

ROSEMARY CHINJAYANI
versus
MINISTER OF HOME AFFAIRS
and
COMMISSIONER OF POLICE
and
DETECTIVE INSPECTOR MUKOSI

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 14 and 27 April 2010 and 3 May 2010

Urgent Chamber Application

K Gama, for the applicant
L Msika, for the respondents

UCHENA J: The applicant is the registered owner of a Toyota Chasser motor vehicle registration number ABL 2611. It was registered in her name on 9 November 2009. The first respondent is the Minister of Home Affairs cited in his official capacity as the Minister responsible for the Zimbabwe Republic Police.

The second respondent is the Commissioner General of the Zimbabwe Republic Police, cited in his official capacity as the head of the Zimbabwe Republic Police. The third respondent is the investigating officer of the frauds, whose proceeds are believed to have been used to purchase the motor vehicle in question.

The applicant's motor vehicle was on 8 April 2010, seized by the third respondent without a warrant. It was seized because the police had information that it had been bought with proceeds from frauds committed by the applicant's brother Roderick Chongo against his employer FBC Banking Limited Mutare. The frauds are being investigated by the third respondent under Mutare Central CR'S 07/02/10, 41/02/10 and 42/02/10.

The third respondent's investigations had by the time he seized the applicant's motor vehicle established that the applicant had on two occasions been given large sums of money by her brother who is now on the run to buy a house and household goods in her own name. The agreement of sale states that the applicant is the purchaser. The applicant had confessed to the police in an affidavit that the house belonged to her brother who asked her to purport to be the buyer on his behalf.

The applicant applied to this court for a provisional order, ordering the respondents to release the motor vehicle to her on the ground that the third respondent had unlawfully seized it without a warrant. She further said that she did not consent to its seizure.

The third respondent does not dispute seizing the motor vehicle without a warrant. He in para 4 of his opposing affidavit says:

“I hold a reasonable suspicion that this vehicle is the product of the proceeds of a fraud which is under investigation under Mutare Central CRs 07/02/10, 41/02/10, and 42/02/10, and I believe that a warrant which I have already applied for will be issued to me thus the seizure can not at this particular point be pronounced unlawful.”

Mr *Gama* for the applicant submitted that the seizure of property without a warrant must be in terms of s 51 (1) (b) of the Criminal Procedure and Evidence Act [*Cap 9:07*], herein after called the CP & E Act, which provides as follows:

- “(1) A police officer may, without warrant, search any person or container or premises for the purposes of seizing any article referred to in section *forty-nine* and additionally, or alternatively, seize any such article—
- (a) if the person concerned consents to the search for and additionally, or alternatively, the seizure of the article in question or if a person who may consent to the search of the container or premises consents to such search and additionally, or alternatively, the seizure of the article in question; or
 - (b) if he on reasonable grounds believes that—
 - (i) a warrant would be issued to him in terms of paragraph (a) of subsection (1) of section *fifty* if he applied for one; and
 - (ii) the delay in obtaining a warrant would prevent the seizure or defeat the object of the search, as the case may be”.

He submitted that there was no basis for the seizure of the motor vehicle without a warrant as the applicant had given the third respondent a certified copy of the motor vehicle’s registration book.

Mr *Musika* for the respondents submitted that the seizure was in terms of s 51 (1) (b) (i) and (ii) of the CP&E Act, as the third respondent believed on reasonable grounds that the warrant he had applied for would be issued.

A seizure without a warrant in terms of s 51 (1) (b) must satisfy the two requirements of s 51 (1) (b) (i) and (ii) of the CP&E Act. The officer effecting the seizure must on

reasonable grounds believe that, a warrant would be issued to him in terms of para (a) of subs (1) of section fifty if he applied for one; and the delay in obtaining a warrant would prevent the seizure or defeat the object of the search, as the case may be.

In this case Mr *Gama* submitted that the third respondent did not have reasonable grounds for believing that the delay in obtaining a warrant would prevent the seizure or defeat the object of the search as the third respondent had just before the seizure been given a certified copy of the motor vehicle's registration book.

