

ADMORE MUSIZA
and
TAFARA MACHOKOTO
versus
MAGISTRATE F. CHAKANYUKA N.O.
and
NATIONAL PROSECUTING AUTHORITY

HIGH COURT OF ZIMBABWE
MAMBARA J
HARARE; 12 & 18 June 2025
,

Opposed application for review

A Mugiya, for the applicants
F. Zacharia, for the respondents

MAMBARA J: This is a review application against a magistrate’s decision refusing to release seized money (US\$56,000 and US\$22,000) to the applicants respectively after criminal proceedings against them were halted. The applicants were charged with theft, allegedly stealing cash belonging to a company and their trial commenced. Several witnesses testified, but the State failed to locate a key witness. Consequently, on the applicants’ motion, the magistrate refused further remand and removed the applicants from remand effectively ending the proceedings. The applicants then applied under section 58 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] (“CP&EA”) for return of the seized money. On 9 December 2024, the magistrate dismissed that application, leaving the money in police custody. The applicants now seek this High Court’s intervention to review and set aside the magistrate’s decision. They argue that once the prosecution was discontinued, the law *mandated* the return of the exhibits to either the accused or the lawful owner. They contend the magistrate misdirected herself by failing to determine ownership of the money and by effectively leaving the property in limbo, contrary to the CP&EA and established legal principles. The State opposes the application, citing concerns that the money may be stolen property belonging to a third party and should not automatically revert to the accused without an ownership determination.

Issues for Determination

The central issues arising for determination are:

1. Interpretation of Sections 49, 58, and 61 of the CP&EA
2. Jurisdiction to Determine Ownership
3. Effect of Refusal of Further Remand
4. Alleged Error in Failing to Determine Ownership
5. Risk of Returning Potentially Stolen Property

Section 49 – Power to Seize Articles

Section 49 of the CP&EA empowers the State, usually through the police, to seize any article that is believed on reasonable grounds to be involved in the commission of an offense, to afford evidence of an offense, or to be intended for use in the commission of an offense. This provision justified the initial seizure of the cash from the applicants upon their arrest, given the allegation that the money was the proceeds of theft. Section 49 requires police officers to issue a full receipt for any seized article and to give that receipt to the owner or possessor of the article or other appropriate persons in their absence. The intent is to formally document the seizure and to acknowledge the possessory interest of the person from whom the item was taken. The law thus recognizes from the outset a distinction between the possessor of the article at time of seizure and a potential true owner – the receipt process ensures there is a record linking the item to the person from whom it was seized. In this case, receipts were issued to the applicants for the US\$56,000 and US\$22,000 seized from them, acknowledging them as the possessors at the time.

It is important to note that section 49 is only the starting point: it sanctions the deprivation of property temporarily for law enforcement purposes. It does not by itself divest the possessor or owner of ultimate rights to the property. The subsequent provisions (sections 58, 59, 60, 61, etc.) regulate how long the State may hold such items and what must eventually be done with them. Thus, while section 49 allowed the police to lawfully seize the money as evidence of a suspected crime, the continued retention and final disposal of that money must comply with sections 58 and 61, which I now will consider in detail.

Section 58 – Custody and Disposal of Seized Articles

Section 58 of the CP&EA governs the custody and disposal of articles seized under section 49 or under other laws, once delivered into police custody. This provision is pivotal to the present case. In essence, section 58 imposes a duty on the police to keep seized exhibits safe and to eventually dispose of them depending on what happens in the related criminal proceedings. The relevant portion is section 58(1)(d), which provides (in paraphrase) as

follows: a seized article shall be held by the police until the criminal proceedings in relation to that article –

- (i) “have been abandoned or discontinued or are concluded otherwise than with the conviction of the accused,” in which event the custodian police officer shall forthwith restore the article to the accused or the owner thereof, as may be appropriate, unless the article is intrinsically unlawful to possess; or
- (ii) have resulted in a conviction, in which event the trial court will order the item’s disposal – typically restoration to the owner or accused, or forfeiture/destruction, as the case may be.

