PROSECUTER GENERAL
versus
SAMUEL TERERAI CHIODZE
and
RATIDZAI LYDIA CHIODZE
and
REGISTRAR OF MOTOR VEHICLES N.O.

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 18 March 2024 & 15 May 2024

Opposed Application

C *Mutangadura* with *K Mufute* for the applicant
No appearance for the 1st and the 3rd respondents
2nd respondent in person.

CHIKOWERO J:

INTRODUCTION

[1] This is a ss79 and 80 of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*] ("the Money Laundering Act") application for the civil forfeiture to the State of ZWL$1436 500 and a white Honda Airwave Registration number AFD 1898 ("the motor vehicle)

THE BACKGROUND

[2] On the 24 September 2021 there was a police operation targeting illegal foreign currency traders otherwise known as money changers.

[3] Such persons, so the Court is told, violate certain national laws by purchasing United States dollars using local currency, and vice versa, without being licensed to do so. In the course of such trading in cash they employ an unregulated exchange rate of the United States dollar to the local currency, which would be higher than the official rate, hence the incentive to engage in such unlawful enterprise. The activities are fuelled by the demand for the United States dollar and its scarcity in this country.

[4] A four member team of police officers, who were part of the said operation, got certain information which led them to 41 Southlands Flats, Mazowe Street, Harare. This is where the first respondent resided. In his presence, they searched his residence for evidence suggestive of his involvement in the violation of exchange control laws and money laundering. The search yielded neither evidence nor leads to that effect. But that was not the end of the investigation.

[5] The team of investigators discovered the motor vehicle in question parked in bay number 12. This was still at the flats. The investigators were in the company of the first respondent.

[6] Inside the vehicle were two sacks. These were not empty sacks. Since the first respondent was in possession of the motor vehicle, the investigators asked the former to open the vehicle to enable them to ascertain what was contained in the sacks.

[7] The first respondent refused to do so, claiming that he did not have the vehicle keys.

[8] The motor vehicle was placed under police guard until 25 September 2021 when it was seized and towed to the Commercial Crime Division (Northern Region) premises.

[9] The first respondent was still not cooperating with the investigators. On 1 October 2021 the police engaged the services of a locksmith. The latter opened the motor vehicle. It was only then that the investigators discovered that the two sacks contained bond notes which amounted to ZWL$1 436 50. The amount was immediately seized. The money was then equivalent to US$16386-19 at the Reserve Bank of Zimbabwe official exchange rate of the United States dollar to the Zimbabwe dollar.

[10] When the locksmith opened the motor vehicle leading to the investigators discovering the money in the sacks the first respondent was present. He was warned and cautioned in connection with the case of contravening s 8(3) of the Money Laundering Act. The allegations were that he was found in possession of the money in question stashed in the said motor vehicle with the money being suspected of being proceeds of crime in the sense of it being suspected to have been earned through criminal activity. S 8(3) of the Money Laundering Act reads as follows:

> "Any person who acquires, uses or possesses property knowing or suspecting at the time of receipt that such property is the proceeds of crime, commits an offence."

[11] In his warned and cautioned statement the first respondent denied the allegations. The founding papers, which the first respondent did not respond to, make it plain that the first respondent claimed that prior to its discovery he did not know that there was money in the car.

[12] Investigations at the Central Vehicle Registry established that the motor vehicle belonged to the second respondent. She is sister to the first respondent.

[13] Her warned and cautioned statement on allegations of contravening s 8(1) (a) and (b) as read with s 8(6) of the Money Laundering Act reads thus:

> "I vehemently deny the allegations levelled against me. I was not in possession of the motor vehicle during the stated period. I gave the motor vehicle to my mechanic whom l only know as Jack Kani cellphone number 0778 0770 977, so that after repairing it he could give it to my brother Samuel Tererai Chiodze. The motor vehicle had no money at all when l gave it to the mechanic. I then left to Zambia on other commitments leaving the mechanic in possession of my vehicle. I came back after three days and that is when I came to know that my motor vehicle was taken by police officers."

[14] Section 8(1) (a), (b) and (6) of the Money Laundering Act reads:

> "8. Money Laundering Offences
>
> (1) Any person who converts or transfers property-
> (a) that he or she has acquired through unlawful activity or knowing, believing or suspecting that it is the proceeds of crime; and
> (b) for the purposes of concealing or disguising the illicit origin of such property, or of assisting any person who is involved in the commission of a serious offence to evade the legal consequences of his or her acts or omissions;
> commits an offence
> (2)- (5)...
> (6) In order to prove that the property is the proceeds of crime, it is not necessary for there there to be a conviction for the offence that has generated the proceeds, or for there to be a showing of a specific offence rather than some kind of criminal activity, or that a particular person committed the offence."

