

IN THE HIGH COURT FOR ZAMBIA

HPEF/02/2022

AT THE ECONOMIC AND FINANCIAL CRIMES COURT

HOLD AT LUSAKA

(CRIMINAL JURISDICTION)

BETWEEN:

ANTI-CORRUPTION COMMISSION

VS

BOWMAN CHILOSHA LUSAMBO

RESPONDENT



**BEFORE: Hon. Mr. Justice Kenneth Mulife
Hon. Mrs. Justice P.K. Yangailo
Hon. Mrs. Justice S. Wanjelani**

ON 30th August 2022

For the Appellant: Mr. E. Mbewe – Anti Corruption Commission
For the Respondent: Mr. N. Botha – Messrs Makebi Zulu
Advocates

RULING

MULIFE, J. DELIVERED THE RULING OF THE COURT

LEGISLATION REFERRED TO:

1. Subordinate Court Act, Chapter 28 of the Laws of Zambia.

2. Criminal Procedure Code Act, Chapter 88 of the Laws of Zambia.
3. Anti-Corruption Act No. 3 of 2012.

1.0. INTRODUCTION

1.1. This is a Ruling on the Issues which were raised on 14th July, 2022, by the Parties in this matter. The Issues were raised during a preliminary meeting that was convened by this Court, to prepare ground for hearing of the Appeal against a Ruling dated 19th May, 2022, of the Lower Court delivered at the Lusaka Magistrate Court Complex. The Appeal is by the Anti-Corruption Commission (hereinafter referred to as the 'ACC') and the Issues are as follows:

- (i) Whether these proceedings are Criminal or Civil; and,
- (ii) Whether or not this Court can determine the ACC's application for its intended appeal to be heard out of time, without having to hear the parties.

2.0. BACKGROUND

2.1 The background to the Issues is as follows: on 13th April 2022, Mr. Siwakwi Christopher, an Investigations Officer in the ACC, swore an Affidavit before the Lower Court in which he sought a Warrant of Seizure to enable him seize specified real properties belonging to the Respondent. This is against the background that the Officer is suspecting that the said properties have been derived or acquired from corrupt practices.

The Warrant was issued pursuant to section 58(1) of the Anti-Corruption Act No. 3 of 2012 (hereinafter referred to as 'Act No. 3 of 2012'). The provision states as follows:

“58. (1) Where in the course of an investigation into an offence under this Act, an officer has reasonable grounds to suspect that any movable or immovable property is derived or acquired from corrupt practices, is the subject matter of an offence or is evidence relating to an offence, the officer shall, with a warrant, seize the property.

(2) An officer who seizes any property pursuant to subsection (1) shall prepare and sign a list of all the movable or immovable property seized under that subsection and of the places in which the property is found.

(3) An officer shall serve a copy of the list referred to in subsection (2) on the owner of the property or on the person from whom the property was seized, not later than thirty days from the date of seizure.

(4) For the purpose of this section, “property” means real or

personal property of any description, and includes money and any interest in the real or personal property”.

2.2 On 22nd April 2022, the Respondent filed before the Lower Court, an Exparte Summons for an Order to set aside the said Warrant, on grounds stated in the Affidavit in Support of the Summons to the effect that the Warrant of Seizure was not accompanied by an Originating Summons as prescribed by Section 86 of Act No.3 of 2012. The provision states as follows: ***“Except where otherwise specifically provided for, all applications under this Act shall be commenced by way of Originating Summons”.***

2.3 Further, that the said Warrant and the Affidavit on whose basis the Warrant was issued, were not filed into the Subordinate Court as prescribed by **Order V, Rule 11 of the Subordinate Court Civil Jurisdiction Rules, Chapter 28 of the Laws of Zambia**. The provision states as follows:

“where an affidavit is used in court for any purpose, the original shall be filed in the court, and the original and an office copy shall alone be recognised for any purpose in the court.”