Several important points flow from section 58(1)(d)(i). First, if the proceedings are discontinued or end without a conviction, the default rule is that the seized property *should be returned*. The law identifies the potential recipients of the return as either “the accused,” from whom it was seized, i.e. the possessor or “the owner” of the article – “as may be appropriate” in the circumstances. This wording implicitly recognizes that the person from whom the item was seized might not be the true owner, and if a different person is the proven owner, restoration should be to that owner. Conversely, if no one else has proven a superior claim, the article goes back to the person from whom it was seized even if that person was the accused. The only exception is if the item itself is illegal to possess, for example, unlicensed firearms, narcotics, etc., in which case it cannot be returned to anyone whose possession would be unlawful. Cash is not intrinsically unlawful to possess, so that exception does not apply here.

Section 58’s mandate is peremptory. The use of the word “shall” – “*shall forthwith restore*” – indicates that once the precondition, discontinuation or conclusion without conviction is met, the police have no discretion: they must promptly return the item to the appropriate person. Courts have described this provision as “mandatory” and not subject to a police or court whim. In the applicants’ case, it is common cause that the trial did not result in a conviction. The proceedings were effectively abandoned or at least suspended indefinitely when the magistrate removed the accused from remand due to the absence of a key witness. Therefore, by the clear terms of section 58(1)(d)(i), the condition for restoration of the exhibits was satisfied – the prosecution was not completed to conviction.

It bears emphasizing that section 58(1)(d)(i) covers scenarios where a trial has begun but is discontinued or abandoned. This complements section 59 of the Act which I will discuss shortly, which deals with situations where no trial is instituted or where items are not required for evidence. The legislative intent is that seized property should not remain in indefinite limbo.

As was noted in *Commissioner of Police v D’Elia* 1992 (1) ZLR 367 (S), “the article cannot be left in limbo. It must be returned to the person from whom it was seized or delivered to the person who may lawfully possess it or forfeited to the State”. This principle, pronounced by the Supreme Court, underscores that the authorities have a duty to resolve the status of an exhibit one way or another – either give it back to a claimant with a legitimate right, or formally forfeit it to the State if no legitimate private claim exists. Simply holding the property indefinitely perhaps hoping for a future prosecution or to avoid giving it to an accused is not an option recognized by law.

It is also noteworthy that section 58(2) provides a mechanism for police, even before trial, to return stolen property to its rightful owner with the consent of the possessor from whom it was seized. For example, if the accused admits the item is stolen and consents, the police can hand it back to the theft victim, who must hold it available as an exhibit in any trial. This provision illustrates the law’s preference for returning property to the true owner whenever possible. However, such consent was not given in the present case – the applicants maintain the money is theirs, so naturally they did not consent to it being given to the company. Therefore, section 58(2) was not invoked, and the money remained in police custody through the abortive trial.

Finally, section 58(1) is made expressly “subject to section 59”. Section 59 covers instances where no criminal proceedings are instituted or the item is not required for evidence, etc. Although in our case proceedings *were* instituted and then discontinued, section 59’s framework is still instructive as it reflects the same fundamental principles. We turn briefly to section 59 for completeness.

Section 59 – Disposal where No Prosecution or Not Required for Trial

Section 59 addresses what happens to seized articles if a prosecution is never launched, or if the article is not needed in evidence, or if the accused admits guilt and pays a fine, etc. In such situations, which all effectively result in no trial on the merits, the law again says the article “shall” be disposed of as follows:

- If the person from whom it was seized may lawfully possess it, return it to that person.
- If that person may not lawfully possess it (e.g. it’s contraband or that person has no right to it), then deliver it to the person who may lawfully possess it, that is the rightful owner or someone with a legal entitlement.

- If no person can lawfully possess it or no rightful owner is known, it is forfeited to the State.

This tripartite scheme mirrors the options under section 58 and 61: return to possessor, or return to true owner, or forfeit to State if neither of those is applicable. Section 59 further provides procedures such as sending notice to a known owner to come collect the item, and allows a magistrate within 3 years to entertain claims by any person asserting ownership or other rights in the item, even after a forfeiture to the State. The magistrate can inquire into the claim and order the item returned or compensation paid if the claim is proven. This shows that the CP&EA builds in safeguards to protect property rights: even after property technically goes to the State, a rightful owner can come forward to reclaim it via the courts.

