DUDI MINING ACTIVITIES
versus
CENTRAL AFRICAN BUILDING SOCIETY

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 26 July 2019 & 8 January 2020

Opposed Application

T Nyamuchera, for applicant
H Mutasa, for respondent

TAGU J: This is an application in terms of Rule 226 of the High Court Rules 1971 seeking an order of removal of an illegal freeze or restriction that is pending on the applicant's account number 1006358897 with the respondent.

The facts are that on the 19th of November 2018 the Police applied for and the Magistrate Court granted a Warrant of search and seizure in respect of the above account. On the 11th of December the High Court granted a Provisional Order directing that the above account be frozen by the respondent pending investigations and prosecution under reference number IR 11 305, docket number D.R 74/09/18. The reason for the freeze being that there were suspicions that some funds which were procured by Fraud had been deposited into this account. The applicant's contention is that in terms of s 58A of the Criminal Procedure and Evidence Act [*Chapter 09.07*] a Warrant for Search and Seizure is only valid for 21 days unless the matter is brought before the Magistrate upon the expiry of 21 days. The applicant now seeks the following order-

"It is ordered that

a. The Respondent be and is hereby ordered to immediately unfreeze and remove all restrictions on Applicant's CABS Account Number 1006358897.
b. The Respondent to bear legal costs at an attorney client scale in the event that it opposes this Application."

The respondent opposed the application. In its Notice of Opposition the respondent raised a preliminary objection. The preliminary objection being that this application is fatally defective in

that the relief being sought by the Applicant ought to have been sought from the investigating Police Officer in terms of s 58A (2) of the Criminal Procedure and Evidence Act [*Chapter 9.07*] hence the application be dismissed with costs without delving into the merits.

It is therefore necessary to examine the provisions of s 58A of the Criminal Procedure and Evidence Act first to see if the preliminary point has merit or not.

Section 58A (2) of the Criminal Procedure and Evidence Act provides as follows-

> **"58A Continued retention of seized article if institution of criminal proceedings is delayed**
> (1) ……..
> (2) If the owner or possessor of a seized article is not served with a notice of continued retention after the expiry of the period specified in subsection (1) and no prosecution in respect of the seized article is initiated within that time, then the owner or possessor has the right to recover the article (unless it is one whose possession is intrinsically unlawful) from the police upon mere production of the receipt issued to him or her by a police officer in relation thereto, unless a police officer forthwith delivers to the owner or possessor the notice of continued retention, and subsection (1) shall thereupon apply in relation to such notice."

In casu the legal basis which was advanced by the applicant for the issuance of the present application is couched under paragraph 11 of the Founding Affidavit as being that-

> "…a Warrant for Search and Seizure is only valid for twenty-one (21) days unless the matter is brought before a Magistrate upon the expiry of twenty-one days, which is the legal duration of the basis for the freeze."

In my view there is no provision in the Criminal Procedure and Evidence Act which supports the applicant's aforesaid contention. While a party whose article has been seized in terms of a Warrant of Search and Seizure is entitled to the return of such article in the absence of any prosecution of the offence in respect of which the article concerned had been seized, there can be no doubt that such party can only procure the release of the article concerned by following the procedure that is laid out under s 58A (2) of the Criminal Procedure and Evidence Act [*Chapter 9.07*] I quoted above. In particular the procedure entails that the party concerned must approach the police officer responsible for the seizure and produce a receipt confirming the seizure of the article concerned and only if such police officer has failed to release the item concerned would the party concerned be entitled to litigate in the manner that the applicant has done.

It is common cause that the applicant has not taken steps to approach the police officer who is responsible for the issuance of the warrant concerned and has not even in the current

proceedings produced a receipt confirming the seizure of the articles concerned. In the circumstances the court will uphold the preliminary point and dismiss the application with costs on a higher scale.

IT IS ORDERED THAT

1. The preliminary point is upheld.
2. The application is dismissed.
3. The application is ordered to pay costs on a legal practitioner and client scale.

Lawman law chambers, applicant's legal practitioners
Gill, Godlonton & Gerrans, respondent's legal practitioners