

**IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

CAZ/08/548/2024

IN THE MATTER OF: SECTION 29, 30 AND 31 OF THE FOREFEITURE OF PROCEEDS OF CRIME ACT, NO. 19 OF 2010

IN THE MATTER OF: SECTION 71 OF THE FOREFEITURE OF PROCEEDS OF CRIME ACT NO. 19 OF 2010

IN THE MATTER OF: SECTION 22 OF THE ANTI-CORRUPTION ACT NUMBER 3 OF 2012

BETWEEN:

TASILA LUNGU

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS



APPELLANT

RESPONDENT

CORAM: Hon. Mr. Justice K. Muzenga in Chambers at Lusaka.

For the Appellant: Mrs. D. Findlay, Mr. C. Changano, Mr. B. Chikopo of Messrs D. Findlay & Associates and Ms. M. Phiri of Messrs Makebi Zulu Advocates

For the Respondent: Mrs. M. Kapambwe-Chitundu, Deputy Chief State Advocate, Mrs. R. Malibata Jackson, Senior State Advocates and Ms. V. Nsingo, Senior State Advocate

EX-TEMPORE RULING

Cases referred to:

1. **Sonny Paul Mulenga and Others v. Investrust Merchant Bank Limited (1999) ZR 101**
2. **Watson Nkandu Bowa (suing as Administrator of the Estate of the late Ruth Bowa) v. Fred Mubiana and Zesco Limited, Selected Judgment No. 21 of 2012**
3. **Charles Laima v. Pulse Financial Services, CAZ Application No. 41 of 2023**

Statutes referred to:

1. **The Forfeiture of Proceeds of Crime Act No. 19 of 2010**
2. **The Court of Appeal Rules, Statutory Instrument No. 65 of 2016**
3. **The Rules of the Supreme Court of England (1999) Edition**

This is a renewed application for an order to stay execution of judgment dated the 17th September 2024 pending hearing and determination of appeal to this court pursuant to **Section 11(4)** of the **Forfeiture of Proceeds of Crime Act No. 19 of 2010** (the Act), **Order 7 Rule 1(1)** and **Rule 2**, and **Order 10 Rule 2(1)** and **Rule 5 of the Court of Appeal Rules (CARs)**.

I have carefully considered the application, the affidavits and arguments for and against the application.

Although this matter is strictly speaking relating to an application for a stay of execution, there are some issues that have arisen which require the court to decide upon and provide guidance.

The first issue relating to the propriety of Counsel for the respondent to dispose to the affidavit in opposition. The second issue is whether the State can take possession of forfeited property without an order of court or leave to that effect.

Regarding the first issue, learned Counsel for the appellant contends that counsel for the respondent should not have deposed to the affidavit in opposition especially that it contains contentious information. I was referred to paragraphs 20, 21, 22 and 25 as the paragraphs containing contentious matters. On the other hand, learned Counsel for the respondent argued that the application for stay was mainly a legal matter, where Counsel would depose to.

I understand the difficulty learned Counsel for the appellant has with Counsel deposing to contentious matters. It is trite that Counsel should sparingly depose to affidavits in a client's case. The ban, as can be seen, is not absolute. There are issues of which Counsel can depose to affidavits. In this situation however, Counsel acts for and appears on behalf of the respondent and as such Counsel is allowed to depose to even contentious matters as there is very little or no distinction between the appellant and Counsel. Further, I have had sight of the paragraphs in issue and hold a firm view that there is nothing contentious about them which would warrant me to

declare the affidavit improper. This issue therefore lacks merit, especially in this circumstances of this case.

I now turn to consider the second issue. Learned Counsel for the appellant contends that it was improper for the respondent to take possession of the forfeited property without leave of court or further order of the court to that effect. Learned Counsel for the respondent, with equal force, has submitted that the subject property is forfeited property and the State was justified in taking possession. Reliance for this argument was placed on **Section 11 of the Act**.

I must state on the onset that the forfeiture of the within property was a subject of civil forfeiture proceedings **Section 11 of the Act** provides that:

"11. (1) Subject to subsection (2), where the court makes a forfeiture order against any property, the property vests absolutely in the State by virtue of the order.

(2) Where a forfeiture order is made against registrable property

(a) the property vests in the State in equity but does not vest in the State at Law until the applicable registration requirements have been complied with;

(b) the State is entitled to be registered as owner of the property; and

(c) the Attorney-General has power on behalf of the State to do, or authorise the doing of, anything necessary

or convenient to obtain the registration of the State as owner, including the execution of any instrument required to be executed by a person transferring an interest in property of that kind.

(3) If a forfeiture order has been made against registrable property-

(a) a public prosecutor has the power on behalf of the State to do anything necessary or convenient to give notice of, or otherwise protect, the equitable interest of the State in the property; and

(b) any action by, or on behalf of, the State is not a dealing for the purpose of paragraph (a) of subsection

(4)

(4) Where the court makes a forfeiture order against property-

(a) the property shall not, except with the leave of the court and in accordance with any directions of the court, be disposed of, or otherwise dealt with, by or on behalf of the State, before the relevant appeal date; and

(b) if, after the relevant appeal date, the order has not been discharged, the property may be disposed of, and the proceeds applied or otherwise dealt with, in accordance with the direction of the Attorney-General.

(5) Without limiting the generality of paragraph (b) of subsection (4), the directions that may be given pursuant to that paragraph include a direction that property is to be disposed of in accordance with the provisions of any Jaw specified in the direction.

(6) Money forfeited to the State under a forfeiture order shall be paid into the Fund.

