PROSECUTOR GENERAL
versus
BRIAN TENDAI KASHAYA
and
CULVER CITY INCORPORATED (PVT) LTD
and
CHRISTIAN BY MANSA MUSA (PVT) LTD

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 6 February 2023 & 14 June 2024

Opposed Application–Anti Dissipation Interdict

Mr *A Jakarasi* with Ms *M Mtamangira*, for the applicant
Mr *E Ngwerewe* with *M Tarugarira*, for the respondents

MUSITHU J:

This is a chamber application for an anti-dissipation interdict in which the applicant wants the respondents restrained from disposing of certain assets that it believes were acquired illegally. The application was made in terms of s 40 of the Money Laundering and Proceeds of Crime Act. The draft order records the relief sought as follows:

"TERMS OF THE ORDER

1. That the 1st, 2nd and 3rd Respondents be and are hereby interdicted from using in any manner or disposing of the following property:-
   (i) Clinic Tanker Trailer White in Colour Registration number AEZ 0133, Chassis Number AA911HJA17ZDW1458.
   (ii) Argosy Freightliner Horse, White in Colour Registration number ADS 8214, Chassis Number 1FUJAWCG9ELFU7704
   (iii) Clinic Tanker Trailer White in Colour Registration number AEU7688, Chassis Number AA911HJA17ZDW1449
   (iv) Argosy Freightliner Horse, White in Colour Registration number ADS 8240, Chassis Number IFUJAWCG4ELFU7691, Engine Number 06R1060448.
   (v) Clinic Tanker Trailer White in Colour Registration number AEZ 1482, Chassis Number AA911HJA17ZDW1450.
   (vi) Argosy Freightliner Horse, White in Colour Registration number ADS 8239, Chassis Number IFUJAWCG2CLBU7576, Engine Number 06R1051585.
   (vii) Toyota Fortuner Station wagon Chassis Number AHTCB3GS402007671, Engine Number 2GD0656389.
2. The property mentioned in paragraph 1 of the terms of this order shall be kept secure and in good condition and protected from any wear and tear by the 1st Respondent at 630Dowe Street RUWA.

3. The Investigating Officer shall be allowed to have access to the aforesaid property upon giving twenty-four hours notice to the 1st Respondent.
4. The Respondents shall pay costs of this application."

The Applicant's Case

The founding affidavit was deposed to by Clemence Chimbari, a Chief Public Prosecutor in the National Prosecuting Authority. On 23 January 2020, the deponent was approached by the Commercial Crimes Division of the Zimbabwe Republic Police, requesting the placement of an interdict on the property listed in para 1 of the draft order above. Where a person has been charged with a serious offence, the law permits the applicant to approach the court for an interdict restraining such person from dealing with specified property that is reasonably believed to be tainted or terrorist property or in which the said person has an interest. The listed property was reasonably believed to be tainted property.

The background facts which found the cause of action were as follows. Sometime in May 2019, an informant by the name Emmanuel Manyika entered into some contractual arrangement with a businesswoman called Shaillon Chiswa. Chiswa misrepresented to Manyika that there existed some company shares that she had disposed of together with a colleague in the United States of America. Chiswa needed a bank account through which she would receive her money. Manyika identified a colleague by the name Carl Burwell to offer a bank account in the name of Wells Cargo for that purpose.

On 4 June 2019, an amount of US$650 000 was deposited into the said account. Manyika instructed Carl Burwell to transfer US$500 000 to BancABC Botswana into the account of DBF Capital. Manyika then instructed DBF to transfer US$300 000 to his business colleague in Mauritius who required United States dollars in exchange for ZAR 4 590 000 to be paid in South Africa into an account held by Chromium Trading. Manyika was employed by that entity as a Procurement Officer since 2009.

On 13 June 2019, Chromium Trading paid (a) ZAR 980 000 to Pomona Trucks bank account number 030639492, held by Standard Bank of South Africa, (b) ZAR 468 925.43 to Bedvest McCathy Toyota Midrand's account number 62167866618, (c) ZAR 2 107 500 to Trailer Link T/A Status Truck Sales' First National Bank account 62016291677 for fuel tankers. Two separate deposits of ZAR 973 574.57 and ZAR 255 426 were made by Manyika at Chiswa's instance to Geofrey Sutherns lawyers.