In summary, sections 58 and 59 are grounded in the same principle: the State should not hold seized property any longer than necessary, and ultimately the property should end up with its lawful owner or possessor unless lawfully forfeited. The law strikes a balance by giving law enforcement temporary custody and certain forfeiture powers, but it does not allow permanent deprivation of property without due process or without according the possessor/owner an opportunity to assert their rights.

Section 61 – Disposal of Exhibits After Commencement of Proceedings

Section 61 specifically deals with disposal of exhibits *after criminal proceedings have commenced*. It empowers the trial court, judge or magistrate, at the conclusion of the proceedings to make an order about any exhibit that was produced in evidence or held for purposes of the trial. Notably, section 61(1) essentially echoes the distribution scheme we've seen: the court may order that the article –

- (a) be returned to the person from whose possession it was obtained, if that person may lawfully possess it;
- (b) if the person from whom it was seized is not entitled to it or may not lawfully possess it, then it be returned to any other person entitled thereto, if such other person may lawfully possess it;
- (c) if no person is entitled to it or it's intrinsically unlawful or the true owner is unknown/untraceable, it shall be forfeited to the State.

The court is expressly allowed to hear additional evidence, by affidavit or orally at the end of the trial to determine these questions of entitlement, ownership or lawful possession for the purpose of making an order. If for some reason the trial court does not make a disposal order at the conclusion of the case, the clerk of court is tasked with handing the exhibit to the

person who appears entitled under the above rules, or if in doubt, to refer the matter to a magistrate or judge to make the decision again with power to hear evidence. There is even a provision that if three months pass after the trial's end with no order or claim, the item is forfeited to the State by default – another indication that the law will not allow exhibits to remain in limbo indefinitely.

Crucially for our purposes, section 61(6) provides: “If circumstances so require or if the criminal proceedings in question cannot for any reason be disposed of, the judge or magistrate concerned may make any order referred to in paragraph (a) or (b) of subsection (1) at any stage of the proceedings.” This means that even if a case has not run to a normal conclusion, for example, if it is stayed, abandoned or otherwise cannot be finalized, the court may still make an order returning the article to the person from whom it was seized or to another person entitled to it. In other words, the power to resolve the fate of the exhibit is not lost just because the trial did not end in conviction or acquittal; the court can step in at that juncture and make the appropriate order.

Section 61 thus squarely answers one of the key questions: a magistrate has the jurisdiction to determine entitlement or ownership of exhibits when deciding on their release. The statute not only grants jurisdiction but indeed expects the court to exercise it to prevent arbitrary outcomes. The magistrate is to apply the legal criteria, possession and ownership rights and lawfulness of possession to decide who should receive the property. As the High Court observed in *Patrick Mutodi v Minister of Home Affairs & Ors* HH-260/22, section 58 and by extension section 61 “identifies the beneficiary as the owner or possessor” and the key question is whether the claimant has proved that he is such owner or possessor. The court must make that determination on evidence; it cannot shirk from deciding, because the law does not permit simply leaving the item in indefinite custody. *S v Prince Ndlovu* HB-136/22, cautioned that courts have a limited discretion in disposal of exhibits and must follow the statutory scheme. In that case the High Court criticized a magistrate for attempting to devise an ad hoc method of disposal outside what the Act provides, emphasizing that allowing magistrates to choose novel disposal methods would be “chaotic” – instead, the statute’s procedure must be strictly observed. This reinforces that magistrates must stick to the paths laid out in sections 58, 59, 61, etc., which invariably require an inquiry into who should rightly receive the item.

In summary, sections 58 and 61 operate in tandem to ensure that when a case ends without a conviction, be it via discontinuance, withdrawal, or even mid-trial abandonment, the default position is to restore the property to its prior possessor or to the proven rightful owner.

