

**IN THE HIGH COURT OF ZAMBIA  
AT THE ECONOMIC AND FINANCIAL CRIMES  
DIVISION REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)**

**2022/HPEF/02**

**IN THE MATTER OF: ARTICLE 1(3) OF THE CONSTITUTION OF  
ZAMBIA (AMENDMENT) ACT NUMBER 2 OF  
2016 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: ARTICLES 17 AND 18 OF THE  
CONSTITUTION OF ZAMBIA (AMENDMENT)  
ACT NUMBER 2 OF 2016 OF THE LAWS OF  
ZAMBIA**

**AND**

**IN THE MATTER OF: ARTICLE 28 OF THE CONSTITUTION OF  
ZAMBIA (AMENDMENT) ACT NUMBER 2 OF  
2016 OF THE LAWS OF ZAMBIA**

**AND**

**IN THE MATTER OF: SEIZURE NOTICE ISSUED DATED 27<sup>TH</sup>  
APRIL, 2022**

**AND**

**IN THE MATTER OF: THE PROTECTION OF FUNDAMENTAL  
RIGHTS REGULATION, 1969**

**BETWEEN:**

**RONALD KAOMA CHITOTELA**

**PETITIONER**

**AND**

**ANTI-CORRUPTION COMMISSION**

**1<sup>ST</sup> RESPONDENT**

**SILUMESI MUCHULA**

**REPUBLIC OF ZAMBIA  
HIGH COURT OF ZAMBIA  
ECONOMIC & FINANCIAL CRIMES DIVISION**

**2<sup>ND</sup> RESPONDENT**

**GIFT TEMBO**



**20 AUG 2024**



**3<sup>RD</sup> RESPONDENT**

**KOPANO CHILEMBO**

**4<sup>TH</sup> RESPONDENT**

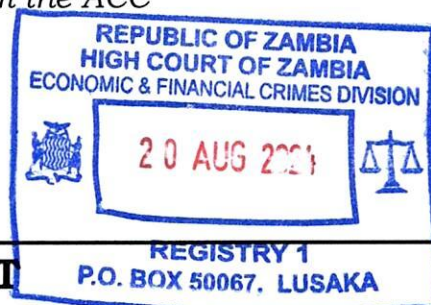
**REGISTRY 1**

**Before Honourable Justices S. M. Wanjani, P. K Yangailo and S. V.  
Siloka on 20<sup>th</sup> day of August, 2024.**

*For the Petitioner:*

*K. Kombe, with C Liato and P P Lialamba,  
Messrs Andrew & Partners and B. Mwelwa,  
Messrs Mwelwa Phiri Partners.*

For the 1<sup>st</sup> Respondent: G. M Muyunda, K. Lukama and M. C Nalwenga, from the ACC  
For the 2<sup>nd</sup> Respondent: In Person  
For the 3<sup>rd</sup> Respondent: In Person  
For the 4<sup>th</sup> Respondent: In Person



---

## JUDGMENT

---

**S. M. Wanjelani J. delivered the Judgement of the Court**

**Cases referred to:**

1. *Woolmington v The DPP* (1935) AC 462, 481;
2. *The People v Austin Chisanga Liato*, Appeal No. 291/2014;
3. *Re Thomas Mumba* (1984) ZR 38 (HC),
4. *Anti-Corruption Commission v Serios Farms Limited*, Appeal No. 155/2009;
5. *Kachasu v The Attorney General* (1967) ZR 145 (HC);
6. *Patel v The Attorney-General* (1968) ZR 99 (HC);
7. *Communications Authority v Vodacom Zambia Limited* (S.C.Z Judgment No. 21 OF 2009);
8. *Arzika v Gov. N Region* (1961) ALL NLR 379;
9. *C & S Investments Limited and Others v The Attorney General* (2004) ZR 216;
10. *Rajan Lekhraj Mahtani & John Sangwa v The People*, SCZ No. 21 of 2019;
11. *Lloyd Chembo v The Attorney General* CCZ No. 15 of 2018; and
12. *Nkumbula v The Attorney General* (1972) Z.R. 204.

**Legislation and other materials referred to:**

1. *The Constitution of Zambia (Amendment) Act No. 2 of 2016*;
  2. *The Anti-Corruption Act No. 3 of 2012 of the Laws of Zambia*;
  3. *The Forfeiture of Proceeds of Crime Act No. 19 of 2010*;
  4. *Criminal Procedure Code, Chapter 88 of the Laws of Zambia*;
- and

5. *Black's Law Dictionary, 9<sup>th</sup> Edition Bryan A. Garner (Editor in Chief) Thomson Reuter, 2009.*

## **1. INTRODUCTION**

- 1.1 The Petitioner, **Ronald Kaoma Chitotela**, filed this Petition on 3<sup>rd</sup> May, 2022, seeking various declaratory reliefs; and damages against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents for misfeasance in public office as well as costs, on allegations of their unconstitutional conduct.
- 1.2 The Petition was filed pursuant to **Articles 1(3), 16, 18, 28** and **135** of the **Constitution** and was accompanied by an Affidavit verifying the Petition as well as Skeleton Arguments.
- 1.3 The Respondents opposed the Petition by filing their respective Answers, Affidavits opposing the Petitioner's Affidavit as well as Skeleton Arguments.
- 1.4 The Matter then proceeded to trial and Witnesses gave *viva voce* testimonies.

## **2. THE PETITIONER'S PETITION**

- 2.1 The Petitioner stated that he is a Zambian National, and a Member of Parliament for Pambashe Constituency in the Luapula Province, whilst the 1<sup>st</sup> Respondent is a statutory body established under **Section 4** of the **Anti-Corruption Act**, entrusted amongst other things with the duty to prevent, investigate and prosecute

corruption related matters in the Republic of Zambia.

- 2.2 He added that the 2<sup>nd</sup> Respondent was the Acting Director-General in the 1<sup>st</sup> Respondent Institution, while 3<sup>rd</sup> and 4<sup>th</sup> Respondents are Investigation Officers who act at the instance of 2<sup>nd</sup> Respondent's instructions.
- 2.3 With respect to the relevant facts of this Petition, the Petitioner averred that he is the legal owner of Stand Number CHONG/LN\_21188/51, State Lodge, Chongwe (hereinafter referred to as "the Property"), where he currently resides and is his retirement home and that the Property is subject to a Seizure Notice issued pursuant to **Section 58** of the **Anti-Corruption Act**.
- 2.4 The Petitioner stated that the Respondents have alleged that the Property was acquired using suspected proceeds of crime, and that the fact that the Property is still registered in the name of Mr. Liu Runmin is confirmation that the Petitioner has concealed the Property.
- 2.5 The Petitioner stated that the Property is still in the name of Mr. Liu Runmin because he has not completed the transaction by paying Property Transfer Tax, otherwise all conveyance documents have been executed.
- 2.6 He contended that his Property is not tainted in any way as it is not a proceed of crime and there is

no serious crime that the Respondents are currently investigating in relation to the Property.

2.7 The Petitioner explained that he entered into a contract to purchase the Property as bare land in 2017 with Mr. Liu Runmin at the purchase price of ZMW 1, 000, 000.00 (One Million Kwacha only) and that the payment was made in five (5) instalments, which he outlined in various amounts as having been paid between 31<sup>st</sup> January, 2018 and 21<sup>st</sup> March, 2019, through the Bank transfers from his Account for two of the instalments and cash as per exhibits marked “**RKC 2-6**” of his Affidavit verifying Petition.

