

PROSECUTOR GENERAL
versus
MADEFIT INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 23 December 2020 and 18 January 2021

Opposed Application

C. Mutangadura, for the applicant
D.C Ngwerume with *A. Borerwe*, for the respondent

CHIKOWERO J: This is an application for a civil forfeiture order brought in terms of s 79 as read with s 80 of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*] (“the MLPCA”).

The applicant’s contention is that respondent’s five motor vehicles are tainted property and should be forfeited to the state.

THE FACTUAL BACKGROUND

The applicant is the Prosecutor General of Zimbabwe. The respondent, a company duly registered in term of the laws of Zimbabwe, is in the trucking business and owns several haulage trucks.

The police received information suggesting that respondent was smuggling trucks into this country. Thereafter, it would alter the identities of those vehicles to assume the identities of vehicles which would already have been registered in terms of the Vehicle Registration and Licensing Act [*Chapter 13:14*] (“the VRLA’). The result would be that the offending vehicles would be carrying false identities, in contravention of the VRLA.

Acting on this information, the police impounded seven motor vehicles from stand number 301/99 Tilco Industries, Chitungwiza, being the respondent’s place of business.

The Criminal Investigations Department Vehicle Theft Squad subjected the vehicles to a forensic examination by a forensic scientist employed by the Ministry of Home Affairs and

Cultural Heritage, Department of Forensic Science. Her duties included examination of stolen motor vehicles.

The examination was carried out on 10 January 2020 at the Criminal Investigations Department Vehicle Theft Squad in Southerton, Harare. The forensic reports, which were attached to the founding affidavit, took the form of affidavits made deposed in terms of section 278 (1) (a) and (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (“the CPEA”).

In respect of five out of the seven vehicles, the findings of the forensic examination were as follows:

ONE RED FREIGHTLINER TRUCK HORSE WITH REGISTRATION NUMBER ADS 4104

The paint profile indicated that white was the original colour of the motor vehicle.

The chassis number IFUU5D8XXU385933 was dot punched on the near side of the chassis frame.

There were striation marks where the Chassis number is normally located.

Chemical etching on the area where the chassis number is normally located did not restore the original chassis number.

The engine number 11937605 was punched on the engine block where the engine number is normally located.

There was no physical evidence of tampering on the engine number.

ONE WHITE INTERNATIONAL HORSE WITH REGISTRATION NUMBER ADZ 4880

The paint profile indicated that the original color of the motor vehicles was white.

The data plate could not be located.

There was no physical evidence to indicate that the engine number 23172131 was tampered with.

Striation/file marks were observed on the chassis frame where the original Chassis number is normally located.

Physical evidence indicated that the original Chassis number was removed and a new number, IHTRL 00852998, punched to the right of the original number.

Chemical etching partly restored the original chassis number, that is, - H5.....JH 537341.

ONE RED FREIGHTLINER HORSE WITH REGISTRATION NUMBER AEG 6695

The paint profile indicated that white was the original colour of the vehicle.

The sticker stamped on the near side door frame bore the following, among other pieces of information:

Vehicle Identification Number : 1FU YDCYB2YP854636

Date of manufacture : 06/95

The engine number 11663024 was punched on the engine block where the engine number is normally located.

There was no physical evidence to indicate that the engine number was tampered with.

The chassis's frame bore the number IFUYDCYB9T854634 on the area where the chassis number is normally located.

Two of the integers, 9 and 4, were obliterated and different integers, 2 and 5 respectively punched above them.

ONE RED FREIGHTLINER HORSE WITH REGISTRATION NUMBER ADS 0982

The paint indicated that white was the original colour of the motor vehicle.

The plastic sticker located on the near side door frame bore, among other pieces of information, the following:

Vehicle identification IFUYSDYB5WL 970002

The area of the chassis frame where the chassis number is normally located was heavily painted over with orange on the base and black on top.

Chemical etching on this area of the chassis frame revealed two rows of incomplete integers 6-1-60 and 2-1-12-93 respectively.

The two rows of integers were unaligned, unevenly spaced and incomplete.