2.4 In its disputed Ruling, the Lower Court set aside the Warrant of Seizure. Dissatisfied with the Ruling, the ACC expressed its desire to appeal through the following efforts: Firstly, by filing a Notice of Appeal supported by an Affidavit, pursuant to Section 324 of the **Criminal Procedure Code, Chapter 88 of the Laws of Zambia** (Hereinafter referred to the ‘CPC’). And secondly, after the Lower Court declined to act on the same and directed

that they instead file an Exparte Summons, by filing an Exparte Summons for Leave to Appeal out of Time supported by an Affidavit.

2.5 The Record of Appeal discloses that there was a subsequent Summons by the Respondent, to set aside the said Exparte Summons for Leave to Appeal out of Time, for irregularity. The Grounds verifying the irregularity are set out in the Affidavit in Support thereof. For reasons that shall become obvious in the due course, we shall not recite the Grounds. Suffice to state that both Summonses do not appear to have been heard by the Lower Court.

2.6 On 11th August 2022, we invited parties to address us on their viewpoint concerning the Issue whether or not the subject proceedings are criminal or Civil. This is against the obvious background that they are the litigants in the matter. They advanced opposing viewpoints.

2.7 On behalf of the ACC, Mr. E. Mbewe is of the view that the proceedings are criminal for the following reasons: that the impugned Ruling of the Magistrate designates the proceedings as criminal, a position which prompted the ACC to anchor its Appeal in the criminal jurisdiction variously pursuant to Sections 321A and 324 of Cap. 88, as outlined above.

2.8 On the contrary, Mr. Botha, Legal Advocate for the Respondent is of the view that the proceedings are civil for the following reasons: that the originating process namely, the Affidavit in Support of the subject Warrant of Seizure indicates that the matter was taken out in the civil jurisdiction of the Lower Court. The said Affidavit appears at page 10 of the Record of Appeal. That similarly, the following documents indicate that the proceedings in issue are civil: 'Affidavit in Opposition of the Affidavit in Support of Exparte Summons for an Order to Set Aside Warrant of Seizure', the Applicant's List of Authorities and Skeleton Arguments (appearing at pages 86 and 90 of the Record of Appeal). Further, that Parties to the action are denoted by titles in civil proceedings namely, Applicant and Respondent.

2.9 Mr. Botha further submitted that the Court that should hear the present application to appeal out of time, is the Lower Court and not this Court because the documents at pages 25 – 42 of the Record of Appeal (Exparte Summons for Leave to Appeal Out of Time) indicate that the Application was taken out in the Lower Court. Further, that the said application has not yet been determined by the Lower Court.

2.10 In reply, Mr. Mbewe submitted as follows: that although the documents mentioned by Mr. Botha denote that the matter was taken out of the civil jurisdiction of the Lower Court, there is no civil Cause Number allocated to the matter. That parties only

became aware of the Cause Number through the subject Ruling of the Lower Court; that the ACC took out the Exparte Summons for Leave to Appeal out of Time (appearing from pages 25 – 31 of the Record of Appeal) only because it was wrongly directed to do so by the Lower Court. However, the said Summons was never heard by the Lower Court. Instead, the Court transmitted the Record of Appeal to this Court. Therefore, there is no application pending before the Lower Court.

3.0. CONSIDERATION AND DETERMINATION

3.1. We have considered the foregoing arguments and the documents that we have been referred to in the Record of Appeal.

3.2. Indeed, whereas some of the documents in the Record of Appeal indicate that the matter was taken out of the civil jurisdiction of the Lower Court, other documents indicate that the matter was taken out of the criminal jurisdiction of the Court. In particular, and as highlighted already, the Ruling in issue indicates that the Lower Court was exercising criminal jurisdiction when it presided over the matter.

3.3. The Ruling also indicates that the party dissatisfied with the Ruling was informed of its right of appeal. And, in view of the envisaged appeal, the dissatisfied party is

obviously the ACC. Further, by section 321A (1) of the CPC, the principal legislation governing criminal proceedings in Zambia, the ACC should have filed its Appeal within fourteen days of the Ruling, namely on or before 1st June 2022. However, the Notice of Appeal was filed into Court on 8th June 2022. This was seven days out of time.