2.8 The Petitioner stated that the payments made in the acquisition of the Property were not from any suspicious transactions or from any proceeds of crime as alleged by the Respondents. That the sale and purchase price of the Property was confirmed by Mr. Liu Runmin in his Statement to the 1<sup>st</sup> Respondent dated 10<sup>th</sup> March, 2022, when he appeared for an interview before the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

2.9 The Petitioner added that after buying the bare land, on the 9<sup>th</sup> August, 2018, he entered into a contract for the construction of a residential dwelling house with Azadi Investment Limited at a total cost of USD300,000.00 (Three Hundred Thousand United States of America Dollars) and that the latter started the construction of the

house after being paid the first instalment of ZMW500,000.00 on 24<sup>th</sup> August, 2018, through bank transfer. He added that he has since paid a total of ZMW3,150,000.00 (Three Million One Hundred and Fifty Thousand Kwacha), leaving a balance of ZMW6,650,000.00 (Six Million Six Hundred and Fifty Thousand Kwacha).

- 2.10 He added that the source of these funds can be clearly traced from the Bank Statement which the Respondents never requested for, while all the payments are properly documented.
- 2.11 The Petitioner stated that he genuinely and legitimately earned incomes used to purchase the Property where he has constructed a residential house and the money paid to Azadi Investment Limited for construction works so far carried out has been from genuine sources, largely from maize supplied to Honourable Michael Zondani Katambo, Nyimba Milling, Jimbara Merchants Limited, a loan obtained from Indo-Zambia Bank, and other legitimate incomes like Parliamentary gratuities.
- 2.12 He added that the transactions can all be traced clearly to the Petitioner's Bank Statements from the Indo-Zambia Bank, ZANACO, and Atlas Mara as all the transactions were by bank transfers.
- 2.13 He further stated that the contract with Azadi Investments Limited was denominated in United States of America dollars and that the dollar

fluctuation has significantly affected the Contract price which resulted in an Addendum being executed to cover the loss of value for the Kwacha. It was stated that Azadi Investment Limited, through its Advocates has since demanded the outstanding balance of ZMW6,650,000.00 (Six Million Six Hundred and Fifty Thousand Kwacha) from the Petitioner vide a letter dated the 1<sup>st</sup> of December, 2021 as the debt owed remains outstanding.

2.14 The Petitioner bemoaned that the Respondents, without any justifiable cause and without interviewing the Petitioner or Azadi Investment Limited, issued a Restriction Notice dated 22<sup>nd</sup> March, 2022, on the Property and that his Advocates, on the 28<sup>th</sup> March, 2022, wrote to the Respondents demanding the removal of the said Restriction Notice.

2.15 He averred that before the Respondents could reply to the letter of demand, they issued another letter to the Petitioner requesting to value the Property, which is private property, with again no reasonable basis to enter a private dwelling of a private citizen.

2.16 The Petitioner stated that through his Advocates, he had since challenged the said Restriction Notice in the Lusaka High Court under the *Cause Number 2022/ HP /0496* which Matter is active.

- 2.17 That thereafter, the Respondents issued a call-out dated 19<sup>th</sup> April, 2022, summoning the Petitioner for interviews on the 20<sup>th</sup> April, 2022, at the 1<sup>st</sup> Respondent Offices, and that after the Interviews, the Petitioner was warned and cautioned for being in possession of property suspected to be proceeds of crime, in reference to the Property.
- 2.18 The Petitioner stated that while he was out of jurisdiction, the Respondents, on the 26<sup>th</sup> April, 2022, issued yet another call-out summoning him for interviews, which he is yet to attend.
- 2.19 He added that in a letter dated 26<sup>th</sup> April, 2022, and delivered on 27<sup>th</sup> April, 2022, his Advocates wrote and advised the Respondents that the Petitioner was out of jurisdiction and that the Respondents should adhere to the law on seizures because a Seizure Notice does not give authority to the Respondents to take physical possession of a property that is subject to a Seizure Notice.
- 2.20 It was averred that the Respondents on the same day, the 27<sup>th</sup> April, 2022, attempted to serve the Seizure Notice on the Petitioner's Advocates, who refused to receive it as they had no instructions to do so. But that on the 29<sup>th</sup> April, 2022, the 3<sup>rd</sup> Respondent went back to the Petitioner's Advocates, and said they did not need permission to serve the Seizure Notice on anyone as the 3<sup>rd</sup> Respondent had strict instructions to serve the same, and that he eventually served the said

Seizure Notice on the Petitioner's Advocates after the Advocates consulted with the Petitioner.

- 2.21 The Petitioner stated that immediately the Seizure Notice was served, the Respondents, with a horde of Journalists from various media houses went to the Property and announced that they had taken over physical possession of the Property and all that was found there, and that the Petitioner and his family should immediately leave the premises.
- 2.22 That the Respondents went further and maliciously issued a Press Statement to the effect that the Petitioner's Property was acquired using suspected proceeds of crime and that the Property was in fact registered in the name of Mr. Liu Runmin, a Lusaka businessman, without presenting any evidence to that effect before a Court of Law.
- 2.23 He surmised that the meaning of the malicious Press Statement issued by the Respondents is advancing the narrative that the Petitioner has concealed the Property in the name of Mr. Liu Runmin, a Lusaka businessman, when in fact not.
- 2.24 And that to safeguard his interests, the Petitioner's Advocates applied to the Subordinate Court which issued the Seizure Notice to set aside the purported Seizure Notice as the same Warrant of Seizure and accompanying affidavit sworn by the 3<sup>rd</sup> Respondent, had no Cause Number implying

that there was no active Court case before any Magistrate.

- 2.25 The Petitioner averred that he has not been given an opportunity by the Respondents to explain how he acquired the Property but that they have maliciously concluded that he obtained the Property through proceeds of crime of which he was warned and cautioned for as a suspect and that to his dismay, the investigations were solely based on the social media report as shown by their own ACC Form 3 Complaint.
- 2.26 The Petitioner further stated that everything he owns is not tainted at all as it was acquired genuinely and has been documented, including all the animals at his dwelling house that were maliciously and purportedly seized by the Respondents, which were purchased from the private game ranches, and for which the Petitioner has Certificates of ownership.
- 2.27 It was posited that the actions of the Respondents in not ascertaining how the Property was acquired, a dwelling house constructed, and the source of incomes used to construct are wilful excesses of official authority by overzealous officers; malicious exercise of their authority; and wilful neglect of a public duty. That therefore, there was no need to seize the Property and take physical possession when a Restriction Notice was issued. That depriving the Petitioner and the family of the use

of the Property without an Order of the Court or his consent was contrary to the **Constitution**.

2.28 It was averred that if the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents had properly investigated the Matter, they would not have taken the malicious decision to purport to seize the Property, going to an extent of inconveniencing the Petitioner and his family by chasing them away from their own dwelling house; and they would have come to know that the money used came from the Petitioner's private business that he has been doing which is well documented.

2.29 That the Respondents are not mandated to seize any property of the Petitioner and worse off order him to vacate his dwelling house without his consent or Court Order in violation of his constitutional rights to property and privacy.

2.30 The Petitioner listed the alleged constitutional breaches as follows:

- i. The Respondent has no justifiable cause to either enter upon the Petitioner's dwelling house or to attempt to seize the said dwelling house without the Petitioner's consent in the absence of an Order of Court, which actions are *ultra vires* **Article 17 (I)** of the **Constitution**.
- ii. The Respondent has convicted the Petitioner without any trial in attempting to seize his dwelling house contrary to the **Constitution**

and thus the actions are *ultra vires* **Article 17 (I)** of the **Constitution**.

- iii. The Petitioner is presumed innocent until he is proved or has pleaded guilty and therefore, the Respondent without a Court Order cannot seize the Petitioner's dwelling, which actions are *ultra vires* **Article 18 (2) (a)** of the **Constitution**.
- iv. The Respondents have a constitutional duty to convince the Court in all criminal matters beyond reasonable doubt that a criminal offence has been committed by the Petitioner, and the Petitioner cannot be compelled to give evidence and in doing so, the Respondents' actions will be *ultra vires* **Article 18 (7)** of the **Constitution**.
- v. The Petitioner avers that the Respondent has no legal right to threaten to seize the Petitioner's dwelling house without an Order of Court, before the Parties could be heard by Court, and therefore all the actions of the Respondent are in contravention of **Articles 17 and 18 of the Constitution**.
- vi. The Respondents have seized the Property without ascertaining where the resources came from to construct the said dwelling house.

2.31 The Petitioner added that he has not been charged with any offence at the time of the purported seizure which is contrary to the **Constitution** and further that the charge of being in possession of property reasonably suspected of being proceeds of crime shifts the burden of proof on a suspect thereby contravening **Article 18(2)(a)** and **Article 18(7)** of the **Constitution**.

2.32 The Petitioner prayed for the reliefs couched as follows:

(a) *A declaration that the Property which is Stand Number CHONG/LN\_21188/51, State Lodge, Chongwe which is subject of the purported Seizure by the Respondent was legally and genuinely acquired based on the documents provided;*

(b) *A declaration that the Respondent's decision to purport to seize the Petitioner's dwelling house which is the real property is arbitrary, and therefore, contravenes **Article 17** of the **Constitution**;*

(c) *A declaration that the Seizure Notice issued by the Respondent dated 27<sup>th</sup> April, 2022 is illegal, and therefore, void ab initio and contravenes **Articles 17** and **18** of the **Constitution**;*

(d) *A declaration that **Sections 58** and **59** of the **Anti-Corruption Act** are unconstitutional as they deprive the Petitioner's right to privacy of*

*home and other properties without following the due process of the law;*

(e) *A declaration that **Sections 71 and 78** of the **Forfeiture of Proceeds of Crime Act** are unconstitutional as they contravene **Article 18 (2) (a)** and **(7)** of the **Constitution**;*

(f) *Damages against the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents for misfeasance of public office; and*

(g) *Costs.*

2.33 The Affidavit verifying the Petition sworn by the Petitioner, rehashed the contents of the Petition save to add that the Petitioner exhibited various documents including the copy of Contract of Sale for the Property between Mr. Liu Runmin and himself, marked as "**RKC1**"; copies of the acknowledgment receipts and Bank Statements of the payments in instalments marked as "**RKC 2 - 6**", including a payment on the 30<sup>th</sup> April, 2018, of the ZMW700,000.00, (Seven Hundred Thousand Kwacha) which was part payment by Hon. Michael Zondani Katambo in relation to the maize supplied to him on the contract dated 29<sup>th</sup> March, 2018, for the total contract sum of US\$406, 000.00.

2.34 The Petitioner also exhibited copy of a Statement recorded by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents from Mr. Liu Runmin confirming the sale and purchase of

the Property as "**RKC7**", a contract for construction of the house with Azadi Investment Limited, as exhibit "**RKC 8**"; part payments to Azadi Investment Limited through Bank transfers and acknowledgement of receipt by the latter marked "**RKC 2**" and "**RKC 9 - 12**" respectively.

2.35 The Petitioner deposed that the construction works are still on going, but that in June, 2021, he shifted into the house and that the contractor has suspended works because of non-payment of what is outstanding to the contractor.

2.36 He reiterated that he genuinely and legitimately earned incomes used to purchase the plot from Mr. Liu Runmin and the money paid to Azadi Investment Limited for construction works so far carried out as he has been in business of buying maize from Kawambwa District since 2015 which he in turn supplied to amongst others Zondani Katambo, Nyimba Milling, Jimbara Merchants with whom he has contracts as per exhibit "**RKC 53-56**". Further that he had obtained a loan from Indo Zambia Bank and also Parliamentary gratuities.

2.37 The Deponent avowed that he has employed people who buy maize on his behalf and who keep records of those from whom they purchase as per exhibited copies of receipts marked "**RKC 13-52**".

2.38 The Petitioner exhibited a contract dated the 29<sup>th</sup> March, 2018, to supply 2,800 metric tons white

non-GMO maize with Hon. Michael Zondani Katambo as exhibit "**RKC 57**" and that out of the Nyimba Investments Limited contract in 2019 alone, he supplied maize amounting to ZMW5, 263, 490.00 (Five Million Two Hundred and Sixty Three Thousand Four Hundred Kwacha and Ninety) as per Statement of the maize supplied marked "**RKC 58**", from which between January to December 2021 he had received the total payment of ZMW4, 951, 439.06 (Four Million Nine Hundred and Fifty-One Thousand, Four Hundred Thirty-Nine Kwacha and Six Ngwee, leaving the unpaid amount of K312, 050.94 (Three Hundred and Twelve, Fifty and Ninety-Four Ngwee as evidenced by exhibit "**RKC 59**" being a true copy of the maize payment summary for the maize supplied.

2.39 The Petitioner further exhibited copies of Loading Orders as "**RKC 60-78**" for the milling companies that collected maize from his satellite depots in Kawambwa, for Lusaka and Mansa.

2.40 He further exhibited a letter of demand dated 1<sup>st</sup> December, 2021 and marked "**RKC 79**" from Azadi Investment Limited's Advocates for the balance of ZIMW6, 650, 000.00 (Six Million Six Hundred and Fifty Thousand Kwacha) from him.

2.41 He stated that he had been advised by his Advocates which advice he verily believes that the Respondents without any justifiable cause, and

without interviewing the Petitioner issued a Restriction Notice dated 22<sup>nd</sup> March, 2022 as per exhibit "**RKC 80**" and his Advocates demanded the removal of the said Restriction Notice on the 28<sup>th</sup> March, 2022, as shown by "**RKC 81**". He added that before responding to the letter, the Respondents issued another letter to value the subject Property which is private property without his consent as evidenced by "**RKC 82**".

2.42 The Petitioner restated his challenge of the Restriction Notice before Court; the Respondents summoning him for interviews on 19<sup>th</sup> April, 2022, his attendance thereto on the 20<sup>th</sup> April, 2022, where he was warned and cautioned after the interview, for being in possession of property reasonably suspected of being proceeds of crime as per exhibit "**RKC 83**".

2.43 He also recounted the Respondents issuing a call out for interviews and a Warrant of Seizure on the 26<sup>th</sup> April, 2022, issued while he was out of jurisdiction as per exhibit "**RKC 84**", and a demand from his Advocates to the Respondents to adhere to the law on seizures as per exhibit "**RKC 85**".

2.44 The Petitioner also exhibited a copy of the Service of the Seizure Notice and an unfiled Affidavit as well as the Press Statement marked "**RKC 86-87**" and "**RKC 88**" respectively.

2.45 He reiterated that the investigations were solely based on the social media report as shown by ACC *Form 3 Complaint* exhibited as "**RKC 89**" and asserted that his Property including the wild animals being tainted is malicious as he has the Certificates of Ownership, invoices, delivery notes, Inspection Report, Authority letters as per exhibits "**RKC 90 - 99**".

2.46 He averred that he has been advised by his Advocates which advice he verily believes that the actions of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents for not ascertaining how the Property was constructed, and the source of incomes used to construct before the purported seizure are wilful excesses of official authority, malicious exercise of their authority, and wilful neglect of a public duty.