On 21 June 2019, Manyika was advised by Carl Burwell that the sum of US$650 000 received into his bank account and paid out as set out above was proceeds of fraud. The said

account had since been frozen and Wells Cargo's Bank had recalled the money. Manyika instructed DBF Capital to reimburse US$500 000 to Wells Cargo. Chiswa never paid back the money paid to her, while part of the money was used to acquire the vehicles listed above. The said vehicles were registered in Zimbabwe and under the control of the respondents. Investigations by the ZRP had established that the first respondent was a co-director and 100% shareholder of the second respondent together with one Jerry Hondoma, who is only a director of the second respondent.

It was in view of the foregoing that the applicant held a reasonable suspicion that the said property was tainted as it constituted proceeds of crime.

Attached to the deponent's founding affidavit was the affidavit of Joseph Josephat Mutipforo, a Chief Superintendent in the ZRP. His evidence was as follows. He knew the first respondent as the Chief Executive Officer of Kashaya Transport. The first respondent was under police investigation for contravening s 8(1)(a)(b) as read with s 8(6) of the Money Laundering and Proceeds of Crime Act[1]. This was after he bought three Argosy Freightliner horses and three 2007 Tank Clinic Tankers using proceeds of fraud as defined in s 136(a)(b) of the Criminal Law (Codification and Reform) Act[2]. Investigations revealed that the first respondent had acquired the vehicles listed in paragraphs (i)-(vii) of the order sought above.

To avoid tempering with the said vehicles, the deponent was seeking an interdict restraining the first respondent, or any other person acting on his behalf, from dealing with the said property. The deponent also wanted the first respondent ordered to submit property tracking documents in terms of s 72(1) of the Money Laundering and Proceeds of Crime Act fully explaining the source of finding for the said vehicles.

Also attached to the applicant's opposing affidavit, was a statement by Emmanuel Manyika. The statement is almost on all fours with the affidavit filed on behalf of the applicant. It explains how the deposit of US$650 000 found its way into the account of Wells Fargo, owned by Carl Burwell. It also explains the disbursements that were made to several payees at the instance of Shaillon Chiswa. It also explains the payments that were made towards the acquisition of the vehicles listed in paragraph (i)-(vii) of the order sought by the applicant. The vehicles were allegedly imported through Beitbridge Border Post around July 2019, by the first respondent.

[1] [*Chapter 9:24*]
[2] [*Chapter 9:23*]

First and Second Respondents' Case

The first and second respondents' opposing affidavit was deposed to by the first respondent on his behalf and on behalf of the second respondent as its director. The affidavit raises the following points *in limine*. The first was that there was no proof that the deponent to the applicant's founding affidavit was authorised to depose to that affidavit on behalf of the applicant. The second point was that some foreign documents attached to the application were not authenticated and therefore inadmissible for not being authenticated in terms of the rules of court. The third point was that the application did not comply with s 40(1) of the Money Laundering and Proceeds of Crime Act in that there was an incongruence between the application and the affidavit of the Police Officer made in terms of s 40 of the said Act. The fourth point was that it was irregular to seek to place evidence before the court in the form of a statement by Emmanuel Manyika. The statement was not made under oath, and it infringed r 241 of the High Court rules, 1971, as read with s 45(1) of the Civil Evidence Act.

As regards the merits, the first and second respondents dismissed the applicant's averments as baseless and unsubstantiated. The allegations did not establish a link with the respondents. The applicant was relying on evidence from an informant who dealt with a third party and not the respondents. The averments amounted to hearsay evidence. The same informant was said to be the owner of a company in South Africa. The details of the company were not given. The same informant was also said to be employed by Chromium Trading as a Procurement Officer. There was also no resolution attached to prove that the informant had the powers to represent the company.