The magistrate or judge presiding has both the jurisdiction and the duty to make an appropriate order to give effect to that principle, taking evidence if necessary, to resolve any dispute of ownership. Against this legal backdrop, I now turn to the specific contentions in this review: whether the magistrate correctly applied these provisions, particularly on the questions of jurisdiction and ownership determination, and how the concept of “discontinuation” applies here.

Analysis

(1) Does Refusal of Further Remand = Discontinuation of Proceedings?

A threshold issue is whether the magistrate’s act of refusing further remand thereby removing the accused from remand constitutes a “discontinuation” or “abandonment” of proceedings as envisaged by section 58(1)(d)(i). The magistrate in her reasons apparently agreed that the prosecution had been discontinued, but it is important for this Court to confirm that interpretation. On this point, the law and case authority are clear: once a court refuses further remand, the accused is no longer before the court on those charges and the proceedings are effectively stayed unless or until the prosecution is revived by summoning the accused afresh. In *Edmore Shoshera & Ors v The State* HB-103/22, the High Court remarked that the effect of removal from remand is that “there is no case before the court” – the accused ceases to be under any obligation to attend court and even is entitled to the refund of any bail that had been paid. The accused is not acquitted, but the prosecution is in a state of dormancy; practically and legally, the proceedings have been terminated for the time being. Similarly, in *Mhari v Presiding Magistrate & Anor*, HMA 247/15, (unreported), it was observed that after a refusal of further remand the accused “at that point is not facing any pending case” – the prosecution is “suspended and thus discontinued”.

The language of section 58(1)(d)(i) – “abandoned or discontinued” – readily covers the scenario of a matter that the State is no longer pursuing. Here, the State did not formally withdraw the charges, but it failed to proceed and the court ended the remand. In substance, that is a discontinuation of the proceedings. It is telling that section 58(1)(d)(i) uses the term “discontinued” rather than “withdrawn” – it suggests a broad meaning, capturing any situation where the prosecution is not carried through to completion whether by the prosecutor’s choice or by the court’s refusal to allow delay. I therefore have no hesitation in finding that the proceedings against the applicants were “discontinued” within the meaning of section 58(1)(d)(i) when they were removed from remand on 11 April 2024. This triggered the operation of the rule that the exhibits should be restored to the appropriate person. Indeed, the

magistrate's written ruling acknowledged that prosecution had been discontinued; yet, paradoxically, she refused the restoration of the exhibits. The first question is answered in the affirmative: refusal of further remand amounts to a discontinuation of criminal proceedings under the CP&EA, activating the obligations under section 58 and empowering the court under section 61 to make a disposal order.

(2) Magistrate's Jurisdiction to Determine Ownership under Section 58/61

The applicants contend that the magistrate had full jurisdiction – indeed a duty – to determine the issue of ownership or lawful entitlement to the money when considering their application for its return. The magistrate, by contrast, appeared to take the view that deciding ownership was beyond her purview; she declined to release the money seemingly because ownership was contested and perhaps felt that should be decided in a civil court or by some other process. This is a critical point: if the magistrate lacked authority to decide ownership, one might justify her leaving the money in police custody pending a civil claim. But if she did have authority, then failing to use it would be a misdirection.

As outlined above, section 61 explicitly empowers the magistrate to order return of exhibits either to the person from whom they were seized or to “any other person entitled thereto,” and allows the magistrate to hear evidence in order to determine who is so entitled. This is a statutory jurisdiction to consider and decide questions of entitlement which effectively means ownership or the right to possess. Furthermore, even apart from section 61, when an application is made under section 58 for the release of exhibits, the court entertaining such application must of necessity decide whether the applicant qualifies as the proper recipient under section 58(1)(d)(i) – i.e., are they “the accused or the owner” to whom the article should be restored? If someone else, a third-party is asserting a claim, the court cannot ignore that claim; it must evaluate it. The Mutodi case illustrates this: in that case a vehicle had been held by police after charges were dropped, and the applicant sought its return. The High Court (MANZUNZU J) noted that section 58 “identifies the beneficiary as the owner or possessor” and then squarely asked: “Has the applicant proved that he is such owner or possessor?”. The implicit message is that the court must make a finding on whether the applicant is either the owner or was the possessor at seizure both of which were true for Mr. Mutodi, since he possessed the car and claimed to own it. If the evidence showed someone else was the true owner, presumably the application would not succeed without joining that owner.