(7) In this section-

"registrable property " means property the title to which is passed by registration on a register; and

"relevant appeal date " in relation to a forfeiture order made in consequence of a person's conviction of a serious offence, means –

(a) the date on which the period allowed by the rules of court for the lodging of an appeal against a person's conviction, or for the lodging of an appeal against the making of a forfeiture order, expires without an appeal having been lodged, whichever is the later; or

(b) where an appeal against a person's conviction or against the making of a forfeiture order is lodged, the date on which the appeal, or the later appeal, lapses in accordance with the rules of court or is finally determined."

I note that the arguments by the parties centered on the foregoing Section. I however, hold the view that **Section 11** is inapplicable to forfeitures arising from civil proceedings. This Section falls under **Division 2 of the Act**. The heading for **Division 2** is "**forfeiture orders**" and runs from **Sections 10 to 18**. The opening Section which is **Section 10** deals with forfeiture orders on conviction, as per the marginal note. The Section that immediately follows talks about the effect of forfeiture orders (**Section 11**). All the Sections that follow all refer to or relate to convictions. I therefore have no hesitation in holding that **Section 11** refers to forfeiture orders made in the preceding **Section 10**, which is conviction based forfeiture and not all the other forms of forfeiture.

I am fortified in my view by inclusion in the **Act**, of a separate part or division dealing with civil forfeiture orders. This is found in **Division IV**, whose heading is "**Civil Forfeiture Orders**", encompassing **Sections 27 to 31**. What follows thereafter is **Division 5** which makes general provisions, running from **Sections 32 to 34**.

Therefore, **Section 11** is inapplicable to civil forfeiture orders. The within forfeiture orders having arisen from civil forfeiture proceedings are subject to civil procedural rules. For avoidance of doubt, **Section 33** of the **Act** provides that:

"33(1) Any proceedings on an application for a restraining order, forfeiture order or confiscation order is not a criminal proceeding.

(2) Except in relation to an offence under this Act-

- (a) **Rules of construction applicable only in relation to criminal law do not apply in the interpretation of this Act; and**
- (b) **The Rules of evidence applicable in civil proceedings apply, and those applicable only in criminal proceedings do not apply, to proceedings under this Act."**

In casu, there is a civil judgment of the court below granting ownership of the subject property to the State, via a forfeiture order. According to the Rules of Court, in order for the State to take possession of the property, they needed to apply for leave to issue a writ of possession. After the issuance of a writ of possession, that is when a party can take possession and control of the property (see **Order 45 Rule 3 Rules of the Supreme Court of England**).

In this case it is not clear whether the State took possession of the property or simply went to view the property which was pronounced to be forfeited to it. I see no harm in the State viewing the property which was forfeited to itself, notwithstanding that a writ of possession was not issued, because the forfeiture order took immediate effect. However, possessions cannot be effectively carried out without an order of the Court, i.e. evicting occupants, the person against whom the order was made *et cetera*. This is the spirit behind the provision of **Section 31(3) of the Act**, allowing courts to make orders that may be necessary, after making a forfeiture order. For avoidance of doubt, it provides that:

"The court may, where it makes a forfeiture order or at any time thereafter, make any other orders that it considers appropriate, including orders for and with respect to facilitating the transfer of property."

I now turn to the substantive application for stay. I must state that having granted leave to appeal, I should have granted a stay of execution as a matter of course. However, the matter herein is not as straight forward. It is trite that a stay of execution should not be 'willy-nilly' granted. This is because a successful party should be deprived of enjoying the fruits of its judgment only for good cause.

In the case of **Sonny Paul and Others v. Investrust Merchant Bank Limited**¹ the Supreme Court stated that:

"In terms of our rules of court, an appeal does not automatically operate as a stay of execution and it is utterly pointless to ask for a stay solely because an appeal has been entered. More is required to be advanced to persuade the court below or this court that it is desirable, necessary and just to stay a judgment pending appeal. The successful party should be denied immediate enjoyment of a judgment only on good and sufficient grounds..... In exercising its discretion whether to grant a stay or not, the court is entitled to preview the prospects of success of the proposed appeal."

And in a subsequent case of **Watson Nkandu Bowa (suing as Administrator of the Estate of the late Ruth Bowa) v. Fred Mubiana and Zesco Limited**² the Apex court stated that:

“In an application for stay of execution pending appeal, the considerations are: the prospect of the appeal succeeding and the irreparable damage if a stay is not granted and the appellants’ appeal succeeds.”

I have previewed the grounds of appeal and without delving deep into the merits, I hold the view that the grievance taken by the appellant is not baseless. I have also considered that the dispute herein involves real property and as we stated in the case of **Charles Laima v. Pulse Financial Services**³, if a stay is not granted, the appellant may suffer irreparable damage, and the appeal will be rendered academic. The appellant has basically satisfied the requirements for the grant of a stay of execution. However, the circumstances do not permit me to outrightly do so. This is because there lies a danger of disposing of the property or dealing with it in a manner that may prejudice the outcome of the proceedings on appeal or make enforcement of the forfeiture order impossible if upheld on appeal. Ordinarily, when a stay is granted, the status quo is preserved, but this may not be tenable in the circumstances.

I am therefore inclined to grant a conditional stay. I find merit in the application and I, in the exercise of the inherent jurisdiction of this court, grant a stay of execution on condition that the appellant should not dispose of the property until determination of the appeal. The appellant will remain

in control and possession of the subject property but shall not dispose of the same until determination of appeal aforementioned.

For avoidance of doubt, the decision of the court below dated the 17th September 2024 is stayed until the determination of the appeal or until further order of the court. The appellant is precluded from disposing of the property until determination of the appeal. Costs will be in the cause.

Dated this^{22nd}..... day of January, 2025.



K. Muzenga

COURT OF APPEAL JUDGE