I agree with Mr *Gama* that seizure without a warrant is only permissible if the two requirements of s 51 (1) (b) (i) and (ii) are met. In this case the first requirement is satisfied by the third respondent's narration of the basis of his suspicion that the applicant was being used by her brother to spend proceeds of the frauds on properties which were being registered in her name. The third respondent was therefore justified in believing that the applicant had also been used by her brother to purchase and register the motor vehicle in her name. That *modus operandi* between the applicant and her brother had been established by her deposing an affidavit Annexure C to the third respondent's opposing affidavit in the presence of her legal practitioner, in which she agreed to having bought the house mentioned in Annexure B for her brother in her own name. She had again been given money by her brother to buy household goods from the seller of the house. A total of US\$137 000-00 cash was spend on the house and household goods. She had also during the relevant period bought a stand in Goromonzi for US\$25 000-00. The third responded had also established that the applicant did not during the relevant period have such large sums of money in her bank account. See annexure E to the third respondent's opposing affidavit. The Goromonzi stand was bought on 8 October 2009. The Marlborough house was bought on 12 December 2009. The motor vehicle in issue was registered in the applicant's name on 9 November 2009. The cumulative effect justifies the third respondent's suspicion that proceeds of frauds were used to buy the motor vehicle in question. and that if he applied for a warrant of seizure on those facts it would be granted. If, that was all that he had to prove he would have been able to defend his seizure of the motor vehicle without a warrant.

The use of the word "and" at the end of s 51 (1) (b) (i), and before s 51 (1) (b) (ii), means the requirements of both subss, (i) and (ii), must be satisfied before a seizure without a warrant can be lawful.

An examination of the third respondent's opposing affidavit however reveals that he did not deal with the effect of the delay in seizing the motor vehicle while awaiting the issuance of a warrant of seizure. That leaves the issue of the effect of delay unexplained, and the seizure can not in the absence of that explanation stand. In the case of *Hako v Minister of Safety & Security & Anor* 1996 (2) SA 891 (TK) @ 897 MILLER AJ commenting on the South African provision on seizure without a warrant identical to ours said:

“Lieutenant Colonel Westraad also avers that the seizure was performed in terms of s 22 (b) (i) of the Criminal Procedure Act. He gives no reasons or explanation as to why the police officials did not obtain a search warrant prior to the seizure. Section 22 (b) (i) cannot be read in isolation - it must be read together with s 22 (b) (ii). This is so because of the word “and” which appears immediately after s 22 (b) (i). There is absolutely nothing on record to suggest that a delay in obtaining a search warrant would defeat the object of the search.”

See also the case of *Ndlovu v Minister of Police, Transkei, & Ors* 1993 (3) SA 91 (TK)

In this case the absence of an explanation of the effect of a delay in seizing the motor vehicle, while awaiting the issuance of a warrant of seizure is fatal. The application for the provisional order must therefore be granted.

I could however not lose sight of the fact that the third respondent had in his opposing affidavit said he had before seizing the motor vehicle applied for a warrant of seizure. It became necessary to find out the result of that application, because if a warrant of seizure was granted, before the seizure; it might have an effect on the order this court has to grant. The parties were called back for them to clarify whether or not the warrant was issued and when it was issued. Mr *Musika* for the respondents confirmed that it was, and produced it as exh 1, by consent. The warrant of seizure was issued by a magistrate on 20 April 2010. It was therefore issued twelve days after the applicant's motor vehicle had been seized without a warrant. The warrant does not have retrospective effect. It could only have been acted upon after it was issued. It therefore took effect from 20 April 2010 onwards.

A reading of s 50 (1) and (2) confirms that a warrant takes effect from the time it is issued. Section 50 (1) and (2) 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) ...
 - (b) ...

- (2) A 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
 - (b) to enter and search any premises identified in the warrant, or any premises within an area identified in the warrant, and to search any person found upon or in those premises.”

Section 50 (1) clearly states that an article “shall be seized only by virtue of a warrant issued”. This means the warrant must be in existence before the seizure. Section 50 (2) clarifies the above by stating, that “a warrant issued in terms of subs (1) shall require a police officer to seize the article in question and shall to that end authorize such police officer, where necessary”. Therefore the warrant must pre-exist the seizure for it to, “require a police officer to seize the article”, and authorise such officer to search persons and enter premises where necessary. The police officer must in those circumstances ascertain from the warrant, the extent of the authority it gives him.

In this case there is a clear distinction between the third respondent’s conduct on 8 April 2010 when he clearly acted without a warrant, and what he may do in future in terms of the warrant issued on 20 April 2010.

Mr *Gama* and Mr *Musika* agreed that the issue of the granting of an application for a warrant for the seizure of the applicant’s motor vehicle will be the subject of separate litigation. That however does not affect the determination of this case, as the parties in this application only dealt with the seizure of the motor vehicle without a warrant. This court’s decision must therefore only determine that issue and no other.

I will therefore grant the interim order sought in terms of the draft order.

In the result it is ordered as follows.

Pending the finalization of this matter, the applicant is granted the following order:

The respondents, be and are hereby ordered to release into the applicant’s custody a Toyota Chasser motor vehicle registration number ABL 2611.