

RELCO INDUSTRIES (PRIVATE) LIMITED
versus
DETECTIVE ASSISTANT INSPECTOR
HERBERT BANDA N. O
and
THE PROVINCIAL MAGISTRATE, HARARE PROVINCE
DENNIS MANGOSI N. O

HIGH COURT OF ZIMBABWE
MHURI J
HARARE; 11 March & 21 March 2025

Advocate *GRJ Sithole* for Applicant
Ms *A Mangunde*, for the First and Second Respondents

Opposed Application

MHURI J: This is a Court Application for review in terms of R 62 of the High Court Rules SI 202/ 2021.

The review is being sought on the following grounds: -

1. Gross irregularities in the procedure by which the 1st respondent applied for the issuance of a warrant of search and seizure of the applicant's bank account number 5783600051530, which is held at the Ecobank Zimbabwe Limited, Borrowdale branch, Harare, in that the first Respondent, being an Assistant Inspector and not an Inspector, was not a designated police officer who could competently apply for the warrant of search and seizure and could not competently depose to the requisite deposition.

2. Gross irregularities in the procedure and decision of the second Respondent to issue a Warrant of Search and Seizure against the Applicant's bank account on 26 of September 2023 which Warrant was granted to any Peace Officer and other Officers of the law which includes the second Respondent herself and without assigning a specific category of Peace Officers to execute in that it is grossly unreasonable that no Court applying its mind to the set of facts and applicable law should arrive at such a decision.

3. The Respondents improperly issued Warrants of Search and Seizure in a grossly irregular

and unreasonable manner against Applicant thereby causing serious prejudice to the applicant and unlawfully depriving the applicant access to its US\$45 000 – 00, by purporting to freeze the applicant's funds under the guise of a search and seizure warrant.

4. The decision of the second respondent to issue a “freeze order” under the guise of a warrant of search and seizure, is not only grossly unreasonable, but it is also unlawful.

Applicant seeks an order in the following terms:

1. The Application for review be and is hereby granted.
2. The Warrant of Search and Seizure issued by the second Respondent against ECOBANK ZIMBABWE LIMITED on 26 September 2023 under Warrant of Search and Seizure Number 5559/23, Crime Reference Number 93/06/23 be and is hereby set aside.
3. Each party to bear its own costs.

Background Facts

The facts giving rise to the present application are common cause. The Applicant is in the business of selling and distributing petroleum products in Zimbabwe. Sometime in June 2023, the Applicant had four of its bank accounts operated by Ecobank Zimbabwe Limited frozen. The embargo was made after Steward Bank had made a recall request in respect of a certain payment made through that bank, into the Applicant's above-stated account, by one of the Applicant's customers. The transaction alluded to above involved the supply of petroleum fuel to one of the applicant's customers valued at forty-five thousand United States Dollars (US\$45 000 –00). The customer, TN Asset Management Company, through its relevant officials and banker (Steward Bank) had already done an advance payment of the said amount in anticipation of the necessary fuel. The fuel was delivered and consumed. The applicant then engaged the bank through email communications requesting that the embargo be lifted. A meeting was held between the representatives of the Applicant and those of the Bank at its Borrowdale branch, where it was agreed that the embargo on the applicant's accounts was to be lifted and that the agreed position was to be reduced in writing.

Despite the agreement that the freeze on the applicant's bank account was to be lifted, the Bank failed to do so and this resulted in the applicant suing Ecobank Zimbabwe Limited and the RBZ Financial Intelligence Unit under Case Number HCHC599/23.

The Applicant withdrew the Application when the bank served it with a copy of a letter from the RBZ Financial Intelligence Unit in which it confirmed that the embargo on

Applicant's account had lapsed by operation of law and that it had no objection to the applicant's bank account being unfrozen.