Chemical etching did not restore the original chassis number.

There was no physical evidence to indicate that the engine number 11878189 was tampered with.

ONE RED FREIGHTLINER HORSE WITH REGISTRATION NUMBER AEZ 0790

The paint evidence indicated that red was the original colour of the vehicle.

The data plate was missing.

The chassis number IFUYDMDB65H544393 was punched on the chassis frame where the chassis number is normally located.

The “B” and “H” letters had font that was bigger and uneven compared to the rest of the integers.

Chemical etching did not restore the original chassis number.

The engine number 11760181 was punched on the engine block where the original engine number is normally located.

There was no physical evidence to indicate that the engine number was tampered with.

In its opposing affidavit, respondent complained that the forensic examination was carried out in its absence and without its knowledge. It also complained that no photographs of the vehicles were shot before and after the examination.

Respondent denied tampering with the identities of all the five vehicles. In respect of AEG 6695 and ADS 0982, respondent averred that it bought these vehicles locally and effected change of ownership, in its favour, through the very same Southerton Police Station. As for ADZ 4880 and AEZ 0790 respondent averred that what was done was not tampering with the identities of the vehicles. Instead, respondent applied to the Zimbabwe Republic Police Criminal Investigations Department Vehicle Theft Squad for restoration of the engine and chassis numbers. The police granted the application to restore the engine and chassis numbers with a police officer endorsing on the application form that the engine and chassis were corroded.

Respondent also averred that I should disregard the affidavits of Detective Assistant Inspector Blessing Mazvita Mukura and Detective Inspector Tendai Nzirawa, both of the Vehicle Theft Squad. Some of the reasons for this averment were that the affidavits were made in terms of s 59 (1) (d) (iii) of the CPEA and that those affidavits, although attached, referred to and the contents thereof incorporated in the founding affidavit, were not allocated annexure numbers.

Respondent took the view that the present application is malicious because having made no headway in seeking the forfeiture of the same vehicles through the criminal justice system the applicant had now resorted to civil forfeiture. Respondent averred that applicant is thus abusing the provisions of the MLPCA.

THE APPLICANT’S SUBMISSIONS

In well researched heads of argument, the applicant took the court through the law relating to civil forfeiture in, among other jurisdictions, the United States of America and South Africa.

In respect of our MLPCA, Mr *Mutangadura* argued that the findings of the forensic expert spell out the factual foundation for suspecting, in terms of s 79, that the five vehicles were tainted property and hence liable to be forfeited to the State.

Section 80 (1) of the MLPCA is clear that the civil forfeiture order, if it is granted, is against the property itself. Section 80 (2) gives the court no discretion but to grant a civil forfeiture order where the applicant proves, on a balance of probabilities, that the targeted property is tainted. In so satisfying the court, the applicant need not prove that the property was derived directly or indirectly, in whole or in part, from a particular serious offence or that any person has been charged in relation to such an offence or act, only that it is proceeds from some conduct constituting or associated with the serious offence (s 80 (3) (a)). In proving that property is tainted, it is not necessary to show that the property was derived from a specific serious offence as long as it is shown that it was derived from some serious offence (sec 80 (3) (c) (i)). A serious offence includes in terms of the definition section, a money laundering offence or an offence for which the maximum penalty is imprisonment for four years or more, with or without the option of a fine. Tainted property includes proceeds from or instrumentalities of the commission of a serious offence.

Counsel for the applicant submitted that the graphic details contained in the forensic reports prove that the five vehicles were tainted property. They are instrumentalities of the commission of a serious offence or offences. It matters not whether the offence is either smuggling, car theft or some other serious offence. At the very least, the expert evidence reveals the commission of money laundering offences. It is unnecessary to show that it is the respondent who committed either the offences of smuggling, vehicle theft or laundered the proceeds of any of these or any other crime. All that is required to prove that the vehicles are the proceeds of crime is to show that the vehicles are the proceeds of some kind of criminal activity. The falsification of the identities of the vehicles shows that the vehicles themselves were involved in some kind of criminal activity otherwise there would have been no need to materially alter their identities.