The magistrate's jurisdiction in this regard is not an open-ended power to adjudicate civil disputes generally, but a specific mandate tied to the disposal of exhibits. It is part and

parcel of the criminal proceeding's conclusion. The criminal court does not grant declaratory title to property in the way a civil court in a *rei vindicatio* claim would, but it does determine who should receive the property for purposes of section 58/61 – effectively a binding decision as between the contesting parties, subject to review or appeal. Indeed, section 59(3) and section 62 of the CP&EA provide that even after a forfeiture or order, a person who claims a right in the property can apply within 3 years for the magistrate or judge to inquire into their claim. This underscores that the criminal court is the forum to resolve these ownership issues in connection with seized exhibits, rather than leaving parties to initiate separate civil suits. The criminal procedure legislation contemplates and authorizes a summary inquiry by the magistrate to prevent the need for separate litigation over the item, while still safeguarding rights by allowing evidence to be heard and appeals to be taken from the magistrate's determination.

Comparative law supports this approach. In South Africa, which has a similar Criminal Procedure Act, the courts and statute operate in much the same way. For instance, section 31(1) of the South African CPA 51 of 1977 provides that if an article is seized and no criminal proceedings are instituted or it is not required for evidence, it “shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it”. In a recent case, *Minister of Police v Khoeli* [2021] ZASCA 146, the Supreme Court of Appeal upheld a High Court decision setting aside a police forfeiture of seized cattle. The High Court had reasoned that the police should have returned the cattle to the respondent from whom they were seized because he proved he had lawful possession/ownership, the animals bore his registered brand and documentation of ownership. The Supreme Court agreed that the authorities acted unlawfully by not returning the property to the person entitled. This mirrors the expectation that the authorities or court determine who has the right to possess the item and act accordingly.

In the United Kingdom, while the procedures differ, the principle of resolving ownership of seized property likewise falls within the remit of the magistrates' courts through mechanisms like the Police (Property) Act 1897. British courts have observed that once criminal investigations or trials are done, the police have a limited right to retain property – they must either return it to the person it was seized from or to the rightful owner, and if ownership is disputed, the matter can be brought to court for decision. Notably, in *Costello v Chief Constable of Derbyshire Constabulary* [2001] (a case widely reported as the “stolen car thieves' charter” case), the Court of Appeal had to decide whether a car, which was

undoubtedly stolen property, should be returned to Mr. Costello, from whom police seized it, even though he was suspected of being involved in the theft. The true owner could not be traced. The car's identifiers were altered. The Court held that the police could not hold the car indefinitely; their power under the Police and Criminal Evidence Act 1984 was only to retain property temporarily for investigation, evidence, or to find the owner. Once those purposes were exhausted, in the absence of an identified lawful owner, the possessory title of Mr. Costello prevailed, despite suspicion of his wrongdoing. Mr. Justice Lightman's remarks are pertinent: the police's "limited right... to retain property" and obligation to return it were *"unaffected by any perceived public policy consideration that the fruits of [the suspect's] criminal activities ought to be withheld from [him]"*. He cited the principle that *"even a thief is entitled to the protection of the law against the theft from him of that which he has stolen."* This striking outcome – returning a stolen car to a suspect – was driven by the legal principle that possession yields to true ownership, but if true ownership cannot be established, the possessor cannot be arbitrarily deprived. The English court essentially had to assess if anyone had a better claim than the possessor; finding none because the true owner was unknown, it ordered return to the possessor. This is analogous to a magistrate determining ownership under our section 58/61: if the prosecution or a third party cannot substantiate another person's claim to the property, then the default is to return it to the person from whom it was seized.

