

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)**

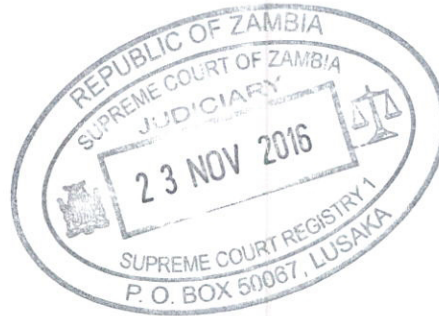
SCZ APPEAL NO. 06/2016

BETWEEN:

AFRICAN BEVERAGES LIMITED

AND

THE PEOPLE



APPELLANT

RESPONDENT

**Coram: Phiri, Hamaundu, and Kabuka, JJS
on 10th May, 2016 and the 11th November, 2016**

For the Appellant: Mr M.J. Katolo, Messrs Milner Katolo & Associates

For the Respondent: Mrs M.P. Lungu, Senior State Advocate

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases referred to:

Wilson Masauso Zulu v Avondale Housing Project Limited [1982] ZR 172

Legislation referred to:

1. **Customs and Excise Act, Chapter 322 of the Laws of Zambia**
2. **Criminal Procedure Code, Chapter 88 of the Laws of Zambia**

The appellant, together with its clearing agent, were charged in the Subordinate Court with two counts of false representations

under the **Customs and Excise Duty Act, Chapter 322** of the **Laws of Zambia.**

In the first count, it was alleged that the appellant and its clearing agent falsely represented to the Zambia Revenue Authority that a consignment of assorted drinks imported by the appellant were non-alcoholic when in fact not. It was alleged that this enabled the appellant to evade paying customs duties in the sum of K697,266,633.90.

In the second count it, was alleged that between the 1st and 20th March, 2011, the appellant and the agent falsely represented to the Zambia Revenue Authority that the appellant had imported 1970 cases of assorted drinks when in fact the cases were 2764.

In the trial that followed, it transpired that the Zambia Revenue Authority had impounded the cases of beverages. At the end of the trial, the appellant and its agent were acquitted; the agent having been found with no case to answer at the close of the prosecution's case while the appellant was acquitted after defence.

The trial court granted the appellant an order for the release of the cases of beverages that are in the custody of the Zambia Revenue Authority.

The application by the respondent to set the order aside was unsuccessful. The respondent appealed the acquittal to the High Court and obtained an order staying execution of the order for the release of the beverages. The appeal was dismissed, whereupon the appellant renewed his application before the High Court for the drinks to be released.

The High Court refused the application on the ground that although the importation documents were tendered in evidence, the drinks were not. The Court advised that, in such circumstances, the appellant needed to seek redress through civil action. Hence this appeal.

Before us the appellant advanced two grounds⁴ of appeal. These are as follows:

- (i) The court below erred in law and fact when it refused the application for release of the exhibits on the ground that the same were not tendered or put in evidence contrary to the**

evidence on record which shows that the exhibits in issue were tendered in evidence as exhibit P4 through PW3, Victor Kasoma.

- (ii) The court below erred in law and fact when it held that it was a misdirection when the trial Magistrate ordered the release of the exhibits in his order dated the 22nd March, 2012 thereby interfering with the finding of fact by the trial court that saw and knew very well what had been tendered or put in evidence before it.

Submitting in the first ground of appeal, Mr Katolo, learned counsel for the appellant, referred us to **Section 355(1)** of the **Criminal Procedure Code** and argued that the section defined “**exhibit**” as all the things that were either formally tendered in evidence or merely mentioned in the testimony of witnesses. Counsel, therefore, submitted that, even assuming that the assorted beverages were not formally tendered in evidence, the witness, PW3, had produced a seizure notice which gave a full description of the beverages that the Zambia Revenue Authority had impounded. According to counsel, on that ground alone, the subordinate court was competent to order their release. Counsel argued, however, that the evidence on record clearly showed that

the beverages sought to be released were formally produced, contrary to the holding of the High Court. According to counsel, therefore, the finding by the High Court was perverse and was arrived at upon a misapprehension of facts and must be set aside. As authority for that proposal, counsel referred us to the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**⁽¹⁾ where we held that an appellate court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts.

In the second ground, learned counsel submitted that it was the subordinate court which was better placed to know what was produced during the trial and not the High Court. It was submitted that no court properly directing its mind to the evidence on record would have come to the conclusion that the goods sought to be released were not produced as exhibits in the subordinate court in the light of the evidence on record.

With those arguments, learned counsel urged us to allow the appeal.

The respondent's brief responses to the appellant's submissions were that; first, the seizure notice was only produced to show that 2763 cases of beverages had been seized by the Zambia Revenue Authority. It did not mean that the cases of beverages shown on the notice were produced in court. Secondly, what were tendered in evidence were the samples of those beverages.

It was submitted that the High Court was on firm ground when it ruled that the subordinate court had misdirected itself when it released the beverages.

With those arguments, we were urged to dismiss the appeal.

The real question in this case is whether the beverages listed on the Magistrates Order should be released to the appellant company through these criminal proceedings.