On the same day of receiving the letter from the Bank, Applicant also received a copy of a warrant of search and seizure of his Ecobank Bank Account. The warrant was applied for by the First Respondent and Second Respondent granted it. The warrant compelled Ecobank Zimbabwe Limited to immediately freeze USD45 000 – 00 that was allegedly transferred into Applicant's bank account on 14 June 2023 and to secure such amount in Ecobank's suspense account. The warrant was executed by the First Respondent and it meant that the funds were no longer available in the Applicant's bank account. This resulted in Applicant making the present application for review.

Issues

The issues that this Court is called upon to determine are:

Whether or not the warrant of search and seizure was irregularly issued?

Whether or not the decision to issue the warrant of search and seizure is grossly unreasonable, unlawful and motivated by malice?

Applicant' submissions

Applicant submitted that the warrant of search and seizure issued by Second Respondent was widely cast as it did not identify the person who was to execute the warrant. Applicant contended that a warrant must not be widely cast as stated in the case of *Elliott v Commissioner of ZRP* 1986 (1) ZLR 228 (H).

It was argued that in terms of s 50(2) and (4) of the Criminal Procedure and Evidence Act, the warrant ought to have only been directed to a police officer and not to Peace Officers and other Officers of the Law. It was Applicant's submission that in view of that the warrant was grossly unreasonable, as its broadness renders the warrant susceptible abuse.

It was also Applicant's contention that s 33(1) c) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] does not provide for a judicial officer to consider a deposition from a police officer who is of the rank of an Assistant Inspector. The rank of the police officer eligible to apply for a warrant of search and seizure is that of an Inspector and above. Once the deposition emanates from an undesignated Police Officer, a judicial officer such as the Second Respondent in this instance, has no jurisdiction whatsoever to even consider the application for the warrant in question.

It was Applicant's further submission that Second Respondent did not apply his mind in arriving at the decision to issue the warrant because the crime so alleged relates to an unknown accused and this has resulted in an unending protracted investigation. Further that, the warrant relates to mobile information whose description is unclear which information could be accessed from the bank books and or records. Applicant hence prayed for the granting of the Application.

First Respondent's submissions

First Respondent submitted that, Applicant refers to s 33(I)(c) of the Criminal Procedure and Evidence Act which deals with warrants of arrest and not warrants of search and seizure. It was further submitted that, First Respondent who applied for the warrant had the requisite authority as a police officer to apply for the said warrant in terms of s 50(2) of the Criminal Procedure and Evidence Act. The warrant of search in question was executed by a Police Officer and therefore is lawful. First Respondent submitted that there is nothing irregular or unlawful about the warrant issued by Second Respondent since he is investigating a case of fraud involving the funds. The First Respondent was therefore obliged to apply for the warrant to safeguard the funds as they comprise the evidence to be used in the investigations.

First Respondent although he admits that the warrant of search was directed to peace officers, he contended that it was executed by him, a police officer. It was First Respondent's contention that the law does not specify the rank of a Police Officer who should apply for a warrant of search and seizure. There is no provision on what rank of a Police Officer should apply for a warrant of search and seizure, and in this case, it was applied for and executed by the First Respondent who is a Police Officer.

It was First Respondent's prayer that the Application be dismissed as it lacks merit.

Second Respondent did not file any opposition papers.

Analysis

The Application is basically premised on the provisions of the Criminal Procedure and Evidence Act [*Chapter 9:07*] in particular ss33 and 50(2).

S33 relied upon by Applicant in his founding affidavit provides as follows:

“33. Warrant of arrest by judge, magistrate or justice

(1) Any judge, magistrate or justice (other than a police officer) may issue a warrant for the arrest of any person or for the further detention of a person arrested without a warrant on written application subscribed by—

- (a) the Prosecutor-General; or
 - (b) the local public prosecutor; or
 - (c) a police officer who is of or above the rank of inspector; or
 - (d) a police officer in charge of a police station who is of or above the rank of assistant inspector;
- setting forth the offence alleged to have been committed, and that, from information available to him, he has reasonable grounds of suspicion against that person, or upon the information to the like effect of any person made on oath before the judge, magistrate or justice issuing the warrant:

Provided that it shall not be lawful for a magistrate or justice to issue any such warrant except when the offence charged has been committed within his area of jurisdiction or except when the person against whom the warrant is issued was, at the time when it was issued, known, or suspected on reasonable grounds, to be within the area of jurisdiction of the magistrate or justice.

- (2).....
- (3).....
- (4).....”

(underlining my own)

Section 50 of the Criminal Procedure and Evidence Act referred to provides as follows:

- (1) Subject to sections fifty-one, fifty-two and fifty-three, an article referred to in section forty-nine shall be seized only by virtue of a warrant issued—
 - (a) by a magistrate or justice (other than a police officer), if it appears to the magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of any person, or upon or in any premises or area, within his area of jurisdiction; or
 - (b) by a judge or magistrate presiding at criminal proceedings, if it appears to the judge or magistrate that any such article in the possession or under the control of any person or upon or in any premises is required in evidence in the proceedings.
- (2) warrant issued in terms of subsection (1) shall require a police officer to seize the article in question and shall to that end authorize such police officer, where necessary—
 - (a) to search any person identified in the warrant or any premises within an area identified in the warrant; or
 - (b) to enter and search any premises identified in the warrant, and to search any person found upon or in those premises.
- (3)...
- (4)...”

It is clear from the above therefore that, the applicable Section in casu is Section 50 and not Section 33 as submitted by Applicant in paragraph 15 of his founding affidavit.

It is also clear that the person to execute the warrant is a Police Officer.

This section is peremptory in nature and requires a Police Officer to be specifically authorised to execute the warrant. It is a peremptory requirement of this provision that the warrant is to be directed to a Police Officer who is to execute it.

The warrant is worded as follows:

**C.I.D COMMERCIAL CRIMES DIVISION [N.R] on 33595123 WSS No5559/23
WARRANT OF SEARCH AND SEIZURE**

Issued In terms of Sections 288, 49(1)(b) and 50(1)(a) of the Criminal Procedure and Evidence Act (Chapter 9:07).

**TO THE PEACE OFFICERS AND OTHER OFFICERS OF THE LAW, PROPER TO
THE EXECUTION OF CRIMINAL WARRANTS.**

WHEREAS, from information taken upon oath before myself, there are reasonable grounds for believing that **ECOBANK ZIMBABWE**, is in possession or control of mobile information which is required as exhibit in a criminal docket and that it is necessary for the purpose of investigating or detecting a case of Fraud as defined in Section 136 of the Criminal Law [Codification and Reform] Act, Chapter 9:23, make extracts from and copies of the said information.

Section 50 subsection (1) reads,

Subject to sections fifty-one, fifty-two and fifty-three, an article referred to in section forty-nine shall be seized only by virtue of a warrant issued-

(a) by a magistrate or justice, if it appears to the magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of any person, or upon or in any premises or area, within his area of jurisdiction;

Section 288 reads.....

A bank shall not be compelled to produce its bankers' book or any documents in any criminal proceedings unless the court specially orders that such bankers' books or bankers' documents shall be produced.

Circumstances are during the period extending from the 13th day of June 2023 to 15th day of June 2023, unknown accused person hacked TN Asset Management Company Steward Bank Nostro account 1036130853 and unlawfully initiated a bank transfer of USD\$80 000. Accused transferred USD\$35 000-00 into ZB Bank Limited account number 4372278550405 and USD\$45 000-00 into Ecobank Zimbabwe Limited account number 5783600051530.

It is therefore directed that ECOBANK ZIMBABWE should immediately provide the following;

(a) Immediately freeze USD\$45 000-00 which was fraudulently transferred to Ecobank account number 5783600051530 on 14/06/2023 and to be secured in Ecobank suspense account.