Finally, counsel argued that the facts of this matter fell within the provisions of s 8 (1) (b), (2), (3) and (5) of the MLPCA. I shall advert to these provision in analysing this matter.

THE RESPONDENT'S SUBMISSIONS

I observe that the heads of argument and oral submissions presented by counsel for the respondent were not really helpful to the court.

For some unknown reasons, Mr Ngwerume chose not to focus on the application before the court. In this vein, it was not necessary to challenge the police to carry out criminal investigations into the matter involving the five motor vehicles with a view of preferring a specific criminal charge against the applicant. I am not sitting as a criminal court. This is an application for civil based forfeiture of property that is said to be tainted.

Likewise, it was not necessary to argue that the applicant, in bringing this application, is violating constitutionally entrenched property rights of the respondent. The MLPCA is law.

Counsel argued that there was no falsification of the identities of the vehicles. What was done was merely restoration of the corroded particulars of some of the vehicles. In respect of all the vehicles, the findings of the forensic scientist should not be relied on because applicant was never given an opportunity to explain what was said to be “tampering” with the identities of the vehicles.

All five vehicles were lawfully registered in terms of the VRLA. No provision of this Act was either contravened by the respondent or reaches the threshold of a serious offense as defined in the MLPCA.

In conclusion, the applicant had failed to prove, on a balance of probabilities, that the five vehicles were tainted property.

THE ANALYSIS

Respondent did not place any forensic evidence before me.

The result is that I have no reason not to accept, as correct, the expert evidence adduced by the applicant. This is so because this testimony has not been controverted by other expert evidence.

There can be no doubt that all the five motor vehicles had their identities altered in fundamental respects. A reading of the reports attests to this. In this regard I highlight some issues arising from the reports. The original chassis numbers in respect of all the motor vehicles could not be restored even when the vehicles were subjected to the forensic examination procedure called chemical etching. Ridges, furrows or linear marks (striation marks) now stand where the original chassis numbers were placed by the vehicles’ manufacturer. This is testament to force having been applied to remove the original chassis numbers. In respect of all the vehicles, there are now new

chassis numbers. For the vehicle appearing as ADS 4104 the original chassis number was not only completely erased but a new one was dot punched at a different area of the vehicle. Despite bearing a new, and different chassis number, the vehicle now appearing as ADZ 4880 was resilient to the extent that remnants of the original chassis number, - ---- JH537341, were restored under the forensic examination. Yet, in applying for and obtaining approval for restoration not only of the engine but chassis number, the respondent had supplied the chassis number as IHTRLOOO85H652 998. This means the application for restoration of the chassis number was deceptive. Respondent cannot rely on the deception to resist forfeiture of this vehicle.

Respondent says it acquired from within Zimbabwe the vehicle now appearing as AEG 6695. This vehicle was not subject of an application for restoration of the engine and chassis numbers. On examination, the chassis frame bore the number IFUYDCYB9TP854634 on the area where the chassis number is normally located. But the sticker stamped on the near side door frame reflected the chassis number as IFUYDCYB2YP854636. These are different chassis numbers. To wipe out the discrepancy, the forensic scientist noted that the integers 9 and 4 on the chassis frame were obliterated and different integers, 2 and 6 were respectively punched above them. In addition, although what was being examined presented itself as a red vehicle, the forensic expert noticed that the original paint profile of the vehicle was white.

The vehicle appearing as ADS 0982 has suffered a lot. The examination revealed not one but two and in both instances incomplete rows of integers of chassis numbers. These are respectively, 6-1-60 and 2-1-2-93. That is not all. Both rows of incomplete chassis numbers are not only unaligned and unevenly spaced but are different from the vehicle identification number as reflected on the sticker near the side door frame: IFUYSDYB5WL970002. To cap it all, the vehicle was no longer white in colour but red. The known history of this vehicle, which respondent says it acquired locally, shows that it has had at least three different identities. Its triad of chassis numbers, two of which are incomplete, irresistibly bears this out.

