be fair to deprive him without a hearing or reasons given, then these should be afforded him, according as the case may demand.”

11.3 Premised on the above, the applicant expected that she would be given equal opportunity to adduce oral evidence, that the procedure to be applied and adopted would be as outlined in the lower Courts ruling of 11th March 2024.

Therefore, the ground raising the issue of legitimate expectation has merit.

11.4 On the second ground of appeal which attacks the lower Court's exercise of its discretion, reliance was placed on the case **Kalunga Chansa v. Evelyn Hone College**¹³ where the Court discussed the meaning of judicial discretion and that failure by the Court to take proper consideration of the facts and law relating to a particular matter, would be considered an abuse of discretion. One must establish that the discretion exercised is an arbitrary one or is unreasonable thereby flying in the teeth of precedent and judicial custom.

11.5 Counsel for the applicant urged this court to take cognisance of the fact that, at the time the respondent brought the said witnesses before Court, both parties had complied with the requisite rules and filed their affidavits before Court. So they should have been granted equal opportunity.

11.6 It was argued that the requirements of natural justice were not followed. The case of **Ridge v. Baldwin**¹⁴ was cited where the House of Lords declared that natural justice, although devoid of a single definition referred to what a reasonable

person would regard as fair procedure in the particular circumstances.

12.0 ANALYSIS AND DETERMINATION OF THE APPLICATION FOR LEAVE TO APPEAL

12.1 I have considered the affidavit evidence and the arguments made by counsel for both sides concerning the application for leave to appeal against the ruling of the High Court dated 20th May 2024.

12.2 **Order X rule 4 (5)** of the **Court of Appeal Rules,¹ 2016** which empowers this court to grant leave to appeal upon renewal provides as follows:

“Where leave to appeal is refused, an application for leave to appeal to the Court shall be made to a single Judge.”

12.3 There is no dispute as the jurisdiction of a single Judge in this matter.

12.4 **Order 59/14/18** of the **White Book** provides for the circumstances in which leave to appeal will be granted as follows:

“The general test which the Court applies in deciding whether or not to grant leave to appeal is this: leave

will normally be granted unless the grounds of appeal have no realistic prospects of success (Smith v. Cosworth Casting Processes Ltd (Practice Note) [1997] 1 W.L.R. 1538; [1997] 4 All E.R. 840, CA). The Court of Appeal may also grant leave if the question is one of general principle, decided for the first time (Ex p. Gilchrist, Re Armstrong (1886) 17 Q.B.D. 521, per Lord Esher M.R. at 528) or a question of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage (see per Bankes L.J., in Buckle v. Holmes [1926] 2 K.B. 125 at 127)."

12.5 I hasten to say that both parties have made arguments relating to the substantive issues that may be argued in the appeal hearing should leave to appeal be granted. The applicant did this in an effort to demonstrate that the grounds of appeal have realistic prospects of success and raise important legal issues of public importance. The respondent vehemently objected to the application and applicant's contentions.

12.6 I will focus on the grounds of appeal to see whether the test for the grant of leave to appeal as stated under **order 59/14/18 of the White Book** has been met.

12.7 The intended grounds of appeal outlined in the draft memorandum of appeal annexed to the affidavit in support are as follows:

- 1. The court below erred in law and fact in declining the interested party opportunity to examine or cross examine the witnesses summoned before Court, when the court had created a legitimate expectation that the interested party would be equally offered an opportunity to call intended witnesses as had been granted to the appellant.*
- 2. The court below erred in law and fact in declining to exercise its discretion judiciously by allowing the cross – examination and examination of witnesses at the instance of the interested party whose evidence was vital, necessary and relevant and not in any way conducted for improper purpose, thereby denying the interested party an opportunity to tender in relevant evidence, test the evidence relied upon by the*

applicant and as such denied a fair hearing, fair adjudication and full equality before the law.

12.8 I understand from the grounds of appeal, the affidavit in support and the applicant's arguments that the applicant's complaint is that she summoned the said witnesses without leave of the Court following the lower court's guidance in the Ruling dated 11th March 2024 especially under paragraph 6.13.9 which is quoted in paragraph 8 of the affidavit in support and it reads:

“In our view, the examining party does not require leave to conduct the examination but simply needs to serve summons on the party it wishes to examine. The witness in receipt of the summons must attend to produce documents, or to be examined or cross-examined, in the like manner as at the hearing of a suit. The said summons can be attacked on the basis that the individual sought to be examined would not give relevant evidence or, theoretically, that it is evident from some other circumstances that the examination would be conducted for improper purpose.”

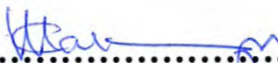
- 12.9 The applicant is therefore aggrieved that the lower court did not permit her to call the witnesses. She is also of the view that the trial was unfair because she was not given an equal opportunity with the respondent to adduce additional evidence through the witnesses.
- 12.10 Having looked at the documents opposing the renewed application for leave to appeal, it is clear that the crucial questions are whether the applicant was misled by the ruling of 11th March 2024 and whether on 20th May 2024 the lower court judiciously exercised its discretion in disallowing the applicant to call or recall the witnesses.
- 12.11 This matter falls under the **Forfeiture of Proceeds of Crime Act No. 19 of 2010** and **section 7 of the Prohibition of Money Laundering Act No. 17 of 2001 as read with Amendment Act No. 4 of 2010** which are relatively new laws.
- 12.12 I am therefore of the view that the questions raised are so important that there is need for further argument and a decision of the Court of appeal would be to the public advantage (see per **Bankes L.J. in Buckle v. Holmes**).¹⁴ Further, the appeal is likely to succeed. This entails that

the test for the grant of leave to appeal to this court has been passed.

13.0 CONCLUSION

13.1 For the foregoing reasons, I hereby grant the applicant leave to appeal against the lower court's decision made on 20th May 2024. Costs in the cause.

Dated this 4th day of November, 2024

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C.K. MAKUNGU
COURT OF APPEAL JUDGE