PIOUS MANAMIKE
and
ETERNAL RESOURCES (PRIVATE) LIMITED
versus
PROSECUTOR-GENERAL

HIGHCOURT OF ZIMBABWE
CHIKOWERO J
HARARE; 18 December 2023 & 26 January 2024

Opposed Application

T K Hove with T A Mandizvidza, for the applicants
M Mutamangira, for the respondent

CHIKOWERO J:

1. This is an application brought in terms of the common law for the setting aside of a property seizure order.
2. The property seizure order was granted by this court on 21 February 2022. It was made on the basis of an application by the Prosecutor-General in terms of s 47 of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*] ("the Money Laundering Act"). The application that gave rise to the order was an *ex parte* chamber application.
3. Having reasonably believed on a perusal of the papers that the property in question was tainted property and that there was a reasonable likelihood of dissipation or alienation of the property if the order were not granted, the court proceeded to grant the order authorising any Investigating Officer in the employ of the Zimbabwe Anti-Corruption Commission or other law enforcement officers to search for and seize the fifteen (15) vehicles in question. These vehicles belonged to the first applicant although they were registered in the name of the second applicant, a company in which the former and his spouse were, apparently, the sole shareholders and directors.
4. Paragraph 2 of the order states that its purpose was to:

> "……preserve the said property from dissipation or alienation pending investigations into allegations of corruptly concealing from a principal a personal interest in a transaction and

> money laundering as defined in terms of s 173 of the Criminal Law (Codification and Reform) Act and s 8 of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*]."

5. Paragraph 4 of the order provides that the order would remain of force until the date when the criminal proceedings and civil confiscation proceedings against the present applicants are terminated unless earlier varied or revoked by order of this court.
6. At the time of the granting of the property seizure order the first applicant was on remand at the Magistrates court sitting at Harare on the charges alluded to in paragraph 4 of this judgment. It would appear that a court application for civil forfeiture of the fifteen (15) motor vehicles has not been filed. Besides the reasonable belief that the applicants would dissipate or alienate these vehicles the property seizure order was also granted on the court reasonably believing that the property was proceeds of crime committed by the first applicant during his employ as the Managing Director of the Cotton Company of Zimbabwe Limited.
7. It is true, as pointed out by Mr Hove at the hearing, that there is no provision in the Money Laundering Act speaking to the setting aside of a property seizure order.
8. All the same, I have no difficulty in accepting, as I do, that this court has inherent jurisdiction at common law to set aside its own orders on good cause shown. Mr *Hove* referred me to this Court's inherent power, enshrined in s 176 of the Constitution of Zimbabwe, to develop the common law taking into account the interests of justice and the provisions of the Constitution. I have no doubt that, where there appears to be a lacuna in a statute, this court has the power to develop the common law without necessarily taking over the mantle of the Legislature. Indeed, the court's power to set aside a judgment or a court order has always been available at common law, quite apart from the fact that Rules of court invariably make specific provision for the setting aside of judgments and orders of the court. Hence, nearly half a century ago, in *Hardroad (Pty) Ltd* v *Oribi Motors (Pty) Ltd* 1977(2) SA 576 MCEWAN J at 579F said:

> "A person who cannot bring his case for setting aside a judgment under either Rule 31 or Rule 42 may nevertheless be entitled to such a remedy at common law in a proper case……."

I did not hear Ms *Mutamangira,* for the respondent, to argue that this is not the law in this country. Although referred to by her on a different point, Ms *Mutamangira's* citation of a

Namibian High Court decision fortifies this position. In Shalli v Attorney-General (POCA 9/2011) 2013 NAHCMD, the court said:-

> "……but even in the absence of a rule nisi, as the full court has in my view, with respect, correctly held an order granted *ex parte* is in any event provisional and subject to being set aside on application by a party affected by it."

9. As I have endeavoured to demonstrate the want of any provision in the Money Laundering Act codifying this court's inherent power to set aside its orders on the showing of good cause does not alter the common law position that this court has that power I accede to the call to exercise the same. Whether I will set aside the property seizure order will depend on the applicants satisfying me that there is good cause to do so.
10. Good cause, even for my purposes, were one to attempt to define the concept, simply means "sufficient" or satisfactory" basis for setting aside the property seizure order. See *Golden Reef Mining (Private) Limited and Anor* v *Mnjiya Consulting Engineers (Pty) Limited* SC 55/16; *Wector Enterprises Private Limited* v *Luxor Private Limited* SC 31/15 and Trustees (for the Time Being) of *Tongogara Community Share Ownership Trust* v *Matrix Realty (Private) Limited* HH 247/18. I am aware that these cases did not concern the setting aside of a property seizure order either under common law or at all but they are instructive in so far as they touch on the meaning of the concept "good cause" also referred to as "good and sufficient cause." The court exercises a discretion, on the facts and circumstances of the particular matter before it, in determining whether good cause has been established to afford the relief sought.
11. The first circumstance relied upon by the applicants in an endeavour to persuade the court that there exists good cause to set aside the property seizure order is that the order did not contain a return date on which the order was to be either confirmed or discharged. Mr Hove complained that the order was thus irregularly granted because it took away the applicants' right to be heard before an independent and impartial court in a matter dealing with their rights to use and deal with their property. I share Ms Mutamangira's views. The order was made in terms of s 47 of the Money Laundering Act. Nowhere in that section or the Act as a whole is there a requirement that a property seizure order, though provisional in nature, should have a return date. Indeed, the mere filing of the present application is