2.47 That therefore, there was no need to seize the said Property and order him and his family to move away without an Order of the Court or his consent as per the **Constitution**, thereby violating his constitutional rights to property and privacy.

### **3. THE PETITIONER'S SKELETON ARGUMENTS**

3.1 In his Skeleton Arguments, the Petitioner posed the following questions:

- a) Whether the Property which is Stand Number CHONG/LN\_21188/51, State Lodge, Chongwe which is subject of the purported seizure by the

Respondent was legally and genuinely acquired based on the documents provided;

- b) Whether the Respondent's decision to purport to seize the Petitioner's dwelling house which is the real property is arbitrary, and therefore contravenes **Article 17** of the **Constitution**;
- c) Whether the Seizure Notice issued by the Respondent dated 27<sup>th</sup> April, 2022, is illegal, and therefore, void *ab initio* and contravenes **Articles 17** and **18** of the **Constitution**;
- d) Whether **Sections 58** and **59** of the **Anti-Corruption Act** are unconstitutional as they deprive the Petitioner's right to privacy of home and other properties without following the due process of the law;
- e) Whether **Sections 71** and **78** of the **Forfeiture of Proceeds of Crime Act** are unconstitutional as they contravene **Article 18 (2)(a)** and **(7)** of the **Constitution**;
- f) Whether the actions or inactions of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents amount to misfeasance in public office and thereby liable to pay damages to the Petitioner for the inconvenience and mental anguish caused to him.

3.2 The Petitioner's Counsel referred to the supremacy of the Constitution with which all laws must be consistent. They stated that the starting point is the provisions of **Articles 16**, **17** and **18** of the

**Constitution of Zambia** as amended by **Act No. 2 of 2016**.

- 3.3 With respect to **Article 16**, it was submitted that it deals with instances where the State can compulsorily acquire property and that there is an element of compensation when a person's right to property has been deprived. It was submitted that **Article 16(2)(b)** and **(c)** makes reference to exceptions including by way of penalty for breach of any law, whether under civil process or after conviction of an offence and execution of judgments and orders of courts.
- 3.4 It was argued that in this case, the 1<sup>st</sup> Respondent in executing a Warrant of Seizure pursuant to **Section 58** of the **Anti-Corruption Act**, has taken over the Petitioner's residential dwelling house without undergoing any court process be it civil or criminal.
- 3.5 It was further submitted that **Article 17** provides that the entry upon any premises must be by consent from the owner of the premise or by Order of Court but that the actions of the Respondent to enter upon the premises of the Petitioner is in direct contravention of this **Article** which guarantees the protection of privacy of the home.
- 3.6 It was argued that while the Warrant of Seizure is purported to be issued out of the Subordinate Court in Lusaka District, it does not bear a *Cause Number* which entails that there is no Court Record and further purports to be a civil process issued out of the Civil jurisdiction of the Subordinate Court.

- 3.7 The Petitioner's Counsel added that the actions of the Respondents to forcibly take over the Petitioner's Property is tantamount to convicting the Petitioner without undergoing the due process of the law thereby acting as prosecutor and judge in the same cause.
- 3.8 It was submitted that the Petitioner was warned and cautioned for an offence under the **Forfeiture of Proceeds of Crime Act** of being in possession of property Stand No. CHONG/LN\_21188/51, State Lodge, Chongwe which offence breaches the provisions of **Article 18(7)** of the **Constitution** as the offence compels an accused person to give evidence at the trial once charged with a criminal offence. It was submitted that **Article 18(7)** clearly states that a person charged with a criminal offence shall not be compelled to give evidence at the trial while **Article 18(12)** only derogates in **Article 18(2)(a)** That therefore, **Section 71(2)** of the **Forfeiture of Proceeds of Crime Act** is inconsistent to that extent with **Article 18(7)** of the **Constitution**.
- 3.9 It was further argued that **Section 78(2)** of the **Forfeiture of Proceeds of Crime Act** shifts the burden proof from the Prosecution to the accused person thereby compelling an accused person to give evidence at the trial in breach of **Article 18(7)** of the **Constitution**. In addition, that the standard of proof in criminal matters is proof beyond all reasonable doubt and does not at any time shift to the accused person as alluded to in the case of **Woolmington vs The DPP** <sup>(1)</sup>, which principles are embedded in **Article 18** of the

**Constitution.** That **Section 78** of the **Forfeiture of Proceeds of Crime Act** lowers the burden of proof to a mere balance of probabilities as though in civil matters whereas **Article 18(12) of the Constitution** provides derogations as regards **Article 18(2)(a)** of the **Constitution** only.

3.10 With respect to **Sections 58** and **59** of the **Anti-Corruption Act**, it was argued that they contravene **Articles 16** and **17** of the **Constitution** as they do not require the Respondents to obtain a court order or judgment after following the due process of the law and thus empower the Respondents to act arbitrarily and capriciously without regard to the provisions of the **Constitution**.

3.11 In relation to the claim for damages for misfeasance in public office, it was submitted that the failure by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents in carrying out proper investigations and determining how the Petitioner acquired the Property is a dereliction of duty and thus the 1<sup>st</sup> Respondent through its servants or agents, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, and other investigating officers, acted maliciously and/or negligently in failing to call the Petitioner to provide the information as he has done in this Petition. That this also amounts to malicious abuse of power on the Respondent's part.

3.12 Counsel argued that the object of effecting the Warrant of Seizure without affording the Petitioner any chances to be heard has done both physical and emotional stress and that the Respondents must be liable. That

there is an intention by all the Respondents to cause harm as the officers concerned knowingly acted in excess of their power as demonstrated from their press release immediately after they took over possession of the Property. It was also argued that the act of carrying Journalists from Media Houses shows the element of malice as the Respondents want to try the Petitioner in the court of public opinion.

#### 4 **THE RESPONDENTS' ANSWER TO THE PETITION**

4.1 The Respondents' Answers to the Petition contained essentially the same averments as those contained in the Petition as regards the 1<sup>st</sup> Respondent interviewing Liu Runmin on the sale of the Property and the attendant Contract of Sale; the issuance of the Restriction Notice on 22<sup>nd</sup> March, 2022, against the Property; the recording of a Warn and Caution Statement from the Petitioner on 20<sup>th</sup> April, 2022, where he opted to remain silent on the basis that the questions he was being asked were *sub judice*; and the issuance and service of the Warrant of Seizure and commencement of these Proceedings.

4.2 The 2<sup>nd</sup> Respondent stated that there was justifiable cause to issue a Restriction Notice on the Property to notify the Petitioner that the Property was under investigations. Further, that there was no obligation on the Respondents to first interview the Petitioner or Azadi Investment Limited prior to serving the Restriction Notice on the Petitioner and that the

Property is still a subject of on-going investigations by the 1<sup>st</sup> Respondent.

