

ESTHER HODZA  
and  
LOVEMORE RAYMOND HODZA  
versus  
OFFICER IN CHARGE MVURWI POLICE STATION N.O  
and  
OFFICER COMMANDING POLICE, MOUNT DARWIN DISTRICT  
and  
OFFICER COMMANDING POLICE, MASHONALAND CENTRAL  
and  
COMMISSIONER-GENERAL OF ZIMBABWE  
and  
PROSECUTOR-GENERAL

HIGH COURT OF ZIMBABWE  
DEME J  
HARARE, 14 March, 2023

### **Opposed Application**

Mr *A Mtima*, for the 1<sup>st</sup> and 2<sup>nd</sup> applicants.  
Ms T Tembo, for the 1<sup>st</sup> to 4<sup>th</sup> respondents.  
Ms *H Tawona*, for the 5<sup>th</sup> respondent.

**DEME J:** On 14 March 2023, I delivered the order dismissing the application for interdict that had been brought by the first and second applicants before this court. The applicants, who are married to each other, subsequently sought the reasons for the judgment. The reasons for the order are thus as supplied in this judgment.

The first and second applicants approached this court seeking the relief couched in the following manner:

- “1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent (sic) are ordered to release to the 1<sup>st</sup> and 2<sup>nd</sup> Applicant (sic) the following;  
A white Toyota Hiace Engine Number 5L4216219 with chassis number LH1841001125, Toyota Hiace engine number 5L4999156 with chassis number LH1821001322, Toyota Dyna engine number N04CFB11883 with chassis number XZU3440001227 and Toyota Gaia engine number 3S984599 with chassis number SXM107169026 referred herein forthwith.
2. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent (sic) are ordered to release to the 1<sup>st</sup> and 2<sup>nd</sup> Applicant (sic) the following;

1 by Capri freezer 420 litres, 2 by gas refrigerator, 1 by 28 litre Capri microwave, 1 by 5,5 horsepower water pump and 1 by 5000 litre water tank, 1 shoe rake, 1 by 884 wardrobe, 1 by 3 piece kitchen unit, 2 sets Victoria leather sofas, 1 newly style coffee table, 2 stools with one brown coffee table.

3. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent (sic) shall jointly and severally, the one paying and the other to be absolved, pay the costs of this application on a legal practitioner and client scale.”

The applicants had their property itemised in the draft order seized by the police pending the criminal proceedings in the Magistrates Court at Mount Darwin. The applicants had mounted a similar application before this court under case number HC3678/21 which the applicants failed to prosecute within the prescribed time frames. This saw the dismissal of the application for want of prosecution filed under case number HC 3731/22 by the respondents.

The basis for the present application, according to the applicants is that the goods specified in the draft order are unlawfully held by the police. The applicants further alleged that the State closed its case at the Magistrates Court without producing the goods as exhibits and on that basis the applicants further averred that the continued holding of the goods is not justified.

The first applicant was arrested on 15 December 2016 facing charges of fraud as defined in terms of Section 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The Toyota Dyna and Toyota Gaia with particulars specified in the draft order belong to the second applicant according to the first applicant’s averments. It is the case of the first applicant that the goods belonging to the second applicant should be returned to the second applicant as he is not facing any charge.

At the end of the State case at the Magistrates Court, the first applicant applied for her discharge which was dismissed. She applied for review against the decision of the Magistrates Court under case number HC 253/21 which was struck from the roll before being re-enrolled. The application is still pending before this court.

It is further alleged that the complainant namely Steward Bank Limited in the criminal proceedings pending at the Magistrates Court withdrew the fraud charges. The first applicant, through her legal practitioners, attempted to have the goods released but she was advised that the police were now preferring new charges of money laundering against her. The first applicant further averred that there was no evidence tendered by the police or the Magistrates Court substantiating such allegations.

The application was opposed by the respondents on various grounds. The respondents opposed the application on the basis that the seized goods may be used in the fresh criminal proceedings of money laundering against the first applicant. The respondents further alleged that only the court can order the release of the seized goods as there are pending cases of money laundering and fraud. The respondents additionally alleged that the seizure of the goods under such circumstances is justified and lawful.

The fifth respondent opposed the application on the basis that it is a frivolous and vexatious application as the applicants did not specify the specific law upon which the present application is based. The fifth respondent also opposed the present application on the basis that the present application ought to have been filed before the Magistrates Court charged with the responsibility of hearing the pending case of fraud.

The fifth respondent also argued that the fact that the State closed its case does not entitle the applicants to the release of the seized goods as there are new charges preferred against the first applicant of money laundering in addition to the pending case of fraud. The fifth respondent also contended that the fraud case is still pending before the Magistrates as the complainant cannot withdraw at this stage where the State closed its case. The fifth respondent also averred that the seized goods must be retained until the criminal proceedings at the Magistrates Court have been concluded as the State may apply for the forfeiture of the goods if the first applicant is found to be guilty.

The sole issue before this court is whether this court may exercise its original jurisdiction in the present matter.

In terms of s 61(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], (hereinafter called “the Criminal Procedure and Evidence Act”), the goods seized can only be released, by the residing judicial officer, at the conclusion of the trial of the criminal proceedings. The provisions of the subsection is as follows:

“Subject to this Act and except as otherwise provided in any other enactment under which any matter shall or may be forfeited, the judge or magistrate presiding at criminal proceedings may, at the conclusion of the proceedings, unless the article is further required as an exhibit at a trial, make an order that any article referred to in section 60 or produced in evidence—

- (a) If the person from whose possession it was obtained may lawfully possess such article, be returned to that person; or

- (b) If the person from whose possession it was obtained is not entitled to the article or may not lawfully possess the article, be returned to any other person entitled thereto, if such person may lawfully possess the article; or
- (c) If no person is entitled to the article (whether by reason of its being an article whose possession is intrinsically unlawful, or otherwise) or if the person who is entitled thereto cannot be traced or is unknown, be forfeited to the State.”

In terms of s 61(1) of the Criminal Procedure and Evidence Act, it is apparent that the presiding judicial officer in the form of the Magistrate or Judge has the jurisdiction to determine whether or not the seized goods are to be released at the conclusion of criminal proceedings. It is apparent that the criminal proceedings for fraud charges facing the first applicant have not been brought to their logical conclusion. The fact that the State closed its case does not mean that such proceedings were concluded. The presiding Magistrate for Mount Darwin Magistrates Court is still seized with the matter until the matter is properly concluded. The withdrawal of fraud charges by the complainant does not bring to finality the criminal proceedings which are pending before Mount Darwin Magistrates Court. It is not clear why the seized goods were not produced as exhibits before the Magistrates Court. Whether or not the seized goods were produced as exhibits will not have the effect upon the provisions of s 61(1) of the Criminal Procedure and Evidence Act. The presiding Magistrate still retains the jurisdiction to make an appropriate order for the release of such goods. This court is reluctant to exercise its jurisdiction where specific statute takes away its original jurisdiction.

Section 13 of the High Court Act [*Chapter 7:06*] and s 171 of the Constitution confer civil original jurisdiction upon this court. Section 13 of the High Court Act is as follows:

“Subject to this act and any other law, the High Court shall have full original civil jurisdiction over all persons and over all matters within Zimbabwe.”

Section 171(1) (a) of the Constitution provides as follows:

“The High Court—

- (a) Has original jurisdiction over all civil and criminal matters throughout Zimbabwe;”

Further s 171(2) of the Constitution provides that the question of this court's jurisdiction may be regulated by an Act of Parliament. The subsection provides as follows:

“An act of Parliament may provide for the exercise of jurisdiction by the High Court and for that purpose may confer the power to make rules of court.”

It is apparent that this court's exercise of its original civil jurisdiction is subject to some limitations that may be imposed by an Act of Parliament. The Criminal Procedure and Evidence Act is one such Act of Parliament that has curtailed the manner in which this court may exercise its original civil jurisdiction in the matters like the present application. This court can only intervene upon application for review or upon appeal lodged by an aggrieved party.

The purpose of s 61(1) of the Criminal Procedure and Evidence Act is to ensure that the presiding judicial officer who is better informed be conferred with original jurisdiction for the determination of the application for the release of the seized goods which are related to the criminal proceedings of the matter before him or her. Further this provision in the Criminal Procedure and Evidence Act is to guarantee that our justice delivery system should operate in a co-ordinated fashion by avoiding other judicial officers who are not seized with the matter to make the appropriate order for the release of the seized goods.

Having made a determination that the criminal proceedings for the first applicant arising from fraud charges are still pending, there is no need for me to determine the relevance and consequence of the contemplated money laundering charges as this will not help the applicants' case. The fact that some of the goods seized belong to the second applicant will not take the present application any further. The critical factor is that such goods are part of the seized goods that are related to the pending criminal proceedings. Such goods may only be released by the presiding Magistrate at the conclusion of the trial at the Magistrates Court. This application was wrongly brought before this court.

There is no principle in our criminal justice system that recognises the complainant's withdrawal of the pending criminal case which is now heading towards the defence case after the closing of the State case. Their private arrangements can have no effect upon the pending criminal proceedings of fraud against the first applicant. There is nothing which prevents the criminal proceedings from proceeding under such circumstances. Put differently, the

purported withdrawal does not result in the conclusion of the pending criminal proceedings of fraud that have been instituted against the first applicant. Any act of entertaining the purported withdrawal of fraud charges against the first applicant would annihilate the essential purpose for which criminal law has been designed. According to Feltoe, (A Guide to the Criminal Law of Zimbabwe, 2006), criminal law plays vital functions in our society. The learned author succinctly put it as follows:

“The criminal law is a set of rules to regulate conduct of people within society. Those who commit crimes are seen as being a social menace. They cause instability and disorder within society.

The main purpose of the criminal law is to prevent socially intolerable conduct or, at least, to hold unacceptable conduct within socially acceptable limits. By threatening punishment the criminal law tries to suppress anti-social conduct likely to disrupt society. Burchell and Milton in *Principles of Criminal Law* at p 2 put it this way:

The criminal law is a social mechanism that is used to coerce members of society, through threat of pain and suffering, to abstain from conduct which is harmful to various interests of society. Its object is to promote the welfare of society and its members by establishing and maintaining peace and order.”

For the reasons aforesaid, the present application lacks merits. This is a clear abuse of court proceedings by the applicants. In future litigants like the applicants must be visited with punitive costs in order to remind them that they are not supposed to play football with the court. Although I did not invite the parties to address me on the effect of the similar application under case number HC 3678/21 which was dismissed for want of prosecution, I am convinced that the dismissal of such application demonstrates applicants’ attitude of lassitude in prosecuting their matters which is a further signal of an act for the abuse of court proceedings by the applicants.

*Jiti Law Chambers*, applicants’ legal practitioners.

*Civil Division*, first to fourth respondents’ legal practitioners.

*National Prosecuting Authority*, fifth respondent’s legal practitioners.