

IN THE HIGH COURT FOR ZAMBIA

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



2019/HP/0141

IN THE MATTER OF:

ARTICLE 28 (10) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF:

ARTICLE 11 OF THE CONSTITUTION OF ZAMBIA CHAPTER 1 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF:

ARTICLE 13 (1), (2) AND (3) 28 (10) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF:

ARTICLE 15 OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF:

ARTICLE 16 (1) AND (2) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF:

ARTICLE 17 AND 18 OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: THE PROTECTION OF FUNDAMENTAL
RIGHTS, STATUTORY INSTRUMENTS NO.
156 OF 1969

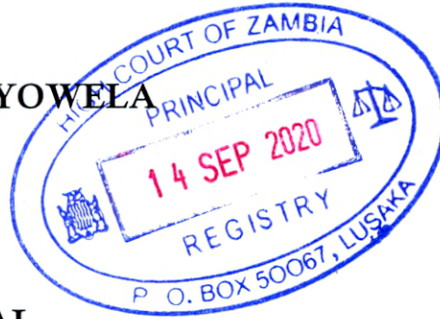
BETWEEN:

GABRIEL ESHILELI YOWELA PETITIONER

AND

ATTORNEY GENERAL

RESPONDENT



Before the Hon. Lady Justice C. Lombe Phiri in Chambers.

For the Petitioner : J. Mataliro- James & Doris Legal Practitioners

For the Respondents : Mr C. Mulonda - PSA- Attorney General's Chamber

JUDGMENT

CASES REFERRED TO:

1. **Shauban Bin Hassien and Others v Chong Fook Kan and Another (1969) 3 All E.R. 1626**
2. **Danel Chizoka Mbandangoma v Attorney General (1979) ZR 45**
3. **R v. John Rondo**
4. **Sitali v Anti- Corruption Commision Appeal No. 98/ 2015**
5. **Mweempe v Attorney General, International Police and Another Appeal No. 15/ 2008**

6. Rowland v Diwali and Gondwe v Supa Baking Company Limited

LEGISLATION REFERRED TO:

- 1. Section 23 of the Criminal Procedure Code Chapter 88 of the Laws of the Republic of Zambia**
- 2. Section 281B of the Penal Code Chapter 87 of the Laws of the Republic of Zambia**
- 3. Article 11 and 16 of the Constitution of Zambia Chapter 1 of the Laws of Zambia.**

This is a petition filed by the Petitioner in which he is asking for the following:

- 1. That it may be determined that the seizure of the Petitioner's vehicle was arbitrary, illegal and an infringement of the Petitioner's rights protected under Article 11 and 16 of the Constitution of Zambia Chapter 1 of the Laws of Zambia;*
- 2. That this court orders for the release of motor vehicle Toyota Land Cruiser Registration number ABZ 6290;*
- 3. That this Court awards damages to the Petitioner for the infringement of the Petitioner's protected rights and suffering; and*
- 4. That this court awards costs to the Petitioner.*

In the petition filed on 22nd January 2020, the Petitioner averred that he was an employee of the Workers Compensation Fund Control Board as Branch Manager stationed in Choma at the material time and owned a motor

vehicle Toyota land cruiser registration number ABZ 6200 which he bought from Mr Clive Mulonga in January, 2014. He stated that at the time of buying the said vehicle a sale agreement was prepared and he purchased the said vehicle at the price of K70,000.00. It was his assertion that the Vehicle was later registered in the names of Workers Compensation Control Board his employers as absolute owners while he remained the owner. This was so because he got a facility from the employers to pay for the said vehicle on condition that it be registered in his employer's name until the loan was fully paid. He stated that he had been using the vehicle from January 2014 until 14th August, 2019 when police officers from Lusaka Police Headquarters which included Inspector Chewe went to Choma and collected the vehicle from him. He stated that he made a follow up to Lusaka where he was informed by the police officers that the vehicle had been seized as it was a stolen vehicle belonging to Zambia Land Alliance. He indicated that he explained to them how the vehicle was purchased and showed them the copies of the contract and registration certificate of the motor vehicle. It was further deposed that the officers refused to release the vehicle and told him that they would get back to him but to no avail.

He further stated that he, on several occasions followed up the police, including writing letters, requesting them to release the vehicle as it was never stolen. He indicated to them that Zambia Land Alliance who are claiming that the vehicle was stolen had actually sold it to their former employee Mr Mulonga. He indicated that he had suffered a lot as he had no vehicle to use. Further that the seizure of the said vehicle was arbitrary as there was no reason for the Police to keep the vehicle away from him.