Respondent applied for restoration of the chassis and engine numbers of yet another vehicle. The application, which was granted, bears the last integer of the chassis number not as “3” but as “5.” On examination, the last integer was “5”. The “B” and “H” letters had font that was bigger and uneven compared to the rest of the integers. The vehicle now appears as AEZ 0790.

Section 8 of the MLPCA in relevant part, reads as follows:

“8. Money Laundering Offences

- (1) Any person who converts or transfers property—
 - (a) that he or she has acquired through unlawful activity or knowing, believing or suspecting that it is the proceeds of crime; and
 - (b) for the purpose of concealing or disguising the illicit origin of such property, or of assisting any person who is involved in the commission of a serious offence to evade the legal consequences of his or her acts or omission; commits an offence.
- (2) Any person who conceals or disguises the true natural source, location, disposition, movement or ownership of or rights with respect to property, knowing or suspecting that such property is the proceeds of crime, commits an offence.
- (3) Any person who acquires, uses or possesses property knowing or suspecting at the time of receipt that such property is the proceeds of crime, commits an offence.
- (4) Participation in associating with or conspiracy to commit, an attempt to commit, and aiding, abetting, facilitating and counselling the commission of any of the offences referred to in subsections (1), (2) and (3) is also an offence.
- (5) Knowledge, suspicion, intent or purpose required as elements of an offence referred to in subsection (1), (2), (3) and (4) may be inferred from objective factual circumstances.”

These provisions are very wide indeed. I have no doubt that the respondent is caught, on a balance of probabilities, within the ambit of one or more or all of these provisions. Respondent says it acquired and owns all these vehicles. Respondent took positive steps to tamper with the identities of two of the vehicles by purporting to restore their original chassis numbers. It proceeded to instruct Dan Panel Beaters, Harare, to punch chassis numbers different from the originals. I have no difficulty in finding, on a balance of probabilities, that all the five vehicles are lying about their true identities.

If some form of criminal activities were not involved, there would have been no need to interfere with the true identities of the vehicles by erasing their chassis numbers and punching different numbers in place thereof. There would have been no need to falsify the chassis numbers and change the colours of some of the vehicles. It seems to me that only some form of criminal activity, either known to or suspected by the respondent, explains the falsification of the identities of these vehicle. I make the inference from the objective factual conspectus reflected in the forensic reports. Further, Nzirawa and Mukura also say the following in their affidavits. The vehicle appearing as AEZ 0790 bore particulars of a different freight liner horse that was involved in an

accident which resulted in it being burnt to ashes and was accordingly written off. The burnt horse was registered under AEU 2791 bearing engine number 11760181 and chassis number IFUYDMDB6544395. The owner of the vehicle applied for change of registration plates from AEU 2791 to AEZ 0790. The accident occurred on 10 March 2019 at the 46 km peg along the Harare-Nyamapanda Highway and was investigated under Murewa Traffic CR43/03/19 and Traffic Accident Book 112/19. The mystery is that in or about November 2019 the respondent applied for and obtained permission to restore the chassis number IFUYDMDB65H544395 (and the engine number) to an existing vehicle yet the vehicle which bore that chassis number had already been burnt to ashes.

A money laundering offence attracts a sentence not exceeding twenty five years imprisonment. Money laundering, smuggling and car theft are serious offences.

I am satisfied that the five vehicles have assumed false identities. They are proceeds of some kind of criminal activity. They are instrumentalities of the commission of some kind of criminal activity.

I am fortified in this regard by two decisions of the Supreme Court.

Mr Mutangadura referred me to *S v Mambo* 1995 (1) ZLR 50 (S). *Mambo* lost an appeal against conviction on a charge of contravening s 63 (1) (b) of the Serious Offences (Confiscation of Profits) Act, 90. This Act has been repealed by the MLPCA.

In *S v Mambo (supra)* MCNALLY JA, writing for the court, said the following at 52F-53D about the wide reach of the offence of money laundering:

“The next point of law is whether the conduct found proved amounted to a contravention of the section.