- 4.3 Further, that the Restriction Notice or Warrant of Seizure of the Property is not a conviction, but a temporal measure to facilitate investigations and preserve the evidence while the investigations are going on, and therefore not a violation of **Article 17(1)** of the **Constitution**.
- 4.4 It was averred by the 2<sup>nd</sup> Respondent that there was a reasonable basis to request to enter and value the Property in order to facilitate further investigations into the allegations received by the 1<sup>st</sup> Respondent but that the actual valuation has not yet been done.
- 4.5 That the 1<sup>st</sup> Respondent is still in the process of ascertaining how the Property was acquired by the Petitioner and verifying the various sources of income used to acquire it. It was stated that there was no legal obligation to charge the Petitioner for an offence prior to restricting or seizing property and that as the Petitioner is still under investigations and not being prosecuted, the burden of proof beyond reasonable doubt does not arise at this stage.
- 4.6 It was contended by the 2<sup>nd</sup> Respondent that the Press Statement was not malicious but was a response to various press queries received by the 1<sup>st</sup> Respondent on the matter.
- 4.7 It was averred that the Petitioner commenced these Proceedings on 3<sup>rd</sup> May, 2022, and opted to render an explanation to the Court on how he acquired the

subject Property whereas when the 1<sup>st</sup> Respondent through its Officers, being the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, administered a Warn and Caution Statement on 20<sup>th</sup> April, 2022, in respect of him being in possession of the subject Property, he had opted to remain silent.

- 4.8 The Respondents contented that a declaration that the Property was legally and genuinely acquired would prematurely curtail the on-going investigations of the Property as the documents exhibited by the Petitioner in this Petition require further investigations by the Respondent, a function which cannot be performed by the Court.
- 4.9 In an Affidavit in Opposition to the Affidavit verifying the Petition sworn by **Gift Tembo**, the 3<sup>rd</sup> Respondent in the employ of the 1<sup>st</sup> Respondent as a Senior Investigations Officer who investigated this matter on behalf of the 1<sup>st</sup> Respondent, the facts deposed to by the Petitioner were substantially not in dispute.
- 4.10 He added that the 1<sup>st</sup> Respondent issued a Restriction Notice, signed by the 2<sup>nd</sup> Respondent exhibited by the Petitioner, as “**RKC 80**” on 22<sup>nd</sup> March, 2022, against the subject Property pursuant to **Section 60(1)** of the **Anti-Corruption Act** for purposes of preserving the evidence as the 1<sup>st</sup> Respondent was actively investigating the Petitioner.
- 4.11 He added that on 30<sup>th</sup> March, 2022, the 1<sup>st</sup> Respondent wrote to the Petitioner informing him that it was conducting investigations into an offence suspected to have been committed in contravention of the **Anti-**

**Corruption Act** and that it had become necessary to conduct a property valuation exercise, as per the Petitioner's exhibit "**RKC 82**".

4.12 The Deponent alluded to the Petitioner challenging the Restriction Notice on the basis that it was not served on him personally; that the request by the 1<sup>st</sup> Respondent to value the said Property on the basis that the said valuation had no legal ground; and that the Matter was dismissed on 30<sup>th</sup> June, 2022, by Honourable Justice D.M. Bowa, on the ground that both the Restriction Notice and the Intended Valuation were valid at law as instruments for carrying out an investigation.

4.13 The Deponent stated that on 20<sup>th</sup> April, 2022 at 10:02 hours he conducted an interview with the Petitioner in relation to the Out of Court Settlement Agreement he had entered into with the 1<sup>st</sup> Respondent and in that interview the Petitioner remained silent on the basis that the questions that the Petitioner was being asked were *sub judice*, as per exhibit '**GT2**'.

4.14 He added that on the same date at 10:32 hours, he recorded a Warn and Caution Statement from the Petitioner as a way of according him an opportunity to render an explanation as to how he had acquired the subject Property, but the Petitioner opted to remain silent, as per exhibit "**GT3**" being a copy of the said Warn and Caution Statement.

4.15 The Deponent averred that he had been advised by Counsel with conduct and verily believes the same to be true that a Restriction Notice and a Warrant of

Seizure can both be executed in the course of an investigation. He further avowed that a Warrant of Seizure is an Order issued by a Court of competent jurisdiction after a Deponent demonstrates that there was reasonable suspicion to believe that the property intended to be seized was suspected to be a proceed of crime. That in *casu*, a preliminary investigation was carried out which ultimately demonstrated to the Court that there was reasonable suspicion that the said Property was a proceed of crime, and consequently a Warrant of Seizure was issued.

4.16 He concluded by stating that he has since continued investigating this matter to date and that the Petitioner has endeavoured to use every means possible to derail investigations.

4.17 The 2<sup>nd</sup> Respondent's Affidavit in Opposition to Affidavit verifying the Petition contained substantially same information and we will not reproduce the averments herein.

## 5. RESPONDENTS' SKELETON ARGUMENTS

5.1 We note that the respective Respondents' submissions are similar and we thus shall combine and summarise them together.

5.2 The Respondents submitted that the Petitioner's contention on the alleged breach of **Article 16** of the **Constitution** is misplaced as the said **Article** provides for protection against compulsory possession of property by the State, while the evidence before Court shows neither the

Respondents nor the State in general ever compulsorily possessed Stand No. CHONG/LN\_21188/51 State Lodge, Chongwe or any property in which the Petitioner has interest.

5.3 It was averred that the **Anti-Corruption Act** provides for seizure of property under **Section 58** and that this is temporary assumption of the custody of property which is by no means compulsory possession as envisaged by **Article 16** nor an arbitrary and permanent deprivation of a person's right to property. It was argued, in the alternative, that seizure of property while armed with a Warrant of Seizure, which is an Order of Court, is captured within the clawback or limitation clause of **Article 16(2)(c)** of the **Constitution**.

5.4 With respect to the Warrant of Seizure itself, it was submitted that this is an Order of Court, which is captured within the clawback of limitation clause of **Article 17(2) (d)** of the **Constitution**. It was submitted that the literal interpretation of **Article 17(2)(d)** of the **Constitution** to the effect that a Judgment or Order of a Court which allows entry upon any premises must only emanate from "civil proceedings" leads to an absurd or unreasonable result in that, even all warrants issued under the **Criminal Procedure Code Act** and the **Anti-Corruption Act**, would all be in violation of **Article 17 (1)** of the **Constitution**.

- 5.5 That this would entail that the whole criminal justice system would be bereft of any warrants or orders of the Court which can allow entry upon any premises. It was averred that this result, would lead to the absurd or unreasonable result in that all warrants issued in furtherance of criminal investigations or proceedings would be unconstitutional.
- 5.6 In responding to the Petitioner's contention that the offence of possession of property reasonably suspected of being proceeds of crime under **Section 71** of the **Forfeiture of proceeds of Crime Act**, violates **Article 18(7)** and **(12)** of the **Constitution**, the Respondents adverted to the Supreme Court holding in the case of the **People v Austin Chisanga Liato**<sup>(2)</sup>, which upheld the constitutionality of **Section 71** of the **Forfeiture of Proceeds of Crime Act**.
- 5.7 With respect to the submission that this Court can declare a provision of a statute unconstitutional as was done in the case of **Re Thomas Mumba**<sup>(3)</sup>, where Section 53(1) of the then Corrupt Practices Act No. 10 of 1980 was declared to be unconstitutional because it compelled an accused person to give evidence on oath, it was submitted that, that is distinguishable from this case as the **Forfeiture of Proceeds of Crime Act** has already been held not to impose on the accused person to prove any ingredient of the offence under it nor

does it take away the accused person's right to remain silent.

5.8 In relation to **Sections 58** and **59** of the **Anti-Corruption Act**, contravening the **Constitution**, it was submitted that a Warrant of Seizure is a Court Order upon which entry on premises and/or property seizure is constitutionally allowed contrary to the Petitioner's contention that the same are unconstitutional because they do not require the Respondent to obtain a Court Order or Judgment after following the due process of the law.

5.9 As regards damages for misfeasance in public office, it was submitted that the Petitioner was accorded an opportunity to render an explanation as to how he acquired the Property, but he opted to remain silent, and upon his failure to do so, a Warrant of Seizure was issued by the Court on 27<sup>th</sup> April, 2022.