In the United States, although the forum is typically a civil motion rather than the trial court's own motion, there is a procedure for people to reclaim seized property when criminal proceedings have concluded or if none were initiated. Rule 41(g) of the U.S. Federal Rules of Criminal Procedure provides that *"[a] person aggrieved by ... the deprivation of property may move for the property's return"* in the court that has the property. Courts hearing such motions will consider who has a right to possess the property and whether the government has any continuing justification to hold it. If the government cannot justify retention, for example, by initiating forfeiture proceedings or proving the property is contraband, the court will order the property returned to the movant. The U.S. system often addresses the issue of potentially criminally-tainted property through separate civil forfeiture actions. If the State believes the property itself is proceeds or an instrumentality of crime, it can file a forfeiture case and must prove the connection to crime usually by a preponderance of evidence in civil court. Absent such a step, the default is to return the property to the individual, even if that individual was an accused whose charges were dropped. This approach aligns with the notion that without a legal process to confiscate property, the State cannot simply keep it.

All of these comparative insights bolster the interpretation that the magistrates do have the jurisdiction to determine who is entitled to exhibits upon termination of proceedings, and indeed they are expected to do so to avoid arbitrary deprivation of property. The magistrate in the present case, therefore, did have the power to inquire into whether the money should go to the applicants from whom it was seized or to another claimant (the company, if it could prove ownership), or to order forfeiture if neither claimant had a lawful right. By not engaging in that inquiry and simply dismissing the application, the magistrate failed to exercise the jurisdiction vested in her by law. In effect, she left the property in the hands of the police without legal resolution – the very state of limbo that the Supreme Court in *D’Elia* decried. This was a misdirection and a gross irregularity, as it defeated the purpose of sections 58 and 61.

(3) Did the Magistrate Err by Failing to Determine Ownership (Entitlement)?

Given the above discussion, it follows that the magistrate ought to have determined the question of ownership/entitlement as between the applicants and the alleged victim company when considering the release of the money. The record indicates that the State’s basis for objecting to the return was that the money was stolen from National Foods Ltd. However, it is common cause that during the criminal proceedings that did occur, the State led no evidence proving that fact. The key witness who might have established the source of the money never testified. The applicants, on the other hand, maintained in their defence outline that the money was theirs. They presumably argued it was lawfully earned or saved. Thus, by the time the case was discontinued, the evidentiary position was that the applicants were the acknowledged possessors of the cash and *no contrary proof of someone else’s ownership had been presented*.

This context is critical. Section 58(1)(d)(i) does not say “restore to the accused if he is innocent or if we think he really owns it” – it says restore to the accused or the owner, as appropriate. How to choose between the accused and some other owner? The answer is: if a specific person can demonstrate a superior claim of ownership, then that person should be the beneficiary; if not, the accused from whom it was seized is the default beneficiary. Here, the State *alleged* the company was the owner, but an allegation is not proof. The magistrate should have invited or allowed the State or the company, if it sought to be heard to produce whatever evidence or affidavits they had of the money’s true ownership. The applicants likewise could produce evidence or rely on inferences from the prosecution’s failure of proof. After considering such material, the magistrate could then make a finding on a balance of probabilities, since this is not a criminal conviction, the civil standard would apply, as to whether the company was the owner of the funds or whether the applicants’ claim to the money

was un rebutted. If the evidence clearly showed the money belonged to the company (e.g. serial numbers recorded, or marked cash from a police trap, etc.), then the proper order might have been to return the money to the company as the “owner” under the statute. If the evidence was inconclusive or non-existent, then the applicants, as the possessors from whom it was seized, would be the ones to whom it should be returned.

By refusing the application outright without making any such determination, the magistrate indeed erred. She essentially abdicated her responsibility to apply the law’s criteria. The result was to leave the money in police custody indefinitely. But as repeatedly emphasized, neither the CP&EA nor the common law countenance indefinite retention without resolution. The magistrate’s approach effectively put the matter in limbo, hoping perhaps that the State might re-institute the case later or that the parties sort it out elsewhere. This was grossly irregular. As the applicants submit, the magistrate had “no discretion but to comply with the law” once prosecution was discontinued. The law required restoration to one of the two potential claimants; doing nothing was not an option.