Mr Carter argued that the section requires the involvement of a third party. It is not an offence, he argues, to launder your own dirty money. You would have to launder someone else’s. Otherwise, a pickpocket who steals money, puts it in his POSB account, and then withdraws it to buy food, is guilty of money-laundering.

I cannot accept this interpretation. It is true that the section is very widely stated. It is true that in many, if not most, cases charged under the section, the accused person might be equally successfully charged with theft or (as was the case here, in the alternative) with fraud. But that is no reason to limit the ambit of the plain meaning of the words used. There is no ambiguity. A pickpocket could be charged under the section for possessing the cash proceeds of his theft. It would be pointless to do so, because you would first have to prove that he had picked the pocket. So it is simpler to charge him with theft.

The present case is a good example of a situation where the general picture is clear but the details are unclear, principally because the paid cheques have been destroyed. The appellant clearly masterminded the laundering. He may or may not have masterminded the fraud. The State may have felt it had a problem in proving misrepresentation.

Accordingly it proceeded on the basis that he was guilty of laundering the proceeds of crime, whether that crime was his or someone else's, or a joint effort.

As long as it would be proved that he knew 'or ought to have reasonably known that the money or other property was derived or realised, directly or indirectly, from the commission of an offence,' it would succeed. Whether the main offence was his or someone else's was immaterial. The court found, with respect, correctly, that he knew the cheques were stolen.

I see no merit in the appeal against conviction.”

My research took me to the archives.

In *Simon Chimbetu v The State* SC 107/92 the appellant lost an appeal against conviction and sentence on a charge of car theft. In *Chimbetu (supra)* MCNALLY JA with the concurrence of GUBBAY CJ and EBRAHIM JA said at pp 2 – 3 of the cyclostyled judgment:

“The evidence against the appellant is wholly circumstantial. He was not the thief. The car was stolen in Bulawayo on 23 June 1990 by one Murehwa. It was parked the same day in the appellant's yard in Harare by one Kazomba who absconded during his joint trial with the appellant.

The appellant drove Kazomba on three occasions on 25 June 1990 to a spray painter's premises where the stolen vehicle, a beige Peugeot 504 Sedan 353 – 279 Y, was being painted blue, so as to accord with the colour shown on the registration book in the appellant's name which was obtained on 18 June 1990, two days before the theft in Bulawayo. The appellant, when challenged, produced this registration book as proof that the stolen vehicle was his. The book in fact related to a non-runner bought on 9 June 1990 at a CMED sale by Kazomba on behalf of the appellant. Before the stolen car was re-sprayed the windows had sand blasted on them the correct registration number of the stolen vehicle, which would not of course have accorded with the new registration number taken from the CMED non-runner. These windows were found in the appellant's house...

The appellant's defence was that he had not seen the non-runner bought on his behalf by Kazomba... He thought the vehicle being re-sprayed at the garage was his non-runner from CMED...”

In dismissing the appeal against conviction, HIS LORDSHIP said at p 3:

“I am satisfied that the magistrate came to the only possible conclusion, namely, that the appellant was a party to the theft. He had conspired with the others, and part of the conspiracy was the purchase of the non-runner from CMED in order to provide a false identity for the stolen vehicle.” (my emphasis)

I find that the five vehicles in the present matter were provided with false identities. They are not, on a balance of probabilities, the vehicles that the respective registration books present

them to be. I find that some kind of serious criminal conduct, known to or suspected by the owner and possessor of these vehicles, the respondent, accounts for this position. Therefore, all the five motor vehicles are tainted property.

Mr Mutangadura did not seek costs. He spelt out his reasons.

In the result, the following order shall issue:

1. The following motor vehicles are tainted property and are forfeited to the State:
 - a) Freightliner Horse registered as AEZ 0790
 - b) Freightliner Horse registered as ADS 4104
 - c) Freightliner Horse registered as AEG 6695
 - d) Freightliner Horse registered as ADS 0982
 - e) International Horse registered as ADZ 4880
2. Each party shall bear its own costs.

*National Prosecuting Authority, applicant's legal practitioners
Ngwerume Attorneys At Law, respondent's legal practitioners*