Further, the respondents averred that there was no evidence to support the allegation that indeed US$300 000 was deposited by DBF Capital into an account in Mauritius. Evidence attached did not comply with authentication rules, and any person could print the documents attached to the application. It was also not clear where the informant was employed. The status of Chromium Trading and its relationship with the informant was also not clear.

There was also no evidence to support the averments that transfer of monies to South Africa was going towards the purchase of the alleged trucks. There was no evidence that Chiswa gave instructions for those payments to be made. There was also no evidence showing any link or connection of the transactions with the respondents. The respondents further averred that there was no specificity regarding the allegations of the alleged fraud, who committed the

fraud, where and when the fraud was committed. There were no details of who was defrauded, and whether the alleged offender was tried and convicted before a competent court.

The deponent claimed to have been arrested on 3 July 2019 on charges of fraud involving the same assets on the same allegations as the current. He further claims that he was never brought to court on the charges. He was arrested again in early 2020 by officers from the Commercial Crime Unit. He was never charged of an offence. On some other occasion he was invited by the police and asked to surrender a Toyota Fortuner. When he inquired why he was being required to surrender the vehicle, he was informed that he was being charged for contravening the Money Laundering and Proceeds of Crime Act. He spent two days in Police custody and was only brought to court on 24 January 2020. The matter was placed before a Chief Law Officer who requested the Police to compile a complete docket before they brought him to court. Nothing was done thereafter until this date.

The deponent averred that the State had ample time to investigate him and have him prosecuted for the alleged offences since 2019, instead of trying to interdict the two companies without any evidence that the property was tainted. The deponent further averred that it was clear that the Police were conniving with their informant to seize his trucks. No sufficient reasons had been submitted to prove that the property was indeed tainted. The order sought would affect a lot of families who were dependant on the companies.

The court was urged to dismiss the application as the applicant had failed to satisfy the requirements of an interdict as envisaged by the Money Laundering and Proceeds of Crime Act.

The third respondent filed a supporting affidavit in which it fully associated itself with the averments made in the first respondent's affidavit.

The Submissions and Analysis

I now turn to deal with the preliminary points raised by the respondents. The first preliminary point concerning the authority of the deponent to the applicant's affidavit was not pursued in oral submissions. I considered it abandoned. The second point concerned the admissibility of certain documents that were attached to the application. The impugned documents include the statement by Emmanuel Manyika and some foreign documents attached to it. Mr *Ngwerewe* submitted that the documents offended s 45(1) of the Civil Evidence Act[3]. They also offended r 3 of the High Court (Authentication of Documents) Rules, 1971. The

[3] [*Chapter 8:01*]

statement by Manyika and the documents attached thereto had to be expunged from the record. was that some foreign documents attached to the application were not authenticated and therefore inadmissible for not being authenticated in terms of the rules of court.

In response, Mr *Jakarasi* submitted that there was nothing irregular about Manyika's statement and the documents attached thereto. These complied with s 282 of the Criminal Procedure and Evidence Act[4], and s 40 of the Civil Evidence Act.

The first part of the respondents' objection relates to the admissibility of the statement by Manyika. The respondents' counsel argued that Manyika's statement was not an affidavit and therefore offended r 241(2) of the High Court rules as read with s 45(1) of the Civil Evidence Act. The applicant's counsel on the other hand argued that the statement by Manyika was a valid supporting affidavit to the affidavit of Joseph Mutipforo.

The present application was filed as a chamber application for an interdict in terms of s 40 of the Money Laundering and Proceeds of Crime Act. Section 40 of the Money Laundering Act requires that such an application be made to court. In terms of r 229(C) of the old High Court rules, the mere fact that an applicant instituted proceedings by way of a chamber application instead of a court application does not vitiate such proceedings unless there is some conceivable prejudice to a respondent. Be that as it may, an application be it a chamber or court application must comply with the rules of this court once it has been placed before this court.