[15] Having investigated the mobile number supplied to them by the second respondent in her warned and cautioned statement as that belonging to Jack Kani (the mechanic), the police established that the same was registered in the name of one Nehemiah Makanya. He is a motor mechanic but, in his statement to the police, indicated that he had never met the first and second respondents. He also indicated that he had not repaired a Honda Airwave at the time material to this matter. Makanya's affidavit, which is annexure "1" to the Founding Affidavit, reads:

> 1. I am male adult bearing the above particulars and I work as a mechanic at Chadcom near Puma Garage along Chiremba Road, Harare.
>
> 2. On 2 February 2022 I was called by Detectives at CID Commercial Crimes Division [N/R] about enquiries which are being made in connection with a case of Money Laundering and Proceeds of Crime Act in which it is alleged that on 24 September 2021, a Honda Airwave registration number AFD1898 white in color was found parked at number 41 Southlands Flats Mazowe street Harare in parking bay number12 with

four sacks loaded with bond notes stashed in the motor vehicle mentioned above. The bond notes were amounting to RTGS$ 1436 500.

3. It is further alleged that I was left with the above motor vehicle on 23 September2021 for fixing it and after I finished fixing it I was supposed to park it at number 41 Southlands Flats Mazowe Street Harare. The motor vehicle was also supposed to be left in the custody of Samuel Tererai Chiodze.
4. I do not know Lydia Ratidzai Chiodze who is said to have given me her Honda Airwave for fixing. I admit that I am a mechanic but also do not know her or her brother Samuel Tererai Chiodze as my clients. I have never communicated with both of them so I am denying all that is being said in connection with this case."

[16] The applicant seeks the forfeiture of the money on the basis that it is proceeds of crime. This, so says the applicant, explains why the money was hidden in the sacks in the motor vehicle parked at the first respondent's parking bay. That the money was earned through criminal activities is explicable also on other grounds. Somebody, who had possession of the motor vehicle at the material time, packed the money, stashed it in the sacks and locked the motor vehicle to secure the money. Makanya, first and second respondents all denied knowledge of existence of that money in the car. No one has explained the origin of the money and why it was stashed in a locked car at the first respondent's parking bay. First respondent was in possession of the car, which belonged to his sister (the second respondent). Both did not disclose the whereabouts of the car keys. Even as l write this judgment I do not know where the car keys are. It will be recalled that the police had to resort to the extra ordinary measure of roping in a locksmith to unlock the motor vehicle. No one has claimed that the money belongs to him or her. No one has opposed the application for the forfeiture of the money itself. For all these reasons, l am satisfied that the money is tainted by reason of it being proceeds of crime. It is forfeited to the state.

IS THE WHITE HONDA AIRWAVE REGISTRATION NUMBER AFD 1898 AN INSTRUMENTALITY FOR THE COMMISSION OF AN OFFENCE OR CRIMINAL OFFENCES?

[17] I am satisfied that it is.

[18] In *Prosecutor General* v *Matinyarare* & *Ors* HH 512\23 this court considered the meaning of the words " instrumentality" or "instrumentalities" as used in the Money Laundering Act in an endeavour to discover the intention of the Legislative. It referred to the ordinary meaning of the words in question as well as the decisions of the South African Court of Appeal in *National*

Director of Public Prosecutions v *R O Cook Properties* 2004 (2) SACR 208 (SCA), *National Director of Public Prosecutions* v *Van Staden* [2006] SCA 135 and *Prophet* v *National Director of Public Prosecutions* [2016] I All SA 212(SCA). Guidance was also sought from the American case of *United States* v *Chandler* 36F 3d 358 (1994).

[19] The South African position of what an "instrumentality of an offence" means is summarized in *National Director of Public Prosecutions* v *R O Cook Properties* (supra) at p31 as follows:

> "…the link between the crime committed and the property is reasonably direct, and that the employment of the property must play a reasonably direct role in the commission of the offence. In a real or substantial sense the property must facilitate or make possible the commission of the offence. As the term "instrumentality" itself suggests (albeit that it is defined to extend beyond its ordinary meaning), the property must be instrumental to, and not merely incidental to, the commission of the offence."

[20] Section2 of the Money Laundering Act ("the Act ") defines tainted property to include instrumentalities of the commission of a serious offence.

[21] The same section defines a serious offence to include a money laundering offence.

[22] Section2 of the Act defines "instrumentalities" as follows:

> "means any property used , in any manner, wholly or in part to commit a criminal offence or criminal offences.

[23] Section 79 (1) of the Act provides that an order for civil forfeiture can be sought in respect of property that is suspected to be tainted. It will be recalled that tainted property includes property that is an instrumentality of the commission of a serious offense.

[24] While an application can be sought for the civil forfeiture of property suspected to be tainted, the Court can only grant such an application if it finds, on a balance of probabilities, that such property is tainted. See s 80 (2) of the Act.

[25] Section 80 (3) of the Act reads as follows:

> "3 In order to satisfy the Court under subsection (2) -
> (a)…
> (b) that the property is an instrumentality of a serious offence …it is not necessary to show that the property was used or intended to be used to commit a specific serious offence …, or that any person has been charged in relation with such an offence or act, only that it was used or intended to be used to engage in conduct constituting or associated with the serious offence…." (The underlining is mine for emphasis).

[26] I have already found that the money which was in the car is proceeds of a serious crime. I have forfeited the money to the state. The fate of the car is inseparable from that of the money. The resort to the use of the two sacks is indicative of at least two things. First, to conceal the fact that it was money which was contained in those sacks. This is demonstrated by the fact that although the investigators saw the sacks even as the car was locked and parked at the bay on 24 September 2021 it was only upon emptying the sacks after the locksmith had unlocked the car that they knew what it was that was in the motor vehicle. This was on 1 October 2021. Secondly, the money stashed in those sacks, both in terms of volume and value at that time, was huge. Documentary evidence obtained from the Reserve Bank of Zimbabwe and placed before the Court by the applicant proves that as at 1 October 2021 the ZWL$1436 500 was equivalent to US$16386.19 at the official exchange rate. This evidence was not controverted by the second respondent. I accept it.

[27] Section 80 (1) of the Act makes it clear that an order for civil forfeiture is an order in rem. This means that it is an order against the property itself. It is granted on the basis that it is the property itself, rather than a person, which is the wrongdoer. In the instant matter I am satisfied that the motor vehicle was used or was intended to be used to engage in conduct constituting or associated with some serious offence or offences. The two sacks were neither safes, vaults nor cash boxes. They were neither manufactured and designed to hold such a huge sum of money nor any amount of money for that matter. The white Honda Airwave registration number AFD1898 is not a bank. Bay number 12 at Southlands Flats Mazowe Street Harare is not premises from which banking services are conducted. Rather, it was at the material time and remains a motor vehicle parking bay at a residence. No one claimed that the money was his or hers. No one explained how the money ended up in a car. No one explained where the car keys were at a material time. No one explained who had the keys.

[28] The applicant does not need to show that the motor vehicle was used or intended to be used to commit a specific serious offence. She does not need to show that any person has been charged in relation to any specific serious offence or act. All she needs to prove, on a balance of probabilities, is that the motor vehicle was used or intended to be used to engage in conduct constituting or associated with a serious offence or offences. That the applicant has done. Proceeding from the premise that the money itself is proceeds of some serious offence (whether that offence be a violation of the exchange control laws, money laundering offences or indeed any

other offence) the motor vehicle was used to conceal the proceeds of some serious offence. That associated the motor vehicle with the serious offence. The motor vehicle was intended to be a safe haven for the proceeds of some serious offence. Keeping the money in sacks in the car at the parking bay was intended to conceal the illicit origin of the money, its ownership, movement, acquisition and to preclude the detection of the commission of the serious offence. It matters not whether that offence was a violation of the exchange control laws, money laundering laws, the Bank Use Promotion Act [*Chapter* 24:24] or any other law. The hiding and storage of the money in the motor vehicle means that the latter was instrumental in the commission of the serious offence. It made the motor vehicle tainted property. That the motor vehicle may have thereafter remained available for innocent use does not detract from the fact that it was instrumental in the commission of some conduct constituting or associated with some criminal offence. For property to be found to be an instrumentality of a criminal offence s 2 of the Act requires that it be found to have been used or intended to be used, in any manner, wholly or in part to commit a criminal offence or criminal offences. It is enough that the property be found to have been used, in part, to commit a criminal offence or criminal offences. I have already made this finding.

[29] In addition, Mr Mutangadura asked me to infer that the motor vehicle was intended to ferry the cash to some place or places for purposes of engaging in further acts of money laundering. This is an enticing submission. But I find it unnecessary to make a pronouncement on this one way or the other. I take the view that the firm finding that I have made, that the motor vehicle is an instrumentality of the commission of a criminal offence, for the reasons already set out in this judgment, suffices.

IS THE 2ND RESPONDENT AN INNOCENT OWNER OF THE CAR?

[30] I think not.

[31] I have reproduced the contents of her warned and cautioned statement at para 13 of this judgment. In that statement the second respondent said, not once but thrice, that she gave the motor vehicle to her mechanic for repair before she left for Zambia. She gave the name of the mechanic as Jack Kani. The warned and cautioned statement discloses this mechanic's mobile telephone number. The points are also made in that statement that her instruction to Kani was that after repairing the vehicle he should deliver it to her brother, the first respondent, and that there

was no money in the motor vehicle when she delivered it to the said mechanic. The warned and cautioned statement was recorded from her and signed on 2 February 2022.