It is also worth noting that the magistrate’s reluctance might have stemmed from a misconception that determining ownership would exceed her criminal jurisdiction. However, as explained, this is a function given to her by the criminal procedure statute itself. This situation is distinguishable from a purely civil dispute unconnected to any criminal case. Here, the property was seized as part of the criminal case and thus falls squarely under the CP&EA’s post-trial machinery. The Rowland text on Criminal Procedure in Zimbabwe (as cited in D’Elia and other cases) notes that upon an acquittal or discontinuation, if there is a dispute over an exhibit, the court should resolve it by deciding whether to return to the accused or someone else. The magistrate could even have required the company (National Foods) to file an affidavit or claim if it asserted ownership, thereby formally bringing it into the inquiry. What she could not do is leave the matter unresolved.

In failing to conduct any inquiry or make any finding on ownership, the magistrate misdirected herself in law. This Court on review finds that to be a reviewable irregularity. The applicants have been prejudiced because a mandatory statutory benefit (return of their property) was denied without proper legal basis. Even the State and the company have been prejudiced in a sense, because there is no finality – the money sits in evidence lockers accruing dust, neither returned to the company if indeed it is theirs nor to the applicants, and not forfeited to the State either. Such a stalemate is precisely what the law aims to avoid.

(4) Balancing Risks: The Dilemma of Returning Potentially Stolen Property

The final issue is more of a policy consideration, but one which must inform the Court's decision: the undeniable risk and optics of returning property that may well be stolen to the very persons accused though not convicted of stealing it. Understandably, this gives pause. No court wishes to facilitate the benefit of crime or to hand criminals the fruits of their alleged wrongdoing on a platter. The police, too, have an interest in not restoring property to suspects if it rightfully belongs to a victim of crime. The magistrate's decision, though legally flawed, likely arose from an instinct to prevent a possibly unjust result (i.e. the alleged thieves walking away with the loot). This Court must address that concern while upholding the law.

It is here that the structure of our law and comparable laws elsewhere provides some reassurance. The safeguards against returning truly stolen property to culprits are:

- (a) **Proof of Ownership by the Victim:** If the prosecution can demonstrate that the property in question belongs to someone other than the accused, the court will return it to that victim or lawful owner instead of to the accused. The onus is effectively on the State or claimant to prove a better title than the accused's possessory claim. In many cases, evidence like serial numbers, distinctive markings, testimonies, or documentation can establish that the item was taken from the victim. For cash, this can be harder unless it was marked or the serial numbers recorded, but sometimes context and circumstantial evidence can persuade a court of true ownership. Here, unfortunately, the State did not lead evidence to prove the company's ownership. In a future proceeding, as will be ordered, the State/company will have the opportunity to present any available proof. If they have none, then by law the court cannot simply assume theft – the presumption of innocence and the possessory title principle weigh in the accused's favour.
- (b) **Civil Forfeiture or Preservation Remedies:** The law does provide avenues to prevent suspected criminals from enjoying ill-gotten gains, but these must be invoked properly. For instance, the State can apply to confiscate proceeds of crime through mechanisms in the Money Laundering and Proceeds of Crime Act or seek a preservation order pending trial. In a theft case, the victim company itself could also initiate a civil suit for the recovery of its funds. If such actions are taken, courts can issue restraining orders (interdicts) on disposal of the assets, or order the money be kept by a neutral party or in court pending outcome. In the present matter, neither the State nor the company pursued any such civil remedy during the lengthy period

while the criminal case was pending. It appears they relied solely on the criminal process. When that process stalled, the money's status became uncertain. It is not the role of a magistrate on a section 58 application to initiate a forfeiture or interdict on behalf of the State – those must be separately sought. Thus, absent a parallel process, the magistrate was bound to apply the default rules of the CP&EA.

