

IN THE HIGH COURT OF ZAMBIA
HOLDEN AT KASAMA
(Civil Jurisdiction)

2019/HW/05

IN THE MATTER OF: SECTIONS 29, 30 AND 31 OF THE FORFEITURE OF
PROCEEDS OF CRIME ACT, NUMBER 19 OF 2010
OF THE LAWS OF ZAMBIA.

AND

IN THE MATTER OF: SECTION 120 (B) OF THE ENVIRONMENTAL
MANAGEMENT ACT; NO 12 OF 2011

IN RE PROPERTY: FUSO TRUCK REGISTRATION NUMBER ALV 9176 AND
100 LOGS OF PTEROCARPUS CHRISOETHRIX (MUKULA
TREE LOGS).

BETWEEN

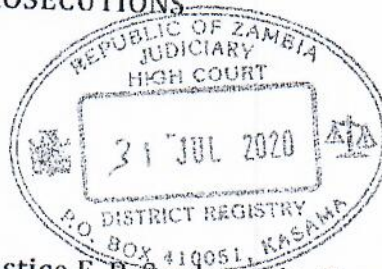
THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

NACHANGA TRANSPORT

RESPONDENT



Before the Honourable Mrs. Justice E. P. Sunkutu; in Chambers.

For the Applicant: Mr. O. Siankanga, Acting Senior State Advocate; National
Prosecutions Authority.

For the Respondent: In Person

RULING

Cases referred to:

- (i) Isadru Vicky vs Perina Aroma & 6 Others Civil Appeal No. 0033 / 2014

(ii) Nahar Investments Limited vs Grindlays Bank International (Z)
Limited (1984) ZR 81

Legislation referred to:

- (i) The Forfeiture of Proceeds of Crime Act, No. 19 of 2010 of the Laws of Zambia.
- (ii) The Environmental Management Act; No. 12 of 2011

1. This is an Application for an Order of Forfeiture to the State of property, namely a Fuso Truck, Registration Number ALV 9176. The Application, which was filed into Court on 18th April, 2019, is made pursuant to Sections 29 and 30 of the Forfeiture of Proceeds of Crime Act, No. 19 of 2010; as read together with Order 30, Rules 15 and 17 of the High Court Act, Chapter 27 of the Laws of Zambia.
2. In support of the Application is an Affidavit sworn by one Detective Inspector **Henry Choti Phiri**; a Police Officer in the Zambia Police Service. In the said Affidavit, Detective Inspector Phiri averred that on 29th December, 2018, whilst he was conducting routine patrols in the Nakonde District, he intercepted a Fuso Truck; Registration Number ALV 9176; which was loaded with one hundred (100) logs of *Pterocarpus Chrisothrix*, commonly known as 'Mukula Tree' logs.
3. The Detective Inspector further averred that when he seized the truck, the Driver, thereof, abandoned it. Further, that the truck was driven to the Nakonde Police Station; where it was parked pending further investigations. It was the

Detective Inspector's averment the Driver of the said Fuso Truck had not been apprehended; and his where abouts were unknown; to date.

4. The Respondent filed an Affidavit-in-Opposition to the Application. The same is dated 12th July, 2019, and is sworn by one **Martin Singongo**, a Manager in the Respondent Company. He averred that the Fuso Truck, Registration Number ALV 9176, belonged to his grandfather; one **Layton Simwawa**. To this end, Mr. Singongo exhibited an unmarked copy of the said vehicle's White Book.

5. Mr. Singongo also averred that, sometime in September, 2018 he employed a Driver, whose name was **Roger Simbeye**, of Nakonde, and to whom he entrusted the said truck. Further, that on 29th December, 2018 the said Driver informed him that he had been hired to transport sand from Chilolwa to Madwa; in the Nakonde District. Upon receipt of that information, Mr. Singongo tried to contact the said Driver, but his phone was not reachable. Later on, he (Singongo) was informed that the Fuso truck had been impounded; as it was found laden with *Mukula Tree Logs*. Further, that it was parked at the Nakonde Police Station.

6. It was Mr. Singongo's further averment that he made follow up; in an effort to have the truck released from the Nakonde Police Station. However, his efforts proved futile; on account that the Driver of the said Fuso truck, whose presence was required at the Nakonde Police Station, could not be found. According to Mr. Singongo, subsequent attempts to locate the said Driver have been in vain; and his where abouts remain unknown; to date.

7. I have very critically considered the Affidavit evidence of both the Applicant and the Respondent; herein. Before I proceed, I wish to express my regret at the delay in the delivery of this Ruling, which was occasioned by the Court interrogating a backlog of cases. Returning to the case in hand, it is not in dispute that a Fuso Truck, bearing Registration Number ALV 9176, was found abandoned; with 100 logs of *Pterocarpus Chrisothrix*, more popularly known as 'Mukula' on it. I shall, therefore, not dwell on the issue of the truck being found loaded with 100 Mukula Tree Logs; save to state that according to the Forfeiture of Proceeds of Crime, Act, that rendered the truck to be tainted property.

8. I must state that in Applications such as this one, the test to be satisfied, if a claim is to be tenable, is, firstly, whether the claimant has an interest in the, property for which forfeiture is sought. Secondly, that the claimant was not, in any way, involved in the commission of the offence; in respect of which the forfeiture of the property is sought. Section 12 (2) (a-b) of the Forfeiture of Proceeds of Crime Act No. 19 of 2010 protects third parties in such applications. It states as follows:

"where a person applies to the Court for an Order under this subsection in respect of the person's interest in any property and the Court is satisfied that;

(a) the applicant has an interest in the property;

(b) the applicant was not in any way involved in the commission of the offence in respect of which the forfeiture of the property is sought, or the forfeiture order against the property was made.

the Court may make an order declaring the nature, extent, and value, as at the time when the order is made of the applicant's interest."

9. From the provision cited above, it is clear that the Burden of Proof shifts to the Respondent, herein, to demonstrate, on a balance of probabilities, that it has a legitimate interest in the property; and that it was not involved in the commission of the offence in respect of which the Application before this Court is made.
10. The record shows that the Respondent deals in the transportation business; and that one **Roger Simbeye** was in the Respondent's employ; as a Driver. It is the position of Mr. Singogo, on behalf of the Respondent, that on 29th December, 2018 he was informed, by Mr. Simbeye, that he had been hired to transport sand from Chilolwa to Madwa. Mr. Singogo does not disclose his reaction to that information. He only, categorically, denies having given Mr. Simbeye permission to under-take the illicit assignment of ferrying Mukula tree logs.
11. It is noteworthy that despite taking the position that Mr. Simbeye acted without authority, in ferrying the Mukula tree logs, there is nothing on record to prove Mr. Singogo's assertions, in that regard, on behalf of the Respondent. This is a grave omission.

12. It is my considered view that, in the quest to show that the Respondent, and any of its representatives had no involvement in the ferrying of the said logs, the Respondent should have, firstly, provided evidence, from the person who hired its vehicle to ferry sand, to show the Court that there was, indeed, an agreement to that effect. Secondly, the Respondent should have availed the Court with concrete proof to show that it was never a party to the illegal transaction, instead of merely stating that its Driver was hired to transport sand from Chilolwa to Madwa; and that the Respondent knew nothing about the ferrying of Mukula tree logs. The proof of ferrying sand to the Respondent's client could have been in the form of a Delivery Note. As things stand, it is possible that the said Mr. Simbeye acted with the full authority of his employer, the Respondent, in the ferrying of the Mukula Tree logs.

13. In his Affidavit and in a further effort to prove that Mr. Simbeye's actions were unknown to the Respondent, Mr. Singogo avers that he was merely informed that the Driver had been hired to transport sand. While this may well have been so, it is most curious that a Driver would engage in a transaction on the Respondent's behalf; without being lawfully authorized to. This waters down the contention that the Respondent's representatives, such as Mr. Singogo, were unaware of what their Driver was carrying, at any particular time, in the Fuso Truck.

14. It stands to reason that in the ordinary course of business, the Driver would have had to consult his employer, the Respondent, before engaging in the transportation of the sand to Madwa. Furthermore, and for the sake of

accountability, the Driver would have had to receipt the payment that he received for the job of ferrying sand. To allow the Driver to freely transact, in his own capacity, using company facilities such as the Fuso truck, which is the subject of this Application, was, in my view, not just reckless of the Respondent; but totally untoward. In fact, it is not unreasonable to conclude that if the Driver was given such a free rein, then whatever transactions he engaged in were with the blessing of the Respondent; if nothing else but impliedly so.

15. With regard to the failure to locate the Respondent's Driver, the record does not show that any such attempts were, in fact made, by the Respondent. There is only mere mention, by Mr. Singogo, that attempts to locate the Driver proved futile. It is common practice for companies, which run any business, to have detailed information on their employees. These will include their residential addresses, the physical or postal address of a next of kin, and their contact details; in case of an emergency such as sudden illness, death, an accident or, indeed, the disappearance of an employee, which would necessitate contacting the employee's relatives.

16. In the case in hand, there is no shred of evidence to show that the Respondent engaged Mr. Simbeye's relatives, friends or, indeed anyone else, to try and locate him. In fact, if the Respondent was serious about locating its Driver, it could have engaged the Police; by formally reporting its Driver missing. The record also shows that there is no evidence of any tangible efforts to locate the Respondent's Driver, other than mere mention that attempts to do so were made. In that, the record is

devoid of the nature of those efforts, leaving the matter open to interpretation; and inviting speculation.

17. In the Respondent's efforts to show that it was not party to any illegitimate act, Mr. Singogo, stated that he did not permit Mr. Simbeye, the Driver, to ferry the Mukula Tree logs. However, and as has already been indicated, the record does not show what instructions were actually given to that Driver; and whether or not he was expressly forbidden to carry the illegal cargo. Mr. Singogo merely mentions that the Driver, according to information he (Singogo) received, was hired to ferry sand. As has been noted, the fact that the Driver's action was not queried, can be interpreted to mean that it was, actually, blessed by his employer.

18. It is important to mention that there are instances when employees act as agents of their employers; and when that happens, then the actions of these employees bind their principle 'the employer'. For the purposes of these proceedings, I will not delve into the law in this regard. It suffices to state that in the case in hand, in the absence of any proof to show that the said Driver acted against the instructions of the Manager, the Respondent is bound by any transaction that the Driver involved himself in; including the ferrying of Mukula Tree Logs.

19. I now focus in a little more detail on the issue of the Respondent's interest in the Fuso Truck which, according to the Forfeiture of the Proceeds of Acrime Act of Zambia, is tainted property. The Applicant has averred that the truck was

impounded on 29th December, 2018. The present Application was filed into Court on 18th April, 2019. The Respondent opposed it by filing an Affidavit-in-Opposition, thereto, on 12th July, 2019; a period of four (04) months since the said truck was impounded and kept in Police custody at the Nakonde Police Station. This status quo begs understanding; because an owner of property that is seized, and who has interest in that property would, ordinarily, lay claim to the same at the earliest possible time; after the seizure thereof.

20. In the case in hand, the fact that the Claimant waited for such a long time to come forward and claim the release of the impounded vehicle, and even then only after the Applicant applied to the Court for an Order to forfeit the said vehicle to the State, casts doubt on the extent of the interest in the property. In taking this view, I am guided by the case of Isadru Vicky vs Perina Aroma & 6 others civil Appeal No. 0033/2014 where it was held that:

"litigants who elect to allow litigation to sink into indefinite abeyance, who have had no serious and settled intent to pursue that litigation and who have in consequence acted in respect of that litigation, in knowing disregard of their obligation to the Court and to the opposing party, should not be allowed to carry out with litigation conducted in that manner".

21. While the **Isadru** case is distinguishable from the case in hand, the common thread is the issue of prompt pursuance of litigation, essentially striking while the iron is still hot. In the present case, the Respondent on its own motion, could have

made an Application to have the Fuso Truck released, long before the Applicant instituted proceedings to have the said vehicle forfeited. The conduct of the Respondent shows, to say the least, a curious lack of seriousness in laying claim to the Fuso Truck and pursuing its release. In consolidation of this view, I also make reference to the case of Nahar Investments Limited vs Grindlays Bank International (Z) Limited (1984) ZR 81 in which it was held that:

"Appellants who sit back until there is an application to dismiss their appeal before making their own application for extension of time, do so at their own peril."

22. Having thoroughly considered the Affidavit evidence in this case, I hold that the Respondent has not shown sufficient interest in the property that is the subject of these proceedings. To start with, the motor vehicle in question is not registered in the Respondent's name; to prove ownership and, therefore, legitimate interest and claim thereto. It is significant that the Respondent's Manager exhibited a White Book for the motor vehicle in question, in the names of one Layton Simwawa. However, there has been no evidence adduced as to whether or not Mr. Singogo was either bequeathed the said motor vehicle, or, indeed, was duly authorized to utilize the same. The absence of such evidence renders the claim to interest in the Fuso Truck, herein, very shaky.

23. In not having laid claim to the Fuso truck, herein, which was impounded on 29th December, 2018, the Respondent slept on its rights; and cannot now

legitimately raise a claim after a period of over four (04) months; without advancing any compelling reasons for not reacting sooner, to the impounding of the truck in issue. One would expect that the Respondent, being in the transportation business, would have been impacted negatively by not having its truck, or one of its trucks, in use; thereby resulting in loss of business. This, alone should have been the catalyst that should have prompted the Respondent to pursue the available legal channels for the release of its truck. Instead it took an Application by the State for the Respondent to react. As for the assertion that one Mr. Rodger Simbeye acted without lawful authority in ferrying logs of *Pterocarpus Chrisothrix*, it is the word of Mr. Singogo only; with no actual proof of the veracity of this assertion.

24. I take the liberty to mention that all too often, it is taken that once an employer claims not to have authorized its employee to engage in an illegal activity, then that claim is sufficient; and shall be accepted by the Courts. To the contrary, and while the standard of proof for civil matter is '*on a balance of probabilities*', the legal adage that *he/she who alleges must prove* holds true, and solid, in modern day litigation. In short, employees should not expect to escape vicarious liability on a mere claim of ignorance as to the illegal activities of their employees.

25. For the forgoing reasons I find that the Respondent's Affidavit falls far short of demonstrating to the Court, on a balance of probabilities, that it has an interest in the property which the Applicant seeks to have forfeited to the State. The



26. The Application for forfeiture of the Fuso Truck, herein, to the State therefore succeeds.

27. I **order** and **direct** that Fuso Truck, Registration Number ALV 9176, along with one hundred (100) logs of *Pterocarpus Chrisothrix* (*Mukula tree*) be forthwith forfeited to the State.

28. Leave to appeal is allowed.

Delivered on this 31st day of July, 2020, at Kasama.



EMELIA P. SUNKUTU
HIGH COURT JUDGE