[32] However, when she deposed to an affidavit opposing the instant application on 12 September 2023, she was saying something completely different. At para(s) 9-12 of her opposing affidavit the second respondent says the following:

> "9 I was not present when these events transpired and the first respondent is the one who can answer as to what took place leading to the car's seizure on 25 of September 2021.
>
> 10. I did not leave or place ZWL 1 436 500 in sacks in the motor vehicle <u>when I left the motor vehicle in first respondent's custody in order for first respondent to ferry my car to a motor mechanic of his choice.</u>
>
> 11. I cannot comment on these averments except to state that the first respondent stated that he would give a detailed explanation to the Courts of law….
>
> 12. … I will reiterate that I am not the owner of the sacks of ZWL1 436 500 found in the car. The search and seizure was done in my absence and the car had been in first respondent's possession and control for over a week" (underlying mine for emphasis).

[33] In her opposing affidavit the second respondent says she gave the motor vehicle to the first respondent for the latter to deliver it to a mechanic of his choice for repairs. This contradicts her warned and cautioned statement wherein she repeatedly said that she gave the same motor vehicle to her named mechanic for repairs (the mobile telephone number of the mechanic is provided) with instructions that the mechanic, after the repairs were done, should deliver the car to the first respondent. What this contradiction does is that it makes it impossible for the Court to believe her when she says she parted with possession of the motor vehicle at the material time. It makes it impossible for the Court to believe her when she says the motor vehicle was meant to be repaired or was repaired at the material time. This is compounded by the following shortcomings in her explanation. The supposed mechanic, Jack Kani, did not depose to an affidavit supporting the second respondent's explanation. There is no evidence that such person exists. Indeed, the mobile telephone number furnished to the police by the second respondent in her warned and cautioned statement as being that of Jack Kani turned out to be Nehemiah Makanya's. Makanya's sworn statement is part of the founding papers. He, in no uncertain terms, denies knowing the first and second respondents. He says he did not repair a Honda Airwave during the relevant period. The second respondent confirms that she did not deal with Makanya at all. This means that she should

have placed Jack Kani's supporting affidavit before the Court. That person, if he exists, and herself, would have disclosed Kani's true mobile telephone number. As things stand, there is no evidence pertaining to Kani's true mobile telephone number. What was given to the police as Kani's mobile telephone number turned out to be Nehemiah Makanya's.

[34] Further, that the applicant parted with possession of her car as she left for Zambia is nothing more than a bare averment. It is devoid of any substantiation. The applicant did not place copy of her passport before the Court. That documentary evidence, if adduced by the second respondent, would have laid a firm foundation for her explanation that she is an innocent owner of the car in question. The second respondent's notice of opposition and opposing affidavit were filed and served by her erstwhile legal practitioners. The legal practitioners would have known the significance of attaching copy of the second respondent's passport for the relevant period, if at all it exists and she had indeed travelled to and from Zambia, in substantiation of what was asserted in the opposing affidavit.

[35] The second respondent professed complete ignorance on how her motor vehicle came to be stashed with the money in question. She says her brother, the first respondent, would give a detailed explanation of this state of affairs. That explanation, if it had been placed before me, may have shed more light on how and why his sister's motor vehicle came to be parked at his parking bay stashed with a huge amount of money whose ownership nobody has claimed. That explanation, if care had been taken to place it before me, would have been expected to traverse the whereabouts of the vehicle keys inclusive of the spare keys. The first respondent filed no papers in response to the application. He must be taken to be unopposed to the granting of the order sought. This circumstance compounds the second respondent's woes.

[36] At the end of the day the second respondent's innocent owner defense fails. I agree with Mr *Mutangadura* that all that the second respondent has done is to vainly endeavour to distance herself from possession of her car at the material time and from knowledge that it was being used as an instrumentality of the commission of some criminal offence. This is why she has failed to give flesh to her innocent owner defense in the manner already explained in this judgment. Her explanation has left this Court with more questions than answers.

ORDER

[37] In the result, the following order shall issue:

1. The following property is tainted property and is forfeited to the state:

(a) The cash in the sum of ZWL$1 436 500-00

(b) White Honda Airwave registration number AFD1898.

2. The second respondent shall within seven days do all such things and sign all papers and documents necessary to transfer ownership of the white Honda Airwave registration number AFD1898 to the State failing which the Sheriff of Zimbabwe or his deputy shall do so.

3. The third respondent shall register transfer of registration of ownership of the white Honda Airwave registration number AFD 1898 from the second respondent to the State.

4. Each party shall bear its own costs.

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CHIKOWERO J

The National Prosecuting Authority, applicant's legal practitioners