- (c) Appeal/Review Checks: If a magistrate does order an exhibit returned to an accused and the State strongly believes this is wrong, for example, due to clear evidence of someone else's ownership, the State can seek review or appeal of that order. Such an application could be made urgently to prevent the handover. This acts as a check against precipitous releases. In our case, had the magistrate ordered the money given to the applicants, the State could have applied to this Court for a suspension and review, arguing that the magistrate's factual finding on ownership was unreasonable given X or Y evidence. The High Court could then swiftly correct any error. That is a better scenario than what happened, where no decision at all was made.
- (d) Possessory Title vs. True Title: The common law concept, as vividly illustrated by the Costello case in the UK, is that a possessor of property has a legal interest in it good against everyone except the true owner. This means the law doesn't consider the possessor a non-entity – even a wrongdoer has rights in the thing against the whole world except those with better rights. In Costello, because the true owner was untraceable, the possessor's right prevailed. In our scenario, the company, if truly the source of the money is known. So it *does* have a potential better right – but it must assert and prove it. The law won't deny the possessor or accused his entitlement unless and until that better right is substantiated. This might be discomfiting morally, but it is how property law balances interests to avoid arbitrary seizures. The law must sometimes yield to the maxim "possession is nine-tenths of the law" in the absence of a proven superior claim.

In sum, the risk of returning stolen property exists, but the legal framework requires the State to mitigate that risk by producing evidence of the true owner or by invoking formal forfeiture processes. What the magistrate cannot do is act on assumption or moral suspicion alone; to do so would undermine the rule of law and property rights. As the U.K. Court of Appeal acknowledged in the Costello case, this can create a "thieves' charter" perception, but the remedy lies in better investigative work and timely legal action by the authorities, not in

bending the law to allow indefinite deprivation without due process. Our courts must enforce the statutes as written. Here, that means if the company's claim is unproven, the applicants are entitled to their money back, because the presumption is that a person in possession is entitled to possession against all but a proven rightful owner.

Conclusion

Having analysed the applicable law and facts, this Court finds that the magistrate's decision of 9 December 2024 cannot stand. By refusing to release the exhibits without determining the competing claims, the magistrate failed to apply sections 58 and 61 of the CP&EA properly. The proceedings are tainted by a material irregularity and a misdirection on the law, warranting this Court's intervention on review.

The appropriate relief is to set aside the magistrate's ruling and to remit the matter to the magistrates' court for a proper determination of entitlement to the seized money, in line with the legal principles discussed. The magistrate (same or another, as the Chief Magistrate may assign) should promptly hold an inquiry where the applicants and any interested party such as National Foods (Pvt) Ltd, if it so wishes can present evidence or affidavits on the ownership of the funds. The magistrate will then make a determination whether the money should be restored to the applicants as possessors or to the company as purported owner, or partly to each if evidence so dictates, or otherwise dealt with according to law. In conducting this inquiry, the magistrate must be guided by the standards of proof in civil matters (balance of probabilities) and the statutory directives in CP&EA sections 58 and 61. If no credible evidence is presented to establish another person's claim, then the magistrate is obliged to order the money returned to the applicants. If, on the other hand, it is proven that the money in fact belonged to the company and was only in applicants' possession by virtue of the alleged crime, then the magistrate can order it delivered to that rightful owner. In either scenario, the outcome will no longer be "in limbo" but anchored in a judicial determination of rights.

For the reasons above, this Court orders as follows:

1. The magistrate's decision of 9 December 2024 dismissing the applicants' application for return of exhibits is hereby reviewed, quashed and set aside.
2. The matter is remitted to the magistrates' court for a fresh determination of the question of entitlement to the seized money (US\$78,000 in total), in accordance with sections 58(1)(d)(i) and 61 of the CP&EA and the guidance provided in this judgment. The magistrate is directed to conduct an inquiry and receive evidence as necessary to decide whether the money should be restored to the applicants or to

any other person claiming ownership, and to then make the appropriate order for disposal of the exhibits.

The registrar is directed to forward a copy of this judgment to the Chief Magistrate to ensure the remitted hearing is accorded priority.

MAMBARA J:

Mugiya law Chambers, applicants' legal practitioners
Civil Division, respondents' legal practitioners