- 3.4 That notwithstanding, a dissatisfied party is empowered to file an application to appeal out of time in the High Court and the procedure for filing the application, is provided for in Section 324 of the CPC in the following terms:

“324. (1) Where the period has expired within which, under section three hundred and twenty-two, an appeal shall be entered, an appellant may nevertheless make application in the prescribed form for his appeal to be heard and shall in support of any such application enter an appeal, and the form of application shall be attached to the notice of appeal when that notice is filed with or transmitted to the court below and the appellate court.

(2) In any case where an appellate court refuses an application made under subsection (1), the appeal entered in support of the application shall be deemed never to have been entered”.

3.5 And, by the Proviso to Section 322 of the CPC, the High Court has discretion to hear an Appeal that has been filed out of time. The Proviso states as follows:

“Provided that the appellate court may at its discretion hear an appeal in respect of which an application has been made in accordance with the provisions of section three hundred and twenty-four”.

3.6 Reverting to our consideration, a determination of whether the proceedings are civil or criminal is, in our view, not guided by the captions on the originating processes or any other document on the Record of Appeal. Rather, it is guided by the law pursuant to which the matter was commenced and in the present case, such law is Section 58(1) of Act No. 3 of 2012, being the Provision pursuant to which the Warrant of Seizure, which triggered these proceedings, was issued. And, our understanding of the provision is that it envisages criminal and not civil proceedings. We are of this view because the provision is intended to facilitate investigations into a suspected offence under Part III of Act No. 3 of 2012 namely, whether or not the properties which are subject of the Warrant of Seizure, were derived from corrupt practices.

3.7 Our view is fortified by the position that Section 58 of Act No. 3 of 2012 is read with section 2 of the same Act. Section 2 of the Act prescribes that

“All offences under this Act shall be enquired into, tried and otherwise dealt with in accordance with the Criminal Procedure Code and any other written law”.

3.8 Considering that the Criminal Procedure Code governs the conduct of criminal investigations and trials (as evident from the Act's Preamble), it follows that the investigations for which the subject Warrant of Seizure was obtained, are criminal. It also logically follows that the proceedings leading to the issuance of the said Warrant were taken out in the criminal jurisdiction of the Lower Court.

3.9 In the view we have taken, an appeal against the disputed Ruling of the Learned Magistrate should be guided by the CPC. And, since it was made out of time, it should be guided by Section 324 of the CPC. With this background, the Notice of Appeal was correctly addressed to this Court as the record discloses. We thus have jurisdiction to entertain the Appeal and we are of the strong view that the Proviso to Section 322 of the CPC empowers us to determine the Appellant's Application for its Appeal to be heard out of time, without having to hear the parties.

3.10 The above position thus provides guidance on the second issue raised by the parties. We accordingly invoke our discretion pursuant to the Proviso to Section 322 of the CPC to hear the Appeal out of time.

4 CONCLUSION

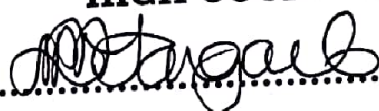
4.4 We find that there was a misdirection by the Lower Court when it directed the Appellant to file an Exparte Summons for Leave to Appeal out of Time. Thus, the summons as well as the Respondent's summons to set it aside are of no effect.

**DELIVERED AND SIGNED AT LUSAKA THIS 30TH DAY OF
AUGUST 2022**



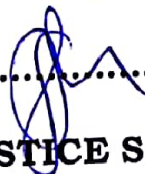
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HON. MR. JUSTICE K. MULIFE

HIGH COURT JUDGE



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HON. MRS. JUSTICE P. YANGAILO

HIGH COURT JUDGE



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HON. MRS. JUSTICE S. WANJELANI

HIGH COURT JUDGE