The Respondents in turn filed an answer on 23rd March, 2020 accompanied by an Affidavit in support sworn by Mr Chewe Bwalya. In the Affidavit in

support, the Respondent admitted the averment by the Petitioner that he bought the vehicle from Mr Mulonga. It was also stated that on 12th August 2019 the Police received a report of theft of a motor vehicle from Mr Kennedy Mulilo, the Finance and Administration Manager for Zambia Land Alliance. The report was that a Toyota Landcruiser registration number ABZ 6290, which had a breakdown whilst in the custody of Mr. Clive Mulonga, was discovered to have been moved to a garage after which it went missing. He stated that investigations were launched in the matter and after interviewing the complainants the said motor vehicle was seized from the Petitioner. He however, stated that Zambia Police Service promised to release the said vehicle. It was further stated that Mr Patrick Musole stated at the police that a decision was made by the company to sell the said motor vehicle in September, 2013. However, there was no buyer and the records still reflected that the motor vehicle was still property of the company. As regards the letter of sale between Mr. Clive Mulonga and ZLA it was stated that the person who signed the letter of sale on behalf of the vendor was not the official representative of the company as only the Executive Director was mandated to transact on behalf of the company. The Respondent stated that the motor vehicle was being kept by the police as investigations were still going on. Further that criminal proceedings were underway relating to the said vehicle.

In this case both the Petitioner and the Respondent relied on the Affidavits filed in court in support of their respective arguments. During cross-examination the Respondent said that there was an advert by the Board alluding to the sale of the Motor Vehicle. Further that he did not have a look at the Board Resolution over the same. In further cross examination he acknowledged that Exhibit CB3 was a letter of sale by ZLA to Clive Mulonga. Also, that the letter was signed by Patrick Sakala on behalf of

ZLA. He also identified Exhibit CB4 as the document used by Clive Mulonga to sell the vehicle to the Petitioner. In further cross examination he stated that he did not have a look at the company policy that was referred to him by Mr Musole.

In the Petitioner's submissions filed on 30th July 2020 it was stated that the bedrock law on the seizure and treatment of property during police investigation is the Criminal Procedure Code Chapter 88 of the Laws of Zambia and in certain circumstances the Forfeiture of Proceeds of Crime Act No. 19 of 2010. Further that section 181 of the Penal Code specifically provides how a vehicle subject of a theft ought to be handled.

It was argued that the seizure, detention and continued detention of the Petitioner's motor vehicle was not only illegal but also a blatant abuse of the Petitioner's property rights. It was also argued that on the facts before court there were no reasonable grounds to release that the vehicle was stolen. It was indicated that if the vehicle was indeed stolen from Zambia Land Alliance the officer could have taken the matter to court. It was further stated that the assertion by the officer that he was keeping the vehicle on mere suspicion was illegal as the law only entitles the police to seize a motor vehicle on a belief based on reasonable grounds that the vehicle is stolen. Counsel relied on the case of **Shauban Bin Hassien and Others v Chong Fook Kan and Another (1969) 3 All E.R. 1626⁽¹⁾** and the case of **Danel Chizoka Mbandangoma v Attorney General (1979) ZR 45⁽²⁾** on the definition of mere suspicion. As regards the meaning of a belief the case of **R v. John Rondo⁽³⁾** was relied upon.

In the Respondent's written submission, it was submitted with reference to **Article (1)(2)(t)** of the Constitution Chapter 1 of the Laws of Zambia that there were exceptions to the protection from deprivation of property which

includes depriving property for the purpose of any investigation in line with an Act of parliament. It was also the Respondent's contention that pursuant to section 23 of the Criminal Procedure Code Chapter 88 of the Laws of Zambia Police Officers only need to have a reason to suspect that anything is stolen for them to detain such property. It was further stated that the Police officers that detained the vehicle had reason to believe that the said vehicle was stolen because of the following:

- I. *The vehicle was reported stolen by Zambia Land Alliance and it was listed as an asset of ZLA.*
- II. *The records at Road Transport and Safety Agency (RTSA) revealed that the motor vehicle had changed ownership from ZLA to the Petitioner and not from ZLA to Mr. Clive Mulonga*
- III. *The person who signed on the letter of sale between ZLA and Mr Clive Mulonga denied having witnessed the said letter.*
- IV. *Lastly that Zambian Police were still investigating the matter*

The case of **Sitali v Anti- Corruption Commision Appeal No. 98/ 2015⁽⁴⁾** was relied upon on the submission that returning the subject vehicle to the Petitioner would have an effect of stifling criminal investigations. As regards the claim by the Petitioner that she is a bonafide purchaser for value without notice, it was submitted that should it be found that Mr Mulonga Clive had no title to the subject vehicle then the Petitioner can not claim that he is a bonafide purchaser for value as a seller can not sell goods which are not his property. The Court was referred to the case of **Mweempe v Attorney General, International Police and Another Appeal No. 15/ 2008⁽⁵⁾** and that of **Rowland v Diwali and Gondwe v Supa Baking Company Limited⁽⁶⁾**.

From the facts presented before the Court, it is common cause that the petitioner bought a vehicle from Mr Clive Mulonga who was an employee of Zambia Land Alliance. It is also not in dispute that there was a letter of sale between ZLA and Mr Clive Mulonga. Also, a further letter of sale between Mr Clive Mulonga and the Petitioner. It is also not in dispute that the vehicle ABZ 6290 was currently registered in the names of both of Workers Compensation and Control Board and the Petitioner.

The facts in this matter reveal that the subject motor vehicle was seized by the Police and is still in their custody. It is also an undisputed fact that there are no criminal proceedings in any court of law regarding the theft of the said vehicle. Nor any person has been arrested in connection with the theft of the said vehicle.

This court is called upon to determine the legality of the seizure and continued detention of the motor vehicle whether it is arbitrary illegal or an infringement of the petitioner's rights enshrined in Article 11 of the Constitution of Zambia.

The starting point is the law governing seizure of property in criminal matters. Section 23 of the Criminal Procedure Code, Chapter 88 of the Laws of the Republic of Zambia states as follows;

“23. Any police officer may stop, search and detain any vessel, aircraft or vehicle in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found and also any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained, and may seize any such thing.”

Furthermore, section 281B of the Penal Code Chapter 87 of the Laws of Zambia provides that:

“281B. (1) A Police Officer may, without a warrant, stop, search and arrest any person found driving, or in possession, charge or control of a motor vehicle, where the officer believes, on reasonable grounds, that the vehicle is stolen.

(2) Where an arrest is made under subsection (1) the Police Officer may seize the vehicle and any documents relating to the vehicle.

(3) A Police Officer who arrests any person or seizes a motor vehicle under this section shall as soon as practicable take the person, the vehicle and any documents relating to the nearest police station.

(4) A person arrested and any motor vehicle seized under this section shall, within forty-eight hours of arrest and seizure, be brought before a court”

The foregoing provisions of the law provide the procedure and circumstances under which the Police can seize or detain any vessel including a motor vehicle where it is suspected to have been stolen. Section 281B(2) clearly states that the vehicle may be seized where a person has been arrested under subsection (1).

It has been argued for the Respondent that the Police officer had reasonable suspicion to seize the motor vehicle and detain it. Further that the release of the motor vehicle will disturb the investigations currently being carried out by the police. According to the Petitioners Affidavit in support of this Petition, the motor vehicle was seized on 14th August 2019. The Respondent has outlined grounds upon which the officer formed the reasonable suspicion that the vehicle was stolen hence

impounding it. It is clear that the impounding of the motor vehicle in the first instance was upon receipt of a report from Zambia Land Alliance representative who reported the suspected theft of the motor vehicle.

However, upon investigations the officer appears not to have found sufficient ground to effect an arrest and he states that he is still investigating the matter.

Quite clearly the law provides that the officer may impound a motor vehicle on suspicion that it is stolen. However, a vehicle can only be seized where an arrest has been made. The Respondent wants this Court to believe that a motor vehicle impounded should be seized and remain in the custody of the police without any person having been arrested. Further that the vehicle should be in such custody for undefined period of time on the premise that investigations are still going on.

Article 11 and 16 of the Constitution of Zambia Chapter 1 of the Laws of Zambia provide as follows:

11. It is recognized and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this Part, to each and all of the following, namely:

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, expression, assembly, movement and association;

(c) protection of young persons from exploitation;

(d) protection for the privacy of his home and other property and from deprivation of property without compensation;

and the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in this Part, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

“Article 16. (1) states that Except as provided in this Article, property of any description shall not be compulsorily taken possession of, and interest in or right over property of any description shall not be compulsorily acquired, unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired.”

The Constitution under Article 11(d) provides for the protection from deprivation of property of an individual. The only time property can be deprived from the owner is under the provision of an Act of Parliament. The law relating to seizure of property specifically a suspected stolen motor vehicle as analysed above provides specific guidelines which have not been met in this case.

In my view even if there were reasonable grounds at the time of impounding the vehicle the continued detention of the vehicle without an arrest is against the law as stated in section 281B of the Penal Code.

In view of the foregoing the claim by the Petitioner succeeds. For avoidance of doubt I find that:

- 1. The continued holding in custody of the Petitioner's vehicle is arbitrary, illegal, and an infringement of the Petitioner's rights under Article 11 and 16 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia;*

2. *It is further ordered that the vehicle Toyota Land Cruiser Registration number ABZ 6290 be released to the Petitioner forthwith;*
3. *Claim for damages are awarded to the Petitioner for the time he has been deprived of the use of this vehicle the same to be assessed by the Registrar; and*
4. *Costs for the Petitioner*

Leave to Appeal is granted.

Delivered at Lusaka this 14th day of September, 2020.



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C. LOMBE PHIRI
JUDGE