

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

**APPEAL NO. 91/2017
CAZ/08/141/2017**

B E T W E E N:

**MUTINTA MAZOKA M'MEMBE
FRED M'MEMBE**

**1ST APPELLANT
2ND APPELLANT**

AND

THE ATTORNEY GENERAL

RESPONDENT

CORAM: Chisanga JP, Chishimba and Kondolo, SC, JJA
On 14th November 2017 and 23rd March 2018



For the Appellants: N. Nchito, SC of Messrs Nchito & Nchito
For the Respondent: F. K. Mwale, Acting Principal State Advocate
Major F. Chidakwa, Assistant Senior State Advocate

J U D G M E N T

CHISANGA JP, delivered the Judgment of the Court

Cases cited:

1. *Chiluba vs The Attorney General (2003) ZR 153*
2. *Chitala vs Attorney General (1995-97) ZR 91*
3. *Council of Civil Service Unions and Others Ministers for the Civil Service (1981) A C 363*
4. *Attorney General vs Great Eastern Railway Company (1880) AC 473*
5. *Nyampala Safari Ltd & Others vs Zambia Wildlife Authority and Others Appeal No. 135 of 2003*
6. *Associated Provincial Picture Houses Limited vs Wednesbury Corporation (1948) 13 I KB 223 CA*
(1985) AC 374
7. *R (Mahmood) vs Secretary of State for the Home Department (2001) 1 WLR, 840*

8. *R (Daly) vs Secretary of State for the Home Department (2001) UKHL 26*
9. *Attorney General vs Clarke (2003) Vol I ZR 38*
10. *Chic Fashions/West Wakes Ltd vs Jones (1968) 1 ALL ER P 229*
11. *Dikon vs O'Brien & Davis (1887) 16 Cox C.C. 245*
12. *Shaaban Bin Hussein vs Chong Fook Kain (1969) 3 ALL ER 1626 at 1630*
13. *Mc Ardle vs Eagan and Others (a) Cox's Criminal Law Vol XXX (1933-38), 39*
14. *Watkins vs Secretary of State for the Home Department and Others (2006) 2 ALL ER 353*
15. *Three Rivers DC vs Governor and Company of the Bank of England (No. 3) (1996) 3 ALL ER 558*
16. *Odhavji Estate vs Woodhouse (2003) 3 SCR 263*

The appellants, who were applicants in the court below, moved the High Court for judicial review, following the grant of leave to do so. The decisions on which they sought review were:

1. The decision of the Police Service to illegally occupy Plot Number 7345, Nangwenya Road Lusaka,
2. The decision of the Police Service to assume control of a privately owned printing press located at Plot Number 7345 Nangwenya Road, Lusaka.

The relief sought was an order of certiorari for irrationality and illegality. Additionally, damages for misfeasance in public office were craved.

The facts in support of the application were that the applicants, aside from being private citizens, are media practitioners. On 15th February 2017, the police visited the applicants' home with a search warrant signed by the Magistrate's Court. The police assaulted the 1st applicant and arrested her on the same date. Thereafter, the police occupied the applicant's home, Plot Number 7345 Nangwenya road, and remained in occupation. The said property is owned by the applicants, and has no legal encumbrances. Further, the police had started the process of dismantling a printing press owned by the applicants in their personal capacity.

On the ground of illegality, the applicants contended that it was illegal for the police to occupy their home, which is privately owned. They further contended that the police could not, at law, use their power to take or occupy private property and take steps to dismantle and take a printing press that was privately owned by the applicants.

On the ground of irrationality, it was contended that it was irrational in the Wednesbury sense for the police to occupy plot number 7345, Nangwenya Road, Lusaka, and to attempt to take the applicants' printing press both of which are privately owned by the applicants and unencumbered. Further, that moving the printing press will completely destroy it as it is delicate and requires professional attention to dismantle.

The affidavit verifying facts was sworn by the 1st applicant, and she exhibited a copy of the agreement as proof that the printing press which the police were in the process of dismantling belonged to the 2nd applicant.

The respondent opposed the application by affidavit sworn by a Senior Assistant Commissioner of Police, one Simon Tembo. He deposed that the 2nd applicant, with another, was accused of failing to deliver to the appointed liquidator property believed to belong to the Post Newspaper Ltd, while the other was accused of impersonating a lawyer for the Post Newspaper Ltd. This followed a complaint filed by Mr. Lewis Chisanga Mosho, the Provisional Liquidator of the Post Newspaper Limited, who suspected that there were some properties belonging to the Post Newspaper Limited that had been concealed at Mr. Fred M'membe's house situated at Plot Number 7345 Nangwenya Road, Rhodes Park Lusaka.

He further deposed that the 1st applicant tore the search warrant, and was later charged with the offence of obstructing police officers carrying out lawful instructions and appeared in court on 17th February 2017. On 16th February 2017, fresh warrants were issued and a search conducted on the premises. A printer and a speed boat were seized as they were suspected to be properties belonging to the Post Newspaper Limited. The continued presence of agents of the Police Service at the applicant's residence was meant to secure the printing press which required to be disassembled.

Upon hearing the application, the learned judge dismissed it. Her reasons for doing so were that the root of the occupation and dismantling of the printing press is entrenched in the search warrant, and the provisions pursuant to which it was issued require that the items searched for be seized and taken to the magistrate under whose hand it was issued, or the nearest court. In the instant case, the equipment had not yet been taken to the Magistrate's Court in order for the police officers to be deemed to have fully executed the search warrant. The judge made reference to Article 17 of the Constitution in this regard. She went on to express the view that the continued occupation and dismantling of the printing press was intrinsically tied to the search warrant, incidental to execution thereof.

Turning to the ground of irrationality, the learned judge found that the search warrant was relevant, while the documents exhibited to the affidavits as proof of ownership, after the search had been conducted were not relevant as they did not found, or were not part of the decision making process. She premised her decision on ***Chiluba vs The Attorney General***¹, where the Supreme Court stated the following:

“When the High Court is reviewing a decision of a public body it will not admit evidence which is relevant to whether the decision is a reasonable one; but it will permit evidence which is relevant to whether the decision is one which the body had power to make or whether it was made in circumstances in which a reasonable body could have made it.”