(b) Bankers affidavit from the manager in terms of Section 286(2) of the Criminal Procedure and Evidence Act (Chapter 9:07) in respect of Ecobank account number 5783600051530.

S.1 195/2014 section 9(2) reads notwithstanding subsection (1), subscriber information on central data base maybe provided to the law enforcement agency, provided that prior written

request is received by the authority from an official of the law enforcement agency who is in possession of warrant or court order to obtain such information.

These are therefore, in the State's name to command you to proceed to **ECOBANK ZIMBABWE**, and there from immediately obtain and take into your custody the above-mentioned documents and records and take them to CID CCD, Northern Region corner Josiah Chinamano and tom street, Morris Depot, Harare or other place of safety until the matter is finalized or until you further receive further orders from Court.

Given under my hand at Harare Magistrates Court this.....day of September.....
2023.

A clear reading of this warrant shows that it was directed to Peace Officers and other Officers of the law to execute it.

See s2 of the Criminal Procedure and Evidence Act which defines Peace Officer.

“peace officer” includes—

- (a) any magistrate or justice;
- (b) the Sheriff or any deputy sheriff;
- (c) any police officer;
- (d) any prison officer;
- (e) any immigration officer;
- (f) any inspector of mines;
- (g) any—
 - (i) chief, within his area; and
 - (ii) headman, within his chief's area; and
 - (iii) village head, within the area of his village; and
 - (iv) chief's messenger or headman's messenger, within the chief's area;as defined in the Traditional Leaders Act [*Chapter 29:17*];
- (h) any other person designated by the Minister by a statutory instrument;”

This is acknowledged by First Respondent in his concession that the warrant of search and seizure was directed to the generality of Peace Officers. This in my view is an irregularity. Further, the warrant relates to mobile information which is required for the purposes of investigating a case of fraud. The description of “the mobile information” is unclear. The second page of the warrant suffers the same predicament of vagueness as it relates to SI 195/2014, making it unclear as to what exactly the Police Officer was to do.

In the circumstances, I find that the warrant was too broad, vague and open ended since all the office holders referred to in s 2 had authority to execute the warrant. Courts have warned

against issuance of vague warrants; this was remarked in *Elliott v Commissioner of ZRP* 1986 (1) ZLR 228 (HC) at pg230(A) where it was held that:

“It has long been established that the Courts will refuse to recognise as valid a warrant, the terms of which are too general”.

It certainly was not the intention of the Legislature to have widely cast and open-ended warrants. This is so to avoid abuse. In *casu*, the wording of the warrant referring to peace officers is widely cast, the contents are vague and these render the warrant invalid.

The general principle governing non-compliance with statutory provisions was concisely stated in *Schierhout v Minister of Justice* 1926 AD 99 at 109:

“It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no force or effect. ...And the disregard of a peremptory provision in a statute is fatal to the validity of the proceedings affected.”

To that end, the warrant of search and seizure being tainted with gross irregularities cannot be allowed to stand. It is void and a legal nullity which affects everything that is premised on it. The issuance and execution of the warrant has resulted in the freezing of Applicant’s funds held at the Bank depriving him of the funds. The principle as enunciated in the celebrated case of *Macfoy v United African Company Limited* (1961) 3 All ER 1169 (PC) at 1172 that:

“if an act is void, then it is in law a nullity. It is not only bad, but incurably bad.....And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.” is apt

Disposition

In the result, it is ordered that:

1. The Application for review be and is hereby granted.
2. The Warrant of Search and Seizure issued by the 2nd Respondent against Ecobank Zimbabwe Limited on 26 September 2023 under Warrant of Search and Seizure Number 5559/23, Commercial Crimes Division [N.R] DR Number 93/06/23 be and is hereby set aside.
3. Each party to bear its own costs.

MHURI J:.....

Hove Legal Practice Applicants’ Legal Practitioners
Civil Division of the Attorney General’s Office: Respondents’ Legal Practitioners