To answer that question, the starting point lies in the testimony of PW3 before the Magistrate Court. That witness gave

testimony as to how the appellant's truck was impounded by the Zambia Revenue Authority and a physical inspection of its contents was carried out. PW3 testified that an Inspection Report was prepared. The witness went on to say;

“Thereafter, our legal department received a court order, ordering Zambia Revenue Authority to return the goods to African Beverages Ltd. The court order was obeyed and the goods were released to African Beverages Ltd. In turn our legal department also secured a court order which compelled African Beverages Ltd to return the same goods to Zambia Revenue Authority. The court order was served on the lawyers for the African Beverages Ltd and the goods were returned to State warehouse. But it was discovered that the goods returned were different from those which were initially detained. We accepted the goods on the grounds that in accordance with the Customs and Excise Act, Cap. 322, there is provision where we can accept the substitution of original goods of a similar nature with the new goods in our custody. We issued a seizure notice reflecting the goods that were originally detained under receipt of held items.”

The witness went on to identify the Seizure Notice which, in turn, was subsequently produced in court as exhibit P3.

The testimony of the witness continued as follows:

"I had a look at the nature of the goods that were inspected. They were packed half dozen per box. They were different varieties, one of them was merrot, there was also Baron djarigno. These brands were included on the Inspection Report. (Wt. asked to pick the brands he had talked about from a number of varieties; The witness picked the brands he had referred to) *These are the only ones I can remember.*
Court: The samples as identified by the witness marked ID. 5."

The samples were later produced as exhibit P4.

The Seizure Notice which was produced as exhibit P3 read:

"You are hereby notified that the goods described below have been seized in terms of the Customs and Excise Act, because there are reasonable grounds for believing that they are liable to forfeiture. You are warned that these goods may be declared to be forfeited by the Commissioner General of Zambia Revenue Authority in terms of Section 162 of the Customs and Excise Act, or they may be released if the Commissioner General considers that they should not be forfeited. You may, if you wish, make representations to the Commissioner General for the release of the goods within 30 days from the date of this notice. Additionally or alternatively you may, within 30 days from the date of this notice, institute proceedings for the recovery of the goods from the Commissioner General. If the Commissioner General does not release the goods following representations made by you or if you do not institute proceedings within the period specified and if the Commissioner General declares the goods to be forfeited, the goods will become the property of the Zambia Revenue Authority without compensation.

Your attention is drawn to section 164 of the Customs and Excise Act.”

We have examined the order which the subordinate court made in releasing the goods. The order stated:

“IT IS HEREBY ORDERED that goods specified in the Notice of Seizure namely non-alcoholic wines (Royalty White Grape) 213 x 12 x 750mls and assorted alcoholic wines, 2550 cases x 6 x 750 mls x 22 loose bottles BE and ARE HEREBY released to the Director of the 1st accused forthwith.”

As can be seen from the Seizure Notice the goods were seized by the Zambia Revenue Authority in exercise of its powers under the **Customs and Excise Act, Chapter 322** of the **Laws of Zambia**. The Notice itself on the face of it plainly stated that the goods risked being forfeited. The Notice clearly explained what process a person affected by such notice should adopt in redeeming those goods. One of the modes of redeeming them was to institute civil legal proceedings. Therefore, when the appellant applied to the Magistrate Court for the release of the very beverages that were listed on the Notice, that court should have realized that the beverages were the subject of a process under the **Customs and Excise Act** and, therefore, had no jurisdiction to interfere with that

process. It is, therefore, immaterial whether or not those beverages were produced as exhibits. But even assuming that they were tendered in evidence and placed in the custody of the court for the purpose of proving the criminal charges the only order the Magistrate was entitled to make at the end of the trial, in terms of **Section 355** of the **Criminal procedure Code, Chapter 88** of the **Laws of Zambia**, was to release them back to the Zambia Revenue Authority, who had statutory right to possession thereof by virtue of the Notice, in order for the process under the **Customs and Excise Act** to take its course.

Furthermore there was evidence from PW3 that after the Notice was issued, the appellant opted to institute legal proceedings and even obtained a court order releasing the beverages to it. The evidence was further that a subsequent court order was made which compelled the appellant to return the beverages to the Zambia Revenue Authority. The trial Magistrate was at least aware that the custody of the goods was the subject of a dispute between the appellant and the Zambia Revenue Authority in a court superior

to his; the High Court. This is evidenced by the fact that the trial Magistrate in his judgment noted that the appellant's Managing Director was cited for contempt of court in the High Court over the same beverages.

All this should have sufficiently warned the trial Magistrate that the process under the **Customs and Excise Act** was in progress in the High Court and that the beverages that the appellant sought to be released to it were at the centre of that process. It should have clearly dawned on the Magistrate that he had no jurisdiction to release the beverages to the appellant.

In the circumstances, the order granted by the trial Magistrate to release, the beverages seized by the Zambia Revenue Authority was erroneous, and the High court was on firm ground when it set it aside.

This appeal stands dismissed.



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G. S. Phiri

SUPREME COURT JUDGE



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E. M. Hamaundu
SUPREME COURT JUDGE



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J. K. Kabuka
SUPREME COURT JUDGE