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The People v Ronald Kaoma Chitotela SSPD/034/2022
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Facts

In a recent decision, Magistrate Jennipher Bwalya sitting in the Zambia's Economic and Financial Crimes Court (EFCC) discharged former tourism minister Ronald Chitotela in a case he was arrested for, on two counts of possessing property reasonably suspected to be proceeds of crime. Chitotela's arrest had been at the hands of the Anti-Corruption Commission (ACC). In 2019, the ACC had signed a consent settlement with Chitotela which, apparently, gave the EFCC a basis for discharging Chitotela. Chitotela raised a preliminary issue before the EFCC, asking Lusaka magistrate Jennipher Bwalya to dismiss the matter he was recently arrested for, arguing that, under Article 18 of the Constitution, he cannot be tried for the same offence twice. He also alluded to the principle of 'double jeopardy'. The magistrate agreed. It is our opinion that her decision was wrong in law. It is especially important to point out that Chitotela's request was made at a *preliminary stage* and, therefore, as the magistrate herself pointed out, 'the view I have taken does not in any way amount to an acquittal but a discharge of the accused.' Since she did not elaborate on the distinction she was making in this context between 'acquittal and discharge', it is not clear what she intended the effect of her judgment to be.

Significance

There are two matters to consider in this case. Firstly, does section 18 of the constitution apply to Chitotela's criminal charges? Secondly, does Chitotela's consent agreement with the ACC fall within the applicability of the principle of double jeopardy? (There are recent online reports that the ACC plans to appeal the magistrate's decision). One of the grounds for their planned appeal, according to www.qfmzambia.com, will state that a settlement agreement under section 80 of the ACC Act number 3 of 2012 is only tenable when an accused person has fulfilled two conditions as follows:

- (i) an accused has given a full and true disclosure of all material facts relating to past corrupt conduct and other illegal activity; and
- (ii) he or she has voluntarily paid, deposited or refunded all property the person acquired through corruption and other illegal activity.

In addition to the above, we are of the view that the magistrate's decision was contrary to the 'protection of law' provisions in Article 18 of the Constitution. The magistrate cited Article 18(5) of the Constitution which provides as follows: 'No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, except upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.'

Clearly, the magistrate's use of Article 18(5) of the constitution as justification for discharging Chitotela was erroneous. Chitotela had a consent agreement with the ACC. The ACC is not a 'superior court' and its action of signing a consent agreement was not being done in the course of appeal or review provisions *relating to conviction or acquittal*. Clearly, the constitutional protection envisaged by Article 18(5) is not applicable to Chitotela's situation.

Magistrate Bwalya also appeared to rely on the principle of "double jeopardy", which stems

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from a procedural defence (primarily in common law jurisdictions, like Zambia) that prevents an accused person from being tried again on the same (or similar) charges following *an acquittal* and in rare cases *prosecutorial and/or judge misconduct* in the same jurisdiction. In the case of Chitotela, there was no acquittal or conviction and no prosecutorial or judicial misconduct. The Magistrate accepts this finding in her judgment. There was simply an agreement between Chitotela and the ACC. For this reason, there was no basis for the EFCC to discharge Chitotela as the principle of double jeopardy did not apply. In the case of *United States v. Ursery*, 518 US 267 (1996), the United States Supreme Court held that civil property forfeitures did not constitute a ‘punishment’ for purposes of the double jeopardy clause. The civil property forfeiture is a remedial civil sanction, and not a punitive criminal ‘punishment.’ We place the ACC agreement with Chitotela in the same category.

According to David S. Rudstein,³ double jeopardy serves a number of purposes. First of all, it prevents the government from prosecuting the same person for the same crime after he or she has already been tried and acquitted.⁴

Secondly, the principle of double jeopardy prohibits the government from prosecuting a person a second time for the same offense after he has already been convicted.

The South African Constitution is clearer on this issue. Its Bill of Rights in s. 35(3) (m) the Constitution of South Africa forbids a retrial when there has already been an *acquittal* or a *conviction*.

‘Every accused person has a right to a fair trial, which includes the right ... not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted...’⁵

Based on the history of the principle of double jeopardy and case law cited above, there was no legal basis for the EFCC to discharge Chitotela because there had been no trial, no conviction, and no acquittal in his case.

It must be noted that double jeopardy is a legal principle applicable to criminal law created to prevent state abuse of power in prosecutions. It primarily arises when the state insufficiently proves their case beyond a reasonable doubt in a manner that leads to a trial where evidence is unprofessionally gathered, or mistakes are made during prosecution. If a person is charged more than once on the same set of facts, the person may rely on double jeopardy to have the second charge dismissed.

An exception to the double jeopardy rule is subsequent death. This is when the perpetrator of a crime is either acquitted of the crime or convicted of a lesser charge, but subsequent to the court ruling, the victim of the act dies from the injuries sustained during the act. Here, the state would seek to prosecute the perpetrator for either murder or culpable homicide. See *S v McIntyre* (1997) 2 SACR 333 (T) at 336C.

With regards to civil actions, there is no double jeopardy. However, there is a ‘once and for all’

³ Available at < <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=https://redir1.com&article=1209&context=wmborj> > accessed 10 May 2022

⁴ *Ashe v. Swenson*, 397 U.S. 436, 444-45(1970) (holding that the Double Jeopardy Clause incorporates the doctrine of collateral estoppel so that an acquittal of one offense can bar a subsequent prosecution for a related offense.

⁵ Constitution of the Republic of South Africa, 1996, s. 35(3)(m).

rule. This is a rule which states that, in terms of payment for damages, the claimant must claim all amounts due in a single proceeding instead of having a multiplicity of claims. The South African Constitutional Court in, *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* (2018 (1) SA 335 (CC) (MEC Health)) recently had to consider whether the common law, insofar as it relates to the once-and-for-all (OAFA) rule, should be developed to make provision for instalment or periodic payments. The majority, per Froneman J, held that the law did not make provision for instalment payments but that any amendment to the rule should be left to the legislature.

In discharging Chitotela, the EFCC's decision is legally unsound. The role of the court is to preside over economic and financial crimes, including money laundering. If the accused had admitted under another process to having obtained funds illegally and transforming those illicit proceeds into real estate, then clearly the accused is potentially liable for money laundering. The EFCC did not consider this. It is clear that the Magistrate does not yet fully comprehend the nature of the crimes over which she was presiding.

Many African countries, including Zambia, are increasingly being pressured to investigate and prosecute economic and financial crimes such as corruption, money laundering, terrorism financing, tax evasion, proliferation financing, *etc.* In instances where criminal actions lead to the accumulation of unexplained assets, it is incumbent upon law enforcement, prosecutors, and the judiciary to add a charge of money laundering.

Money laundering is the process used by criminals to hide the illegal source of funds and/or assets. Money laundering occurs in three stages as follows:

Placement: This occurs when the money is first introduced into the financial sector e.g., deposit in a bank.

Layering: A series of transactions are conducted to move the money so as to disguise the illegal source of the funds.

Integration: This is where the funds are used to purchase luxury assets such as a house, jewelry, luxury cars, *etc.* to give the appearance of legitimacy.

Although there are three stages, they don't always occur consecutively and sometimes only one or two of them can take place. For example, if a politically exposed person who earns just \$1,000 dollars a month is found with millions of dollars' worth of property, a case could be made that they obtained those funds illegally. Allegedly, Chitotela admitted to obtaining funds illicitly in his agreement with the ACC. For this reason, the EFCC could have amended the charges to include money laundering and proceeded with Chitotela's criminal trial. Discharging him was an error in law.