Rule 241(1) required a chamber application to be accompanied by Form 29B and, 'shall be supported by one or more affidavits setting out the facts upon which the applicant relies….". Section 40 of the Civil Evidence Act that counsel for the applicant cited is concerned with the admissibility of financial documents, entries in books of accounts and copies thereof. The terms 'book of account' and 'financial document' are defined in s 39 of that Act as being concerned with records or documents of financial transactions involving financial institutions.

The statement by Emmanuel Manyika is neither an affidavit nor a book of account or a financial document as defined by s 39 of the of the Civil Evidence Act. It was a statement made to the Police Criminal Investigation Department Asset Forfeiture Unit. The statement is not referred to in the affidavit of Joseph Mutipforo. It is only referred to in the affidavit of the deponent to the applicant's affidavit. In para 16 of the founding affidavit, the deponent to the founding affidavit attaches the statement by Manyika which incorporates all documents under

[4] [*Chapter 9:07*]

the annexure A series. The annexure A series is concerned with the electronic funds transfers and runs all the way from annexure A1 to annexure A6.

Section 45(1) of the Civil Evidence Act requires that evidence be received from any person under oath. This is more so in motion proceedings where the court and other interested parties do not have the benefit of hearing the oral testimony of a witness under oath. That evidence must be procured under oath through an affidavit. In view of the foregoing, the court determines that the statement by Manyika is not properly before the court. The same fate also befalls the annexure A series that were incorporated as annexures to that statement. That statement and the annexure A series are accordingly expunged from the record.

The next leg of the respondents' argument concerns the documents attached to the deponent to the applicant's founding affidavit as the B series. Counsel for the respondents also submitted that these documents should be expunged from the record because they were not authenticated. They also infringed s 40 of the Civil Evidence Act. Counsel for the applicant insisted that these were admissible in terms of s 282 of the Criminal Procedure and Evidence Act.

Rule 3 of the High Court (Authentication of Documents) Rules, 1971 states as follows:

> "3. Any document executed outside Zimbabwe shall be deemed to be sufficiently authenticated for the purpose of production or use in any court or tribunal in Zimbabwe or for the purpose of production or lodging in any public office in Zimbabwe if it is authenticated—
> (*a*) by a notary public, mayor or person holding judicial office; or
> (*b*) in the case of countries or territories in which Zimbabwe, has its own diplomatic or consular representative, by the head of a Zimbabwean diplomatic mission, the deputy or acting head of such mission, a counsellor, first, second or third secretary, a consul-general, consul or vice-consul."

The same rules define the word 'document' to mean "any deed, written contract, power of attorney, affidavit or other writing, but does not include an affidavit sworn before a commissioner." The documents under the B series are either bank records or financial documents. Section 2 of the Authentication of Documents rules define authentication to mean "in relation to a document, the verification of any signature thereon." For a document to fall under the ambit of r 3 of the Authentication of Documents rules, then it must have been executed outside Zimbabwe. The words "other writing" in my view should be confined to those documents that may require the verification of a signature of a person who may have signed that document. It would not apply to financial records or bank records that are computer generated and are unsigned. The bulk of the documents under the B series appear to be bank

statements which were computer generated. Only two letters of 21 June 2019 and 29 August 2019 would fall under the ambit of r 3. The two letters were not authenticated and would thus offend r 3. They must therefore be expunged from the record.

The rest of the documents which appear to be bank records or financial documents would not fit under the definition of documents. In my view, these must be dealt with in terms of s 40 of the Civil Evidence Act. The bank records or financial documents would still fall foul of s 40 of the Civil Evidence Act, which states as follows:

> **"40 Admissibility of financial documents, entries in books of account and copies thereof**
> (1) Subject to this Part, a financial document shall be admissible as *prima facie* proof of any fact recorded therein if direct oral evidence of that fact would be admissible, and if it is proved that the financial document—
> (*a*) was received or executed and kept by the financial institution concerned in the ordinary course of its business; and
> (*b*) is in, or comes immediately from, the custody or control of the financial institution concerned.
> (2) …….
> (3) Subject to this Part, a copy of a financial document referred to in subsection (1) or of an entry in a book-of account referred to in subsection (2) shall be admissible as *prima facie* proof of that document or entry if the copy is proved to be a true copy."