5.10 That consequently there was no malice on the part of the 2<sup>nd</sup> to 4<sup>th</sup> Respondents' state of mind as to constitute either targeted malice as they acted on the strength of a Warrant of Seizure and their action of seizing the Petitioner's Property.

## **6. THE PETITIONER'S AFFIDAVIT IN REPLY TO AMENDED AFFIDAVIT IN OPPOSITION TO THE AFFIDAVIT VERIFYING FACTS AND SKELETON ARGUMENTS**

6.1 The Petitioner filed an Affidavit in Reply in which he deposed that the contents in relation to the

Amended Affidavit in Opposition are malicious as he only started to pay for the Property in January 2018 through bank transfer when the said Complaint alleged that he paid ZMW2,500,000.00 cash for the Property.

- 6.2 He stated that the investigations were politically motivated after the change of Government in August, 2021, and yet the 3<sup>rd</sup> Respondent had all the time to investigate the Matter from 2017 and had at no time prior to 2021, called him to give an account of how he acquired and eventually developed his Property.
- 6.3 He averred that he opted to remain silent when the Warn and Caution was administered because the Respondents had a predetermined position and giving his Statement would not have changed a thing and also that the said Statement was not in relation to the State Lodge Property but the Ibex Hill Property.
- 6.4 He contended that a Warrant of Seizure cannot be executed on a dwelling house in the absence of a Court Order and that the Petitioner did not show intentions of disposing off his retirement home. He stated that he has not derailed any investigations but is exercising his constitutional right.
- 6.5 The Skeleton Arguments in Reply were a rehash of the Skeleton Arguments in Support of the Petition and will not be repeated.

## 7. THE HEARING

- 7.1 The Petitioner, **Ronald Kaoma Chitotela** (PW1) testified essentially in line with his Petition and his Affidavit verifying facts.
- 7.2 He added that he was surprised that the Respondent averred that they started investigating in May, 2017, because he bought the Plot in November, 2017 when he signed the contract with Mr. Lui Runmin and made the 1<sup>st</sup> payment through a Bank transfer in January, 2018.
- 7.3 PW1 narrated that he was called to the Anti-Corruption Commission around 20<sup>th</sup> April, 2018, where he was asked questions about the Property procured by his wife in Ibex Hill and the transfer of K380,000.00, for the same plot. He stated that with respect to the Property subject of the Petition, he could not give the Respondents a statement because they had approached him for a Settlement which was registered in Court. He further stated that when he was asked about the Property in State Lodge, he told Gift Tembo that the Matter was before Judge Bowa and anything he said would be contemptuous.
- 7.4 The Witness recounted the averments in line with his Petition save to add that he stated that his children and workers were thrown out whilst the issue of the Restriction Notice was before Judge Bowa; and that he felt that his rights to property

and to be heard before a decision is made before a competent Court have been infringed upon.

- 7.5 He said that the State only started investigating after he filed the Petition and that he has been embarrassed by the malicious and politically motivated decision undertaken by the State/ Anti-Corruption Commission, which was illegal and violated his basic fundamental right as the decision was made in 2022 after change of Government despite the investigations having been instituted in 2017.
- 7.6 PW1 stated that the Officers should be held accountable in their private capacity for failure to carry out basic investigations.
- 7.7 In cross-examination PW1, told the Court that the Complaint was received by the Anti-Corruption Commission but he could not confirm that the investigations started way before change of Government, although he was aware that the person he bought the Property from gave a Statement in 2018.
- 7.8 He responded that the Bank Statements showed part of the money spent on the Property; that he received in excess of USD 5 Million from the maize business between 2017-2018 but that he did not pay taxes; that there was no dissolution of Parliament in 2017 for him to be entitled to gratuity.

- 7.9 PW1 stated that he could not tell the value of the movable property in the house or of the wild animals on the Property off the cuff. He disagreed that there was need to ascertain the value of the Property and the animals in order to ascertain his income.
- 7.10 He responded that the Contract of Sale was entered into with Mr. Liu Runmin in 2017; that the sale of the bare land was concluded between 2019-2020; that the Property is currently registered in Mr. Liu's name; and that the full purchase price has been paid.
- 7.11 When referred to the Press Statement and asked to show where it stated that he had concealed the Property, he responded that there was nothing in that Statement appearing as exhibit '**RKC88**'.
- 7.12 With respect to the Seizure Notice, PW1 stated that it was served on his Lawyer; that he was not aware that a Seizure Notice is signed by a Court, or that ACC can receive complaints even through social media.
- 7.13 He reiterated that he had paid part of the purchase price through the Bank; that one cannot tell the source of funds without investigations and that he was informed through the Restriction Notice exhibited as '**RKC80**' that investigations were being carried out.
- 7.14 PW1 stated that he could not confirm that investigations were being carried out at the time

he instituted these Proceedings, albeit the Seizure Notice was issued on 29<sup>th</sup> April, 2022, and the Proceedings commenced on 3<sup>rd</sup> May, 2022. He said that he was not aware that unoccupied property could be vandalised and depreciate in value. He added that he is supposed to pay the Property Transfer Tax although the Contract of Sale for the Property indicates that the Vendor is the one who should pay.

7.15 In further cross-examination by the 2<sup>nd</sup> Respondent, PW1 admitted that his Petition is largely focused on the Restriction and Seizure Notices; that the Officers are agents of the Commission and act on its behalf but that this should be within the confines of the law.

7.16 He responded that his explanation in the Petition on how he acquired the Property is supposed to be verified by the Commission. He reiterated that he did not give an explanation on 22<sup>nd</sup> April, 2022, because the Matter was in Court. When told that the Matter before Judge Bowa had related to the Restriction Notice and not source of income, PW1 responded that after it was put to him that whatever he said could be used in a Court of law, he opted to remain silent.

7.17 With respect what role the 3<sup>rd</sup> Respondent played, PW1 stated that former wrote the Warn and Caution Statement. He said that he gave an Ordinary Statement in relation to the IbeX Hill

property. PW1 responded that according to what he was told, the Restriction Notice was signed by the Director-General on the recommendation of an Officer; and that he saw a signature of a Magistrate on the Warrant of Seizure dated 27<sup>th</sup> April, 2022, as reflected on exhibit “**RKC 86**”.

- 7.18 When told that the Court had dismissed his application as the Restriction Notice and Intended Valuation were tools of investigation, PW1 said that he had not seen the reasoning as to why the Court had dismissed his application.
- 7.19 In continued cross-examination, PW1 stated that the 4<sup>th</sup> Respondent was part of the investigations team and signed the Statement written by Gift Tembo as an Investigation Officer.
- 7.20 In re-examination, PW1 stated that he did not pay Tax on the maize he sold as it was Duty and Tax free; that he had not effected the name change on the Property as he has not paid the Property Transfer Tax; and that the source of funds can be ascertained without investigations by getting an Ordinary Statement.
- 7.21 The Petitioner’s Second Witness **was Liu Runmin (PW2)** who basically confirmed the sale of the Property transaction with the Petitioner and that the purchase price was partially paid through Bank transfer and through cash, and further that they had agreed that the Petitioner would pay the Property Transfer Tax on the Property.