enough indication that, even though granted on an *ex parte* basis, the applicants still can exercise their right to seek the setting aside of the order. That would still have been the position if the order were granted on an *ex parte* basis but had contained the provision of a return date whereon the applicants would have sought the discharge of the provisional order and the dismissal of the application. Viewed from this perspective the want of a return date cannot be good cause for the setting aside of the property seizure order. I add also that the philosophy behind s 47(1)(b) of the Money Laundering Act is that the application be made without notice to the other party. The giving of notice would defeat the need to obtain an order sanctioning the seizure of the tainted property, and effecting such seizure, before the property is dissipated or alienated. This too demonstrates that the fact that the order was granted pursuant to an *ex parte* chamber application was not irregular. It is not good cause for the setting aside of the order.

12. Section 47(7)(c) of the Act requires the order to specify the date on which the order shall cease to have effect. I think this provision must be construed together with, among others, s 47(4) of the same Act. The latter provision reads:

> "(4) Property other than evidence of other crimes, seized under a property seizure order, may only be retained by or on behalf of the Prosecutor-General for thirty days."

In my view, where property seized under a property seizure order is not evidence of other crimes, it should be possible to state the date when the order should cease to have effect. On the other hand, where the property is not only reasonably believed to be tainted but is in addition required as evidence of other crimes, a proper reading of s 29(4) excludes such property from the requirement that it be held or retained by the Prosecutor-General for thirty days. The reason for this may be easy to understand. If the seized property be evidence of other crimes to require same to be released to the persons from whom it was seized at the expiry of the thirty-day period would only operate to defeat the purpose of preserving that evidence until the conclusion of the criminal investigations or the criminal trial (should the investigations lead to a criminal trial). The paramount intention of the Legislature in enacting the Money Laundering Act was to enable the unlawful proceeds of all serious crime and terrorist acts to be identified, traced, frozen, seized and eventually confiscated. This would be the reason why it could not have been the intention of the Legislature, in respect of property which is not only tainted but is evidence of other crimes,

to require that a date (in the sense of a specific day, month and year) when the order would cease to have effect to be reflected in the order. I agree with Ms Mutamangira that, because the exact date on which the criminal investigations would be completed could never have been known at the time of making of the *ex parte* chamber application for a seizure order, just as it could not be known when the trial itself would be finalised (if the investigations necessitated such trial) it was sufficient that the order was expressed in the terms referred to in para 5 of this judgment.

13. The foregoing necessarily means that the first applicant's removal from remand on 6 February 2023 cannot be good cause for the setting aside of the property seizure order. That event, as conceded by Mr *Hove*, cannot be equated to the termination of the criminal investigations. It only means that the State, in respect of the pending criminal charges against the first applicant, is limited to proceeding against him by way of summons. That is not the same thing as saying the fifteen vehicles were no longer required as evidence of other crimes and were therefore freed from the operation of the property seizure order.
14. That it has taken a fairly lengthy period of time before the first applicant is brought to trial is an issue that the Magistrates court dealt with in rendering its decision to refuse the further remand of the former. It cannot resurface, this time as good cause, to facilitate the release of evidence to the applicant (an accused) pending the finalisation of investigations into the crimes for which the applicant still stands charged before the Magistrates Court. That he has not been called upon to answer those charges cannot be of any consequence. It cannot be a proper exercise of discretion on the part of this court to interfere with the criminal investigations by setting aside the property seizure order, hence facilitating the release, dissipation and alienation of property reasonably believed to be proceeds of crime.
15. I think that the applicants have jumped the gun, so speak. The present cannot be the appropriate platform to consider their argument that the fifteen vehicles are not proceeds of crime. The criminal investigations, which have gone extra-territorial, will traverse that terrain. Should the matter proceed to trial, the Magistrates Court may also be required to pronounce itself on whether any of those vehicles are evidence of crimes. It is preferable that this court refrains from wading into those waters. It was sufficient, in my view, that this court reasonably believed that the property was not only tainted but also that it was

evidence of crimes and that there was a reasonable likelihood of the dissipation or alienation of the same, hence it granted the property seizure order.

16. The applicants' economic hardship consequent upon the operation of that order cannot be a legal basis for setting it aside. The mischief targeted by the Legislature in enacting not only s 47 of the Act but the entire piece of legislation has been alluded to elsewhere in this judgment. The applicants did not argue that the respondent has decided not to prosecute the first applicant and that there is no longer justification for the Prosecutor-General retaining the fifteen seized vehicles.
17. The respondent did not ask for costs of suit.
18. In the result, the application be and is dismissed.

CHIKOWERO J:…….

T K Hove and Partners, applicants' legal practitioners
The National Prosecuting Authority, respondents' legal practitioners