Financial documents would be admissible if they satisfy the requirements of s 40(1) and (3) above. The court must be satisfied that the document originated from the financial institution concerned. The court must also be satisfied that the document is indeed a true copy of what it purports to be. That certification would have to be made through an affidavit confirming the source of the document from the financial institution concerned. No such verification was done herein. The documents under the B series are all photocopies. Their authenticity therefore becomes doubtful making them inadmissible in the absence of any further evidence confirming their authenticity.

As noted already, counsel for the applicant submitted that the documents are admissible by virtue of s 282 of the Criminal Procedure and Evidence Act. That section does not take the applicant's cause any further. Subsection 2 of s 282 specifically refers to "any criminal proceedings". The provisions of that section would therefore be appropriate in the context of criminal proceedings and not motion proceedings of this nature.

For the foregoing reasons, the court determines that the documents under the B series are not properly before the court and are hereby expunged from the record.

The third preliminary objection concerns the compliance of the application with s 40(1) of the Money Laundering and Proceeds of Crime Act. The submission was that there was no

congruence between the founding affidavit accompanying the application and the affidavit of the Police Officer made in terms of s 40(5). In response, counsel for the applicant argued that the alleged defect was cured by the supporting affidavit of Mutipforo.

Subsections (1) and (5) of section 40 are relevant. They state as follows:

> **"40 Application for interdict**
> (1) Where a person has been convicted of a serious offence, has been charged with a serious offence, or is the subject of an investigation for a serious offence (referred to hereafter in this Part as "the relevant person"), the Prosecutor-General may make application to the court for an interdict under subsection (2) restraining any relevant person or other specified person from dealing with either or both of the following kinds of property—
> (*a*) specified property that is reasonably believed to be tainted property or terrorist property;
> (*b*) specified tainted property or terrorist property in which the relevant person has an interest.
> ……..
> (5) An application made to interdict property for the purposes of a confiscation order under subsection (1)(*a*) shall be in writing and shall be supported by an affidavit of a police officer indicating that the officer believes, and the grounds for his or her belief, that the property which is the subject of the application is tainted property or terrorist property." (Underlining for emphasis)

Subsection 1 above highlights the instances under which an application for an interdict can be made. The subject of the application must have been convicted of a serious offence or has been charged with a serious offence or is the subject of an investigation for a serious offence.

Paragraph 2 of the application states that *"the 1st Respondent was charged for contravening section 8(1)(a)(b) as read with section 8 (6) of the Money Laundering & Proceeds of Crime Act arising from his involvement in the acquisition, importation and registration of specified property which is reasonably believed to constitute proceeds of crime.*" That averment is also insinuated in para 6 of the founding affidavit which states *"I aver that where a person has been charged with a serious offence, the Prosecutor General may make application to the court for an interdict restraining any relevant person or other specified person from dealing with either or both of the following kinds of property….."*.

In para 3 of his supporting affidavit Mutipforo states that *"the respondent is under police investigation for contravening section 8(1)(a)(b) as read with section 8(6) of the Money Laundering and Proceeds of Crime Act……"*

There is clearly a disparity between the founding affidavit and the supporting affidavit of Mutipforo which distorts the foundation of the application. That discordance between the two affidavits leaves the court unsure what the status of the first respondent is and makes the application bad at law.

It is in view of the foregoing observations that the court determines that there is no proper application before the court. In light of that finding, it becomes unnecessary to traverse the merits of the case.

COSTS

In the papers, the respondents sought the dismissal of the application with costs on the higher scale of legal practitioner and client. The claim for costs at that level was not further motivated in the oral submissions. There is indeed no justification for an order of costs to be made on the punitive scale. In the exercise of my discretion, I find it befitting to order that each party bears its own costs of suit.

DISPOSITION

Resultantly it is ordered that:

1. The application is hereby struck off the roll
2. Each party shall bear its own costs.

National Prosecuting Authority, applicant's legal practitioners
Chatsanga & Partners, respondents' legal practitioners