- 7.22 He stated that he was surprised that the Property was still in his name after all the paper work was done through the Lawyer, a Mr. Kombe.
- 7.23 In cross-examination, PW2 stated that he was called by the Commission in 2017 before the transaction and again a Statement was recorded from him on 10<sup>th</sup> March, 2022, because the Anti-Corruption Commission wanted to know if he had sold the Property to Mr. Chitotela; and that he was told that investigations were being carried out. There was no re-examination.
- 7.24 The Third Petitioner's Witness, **Mosses Chungu (PW3)** said that he was an agent for the Petitioner, and basically spoke to how they sourced and bought maize for the Petitioner and how the latter would send trucks to collect the maize and pay for it later. He stated that he started dealing with the maize in 2014 and that they would get between 2,500mtt and 10,000mtt and the trucks would come from Nyimba Investments in Lusaka.
- 7.25 In cross-examination, PW3 stated that they would source the maize from the farmers and Nyimba Investments would collect but it was Mr. Chitotela who was buying through his employees, albeit they were not given cash. He responded that they were never told that Mr. Chitotela was being investigated nor had he even given a Statement to the ACC about this. This was the close of the Petitioners case.

- 7.26 The first Respondent's Witness was **Gift Tembo** (RW1) the 3<sup>rd</sup> Respondent herein who said that he is a Senior Investigations Officer in the 1<sup>st</sup> Respondent's employ. He stated that his duties include supervising the receipt of complaints and processing them to facilitate the commencement of investigations, supervising and conducting investigations into corruption and allied offences under the **Anti-Corruption Act**, as well as supervising and giving testimonies before Courts of law in the prosecution of offenders.
- 7.27 RW1 added that the Commission receives and processes complaints that originate from members of the public, anonymous sources, intelligence sources and even social media sources.
- 7.28 He testified that on 20<sup>th</sup> June, 2017, the Commission received a complaint alleging possession of property suspected of being proceeds of crime against individuals who included Hon. Ronald Chitotela. He said that having substantiated the Report, the Director-General authorised investigations into the Matter and he was assigned to be part of the investigative team.
- 7.29 RW1 narrated the events in line with his Amended Affidavit in Opposition to the Petitioner's Affidavit verifying Facts. He added that investigations revealed that by 10<sup>th</sup> March, 2022, the bare

Property had transitioned into a double storey dwelling house with Guest Quarters, Servants' Quarters, swimming pool, fish pond and had a section housing wild animal such as Zebras and Impalas and that the Property was enclosed in a solid perimeter wall fence.

7.30 Of further note was that RW1 stated that the Petitioner wrote to the 1<sup>st</sup> Respondent claiming that he was being harassed by the 1<sup>st</sup> Respondent and that its actions were politically motivated as per exhibit "**RKC85**" of the Petitioner's Affidavit Verifying the Facts. He said that it became clear that the Petitioner was using Court process to frustrate criminal investigations into the matter and that in order to carry out a Property Valuation exercise, the 1<sup>st</sup> Respondent applied for a Warrant of Seizure from the Subordinate Court, which was granted upon consideration of the application by the Court. That this was in order to safeguard the Property and chattels there.

7.31 RW1 restated the process of service of the Warrant of Seizure on 29<sup>th</sup> April, 2022, on the Petitioner's Counsel, Mr. Kombe and that the 1<sup>st</sup> Respondent moved onto the Property pursuant to the Warrant of Seizure. That on the same date, the Commission issued a Press release in respect of the Seizure.

7.32 In cross-examination by the 2<sup>nd</sup> Respondent, RW1 confirmed the on-going investigations; that the

Director-General has authority to issue a Restriction Notice in the course of investigations; that a Restriction Notice on its own is a Notice of investigations; that there is no obligation on the 1<sup>st</sup> Respondent to warn a suspect about investigations; and that a Warrant of Seizure is an Order from Court.

7.33 He responded that at the time the 1<sup>st</sup> Respondent took possession of the Property, they did not throw out the Petitioner's family and that the Petitioner was absent from the premises. He responded that the Warrant of Seizure gave them the mandate to enter the Property, and that the Seizure was not malicious as both the Restriction Notice and the Warrant of Seizure are investigative tools that were justifiably and lawfully used in the circumstances.

7.34 He confirmed that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents acted on behalf of the 1<sup>st</sup> Respondent. He stated that with respect to the relief that the Property was legally and lawfully acquired can only be determined through investigations which are ongoing.

7.35 In responding to the 4<sup>th</sup> Respondent's cross-examination, RW1 stated that the former's role in the Matter was that of having been a witness in the service of the Restriction Notice; recording of Statements and witnessing the taking of possession of the Property that was suspected to

be proceeds of crime. He added that the 3<sup>rd</sup> Respondent carried out the duties for and on behalf of the 1<sup>st</sup> Respondent in the Matter.

7.36 In cross-examination by the Petitioner's Counsel, RW1 confirmed that the investigations were based on a Complaint exhibited as "**RKC89**" dated 28<sup>th</sup> June, 2017, alleging that the Petitioner was receiving kickbacks and had acquired property worth K2.5 Million; that PW2 had been called in for interviews on 12<sup>th</sup> January, 2018, wherein he had stated that the Petitioner was interested in buying the Property and was given an unsigned contract; that no money had exchanged hands by that date and that the first part payment of K200,000.00, was made on 31<sup>st</sup> March, 2018, through Bank Transfer.

7.37 When asked if he had established whether a payment of K2.5 Million had been made between June, 2017, and January 2018, RW1 responded that a property had been mentioned but the Complaint did not specify the property referred to, and that there were several other properties other than the Property herein.

7.38 He responded that the value of the Property done under the Valuation exercise in September, 2022, has not been communicated to the Petitioner because of the on-going investigations.

7.39 RW1 stated that the effect of the Restriction Notice was that the Petitioner could not dispose of the

Property without the consent of the Director-General; that there is an Affidavit in Support of the Warrant of Seizure and that he could not confirm that the Complaint was substantially different from the one in 2017; that investigations were on-going because there was suspicion as the Property was in the name of Runmin as per his exhibit "**GT1**", albeit it was not an offence not to change ownership but that it caused suspicion.

7.40 The Witness was then taken through the Bank Statements and payments schedules and was asked if he had verified the Payments after receiving the Affidavit verifying Petition, he responded that the investigations were ongoing. He stated that he had not come across the documents during his course of investigations between 2017 and March, 2022.

7.41 He admitted that his legal team had advised that he could seize the Property with eventual forfeiture as per exhibit "**RKC87**".

7.42 After going through the various exhibits, and asked to confirm that the Petitioner had shown how he had acquired the Property, and that "**RKC87**" confirmed concealment, RW1 declined to do so.

7.43 RW2 was **Kopano Chilembo**, an Investigations Officer who testified to his role in the investigations, which was essentially that of being supportive, and as a Witness to the Statements

taken by RW1 as well as service of the various letters and Notices.

7.44 In cross- examination, RW2 confirmed that the Petitioner did not render an explanation in the Warn and Caution Statement; that there is an on-going investigation; and that the Petitioner's family was not on the Property.

7.45 In cross-examination by the Petitioner's Counsel, RW2 stated that he could not recall that the Restriction Notice was issued after the Republican President talked about the Matter; that his role was merely to observe; that he was aware that a Warn and Caution is administered to a person suspected to have committed an offence; that it was in order to issue both the Restriction Notice and Warrant of Seizure if the investigator deems it so.

7.46 He responded that a Warrant of Seizure is meant to secure the evidence; that he had observed that there were Police Officers when they went to execute it; that the Property was locked; that he did not witness the securing of the Property; that he did not go for the evaluation of the Property before the Petition; and that they left the Police there to safeguard the Property and the evidence.

7.47 The 2<sup>nd</sup> Respondent relied on his Answer filed on 23<sup>rd</sup> October, 2023, which he into Court as his evidence. None of the Parties cross-examined him.

## **8. THE PETITIONER'S SUBMISSIONS**

- 8.1 The Petitioner's Counsel filed submissions, the gist of which was that the Petitioner had purchased the subject Property through his hard work as further evidenced by the testimony of Moses Chungu, his Agent in the purchasing of maize for resale to milling Companies.
- 8.2 It was averred that there is currently no serious crime that the Respondent has shown that is being investigated against the Petitioner and that the Property is still in Mr. Lui's name because the transaction was not completed as it is pending payment of Property Transfer Tax by the Petitioner contrary to the Respondent's allegation that it is being concealed in the former's name.
- 8.3 The Petitioner's submissions went into detail regarding the cross-examination of the 3<sup>rd</sup> Respondent(RW1) focusing on the documents that were exhibited to the Petitioner's Affidavit verifying Facts in relation to payments into and out of the Petitioner's Accounts, as well as invoices and delivery notes for the wild animals, maize and Schedules of payments.
- 8.4 It was contended that the evidence produced by the Petitioner shows that the Property was legally and genuinely purchased by the Petitioner and the Court should so declare, as the Respondent has failed to show that there is substantial

investigation and justification for the Seizure Notice issued.

8.5 With respect to contravention of **Article 17** of the **Constitution**, it was submitted that whilst the Respondent has authority to issue a Warrant of Seizure under **Section 58** of the **Anti-Corruption Act** based on reasonable suspicion of Property having been derived from corrupt practices, suspicion without concrete evidence or factual basis is not a valid ground to issue a Seizure Notice. It was contended that the Respondent while asserting reasonable suspicion, also claims ongoing investigation thus showing a lack of clear evidence or factual basis, whereas the Petitioner has cooperated with the investigation by providing documentation and explanation regarding the acquisition and development of the Property.

8.6 It was argued that **Article 17(1)** of the **Constitution** provides protection against arbitrary searches and seizures without consent and as such, ensures that individuals cannot be deprived of their property without due process and a legal basis. That the Court can review and if necessary, reverse a Seizure Notice issued by the Respondent especially where the affected Party has raised valid complaints and challenges the decision, in order to ensure that justice is served and constitutional rights upheld. The Court was urged to reverse the Seizure Notice as the

investigations from 2017 lack credibility of suspicion to the standard required by law.

- 8.7 With respect to contravention of **Article 18** of the **Constitution**, it was submitted that the issuance of Seizure Notice contradicts the presumption of innocent until proven guilty as the Petitioner has not been given an opportunity to defend against these allegations of acquiring property through suspected proceeds of crime.
- 8.8 It was submitted that the Seizure Notice issued by the Respondent is illegal, *void ab initio* and in violation of the constitutional provisions safeguarding individual rights and due process because there is no compelling evidence linking the Property to proceeds of crime.
- 8.9 It was argued that **Sections 58** and **59** of the **Anti-Corruption Act**, potentially encroach upon the fundamental right to privacy as enshrined in the **Constitution**. It was submitted that the mandate for individuals to declare their assets and liabilities represents a significant intrusion into their private affairs, especially if there are inadequate safeguards to protect against misuse of unauthorized disclosure of information.
- 8.10 It was contended that there must be legitimate justification for probing into property suspected to have been acquired through proceeds of crime but that the Respondent has failed to demonstrate such justification especially that the

investigations have purportedly been conducted after a lapse of 6 years. The Court was urged to strike a balance between combating corruption and upholding individual liberties to ensure that the sanctity of the **Constitution** is upheld while effectively addressing corrupt practices. That the provisions of **Section 58** and **59 of the Anti-Corruption Act** in their current form fail to meet this standard and warrant judicial scrutiny and intervention.

8.11 In relation to **Sections 71** and **78** of the **Forfeiture of Proceeds of Crime Act**, it was averred that they provide a mechanism for forfeiture of proceeds of crimes without adequate procedural safeguards contrary to **Article 18(2)(a)** of the **Constitution** which guarantees the right to a fair hearing. That this renders these provisions susceptible to abuse and undermines the fundamental principles of justice enshrined in the **Constitution**.

8.12 In addition, it was argued that the said **Sections** do not provide for affected individuals to be afforded adequate compensation for the loss of their property thereby infringing the constitutional protection against arbitrary deprivation of property contrary to **Article 18(7)** of the **Constitution**.

8.13 As regards the claim for damages against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents for misfeasance in public

office, it was submitted that the 2<sup>nd</sup> Respondent, played a pivotal role in the chain of events that led to the harm suffered by the Petitioner as his Property was seized based on suspicions and allegations as opposed to concrete evidence of wrong doing. It was contended that the 3<sup>rd</sup> Respondent's action to persist with the investigations despite being presented with evidence suggests potential improper motive or disregard for due process, both of which are indicative of misfeasance.

8.14 It was contended that in executing the Warrant of Seizure, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents contributed to the harm caused to the Petitioner, as the manner in which they exercised their official functions, including involving armed personnel, raised questions of proportionality when considering the potential harm inflicted on the Petitioner's interests. Counsel submitted that harm suffered by the Petitioner, both financially and in terms of reputational damage highlights the importance of accountability and adherence to legal standards in the exercise of public power.

## **9. THE RESPONDENTS' SUBMISSIONS**

9.1 In response, the 1<sup>st</sup> Respondent recounted the Witness testimonies before Court and asserted that the Petitioner prematurely commenced these Proceedings as the investigations to ascertain whether his sources of income were

commensurate with the value of the Properties/Property he owns are ongoing.

- 9.2 It was averred that the value of the Property was yet to be ascertained and it was registered in Mr. Liu's name thereby increasing the probability of disposal, hence the issuance of the Restriction Notice and subsequently the Warrant of Seizure.
- 9.3 The 1<sup>st</sup> Respondent argued that it did not need to establish the source of income or where the resources came from before seizing the Property, and even if the Petitioner has exhibited his business activities and payment records, these need to be proved by independent sources before they can be said to be legitimate.
- 9.4 It was contended that the Warrant of Seizure does not transfer ownership of the property but merely grants the State temporary custody over the property until investigations are concluded. Reliance was placed on the case of **Anti-Corruption Commission v Serios Farms Limited** <sup>(4)</sup>, for the position that the **Act** does not require anything more than an investigation for the Restriction Notice to issue.
- 9.5 In relation to the allegation that the Warrant of Seizure is in contravention of **Article 17** of the **Constitution**, it was submitted that **Section 58(1)** of the **Anti-Corruption Act** provides for the issuance of the Warrant as a tool of investigations and this is a Court Order which negates the need

for the Petitioner's consent to enter and seize suspected tainted property. It was contended that **Article 17(2)(d)** provides for the seizure and thus it was done within the confines of the law.

- 9.6 In responding to the assertion that **Sections 58** and **59** of the **Anti-Corruption Act** are unconstitutional, the 1<sup>st</sup> Respondent stated that while **Article 16** of the **Constitution** provides against arbitrary deprivation of property, neither the State nor the 1<sup>st</sup> Respondent have compulsorily acquired the Petitioner's Property.
- 9.7 It was averred that even though **Section 58** of the **Anti-Corruption Act** does not provide for how a Warrant of Seizure ought to be issued, **Section 2** makes it clear that offences under the **Act** are dealt with in accordance with the **Criminal Procedure Code** and a Complaint on Oath was made by the Respondent's Officer justifying the issuance of the Warrant of Seizure which was subsequently issued