

Civil Appeal No. 94/01

ALLAN CIMAS MPOFU v

(1) THE DIRECTOR OF CUSTOMS AND EXCISE
(2) THE OFFICER-IN-CHARGE, HARARE CENTRAL (FRAUD)

SUPREME COURT OF ZIMBABWE
EBRAHIM JA, SANDURA JA & MALABA JA
HARARE, JANUARY 7, 2002

G Mandizha, for the appellant

N Mutsonziwa, for the respondents

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed the appellant's application with costs.

After hearing counsel for the appellant, we dismissed the appeal with costs without hearing counsel for the respondent as there was no need for doing so. We indicated at the time that the reasons for the dismissal of the appeal would be handed down in due course. I now set them out.

The background facts are as follows. In March 1995 the appellant was charged in the High Court with eleven counts of smuggling, in contravention of s 182 of the Customs and Excise Act [*Chapter 23:02*], and eleven counts of fraud. He pleaded not guilty but was convicted on all counts. All the counts were treated as one for the purpose of sentence and he was sentenced to fifteen years' imprisonment with labour. In addition, summary judgment in favour of the Director of Customs and

Excise for the customs duty involved of \$3 660 609.04 was given against him.

He subsequently appealed to this Court against sentence only, and on 10 February 1997 the appeal was allowed to the extent that of the fifteen years' imprisonment with labour seven years' imprisonment with labour was suspended on condition that he paid the Director of Customs and Excise the sum of \$3 660 609.04 by 31 January 1998.

Thereafter, in May 2000 the appellant filed a court application in the High Court seeking an order compelling the respondents to produce and make available for inspection by him the original Bills of Entry, copies of which had been produced as exhibits at his criminal trial in 1995. He indicated in that application that he wanted to inspect them because he suspected that they were forgeries.

The application was subsequently dismissed with costs. Aggrieved by that decision, he appealed to this Court.

In my view, the appeal has no merit. The record of the criminal trial indicates that when copies of the Bills of Entry were produced by the prosecutor, Mr *Chikumbirike*, who appeared for the appellant, objected to their production. The prosecutor then undertook to produce the originals on the following day.

When the trial resumed on the following day, the prosecutor informed the judge that he had shown Mr *Chikumbirike* the original Bills of Entry, that

Mr *Chikumbirike* was satisfied that the documents were the originals, and that consequently Mr *Chikumbirike* no longer objected to the production of the copies tendered as exhibits on the previous day.

When asked by the trial judge, Mr *Chikumbirike* confirmed what the prosecutor had said.

All this took place in open court and in the presence of the appellant. The appellant did not inform either his counsel or the court that he wanted to examine the documents in order to satisfy himself that they were genuine originals.

In addition, it is pertinent to note that the appellant subsequently appealed against sentence only. If the authenticity of the documents was in doubt, he should have instructed his counsel to note an appeal against conviction as well.

Furthermore, when the appeal against sentence was argued in this Court in 1997, the appellant made no attempt to apply for leave to appeal against conviction out of time on the ground that the documents in question were forgeries.

It is therefore clear, in my view, that the filing of the application in the court *a quo* was a belated attempt by the appellant to appeal against conviction, about five years after he was convicted and sentenced, and about three years after his appeal against sentence was determined by this Court. The appellant is not permitted to do that by the Rules of this Court. There must be finality in litigation: *S v Franco &*

Ors 1974 (2) RLR 39 (AD).

In the circumstances, we were satisfied that the decision of the learned judge was correct, and that the appeal was devoid of merit.

EBRAHIM JA: I agree.

MALABA JA: I agree.

T H Chitapi & Associates, appellant's legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners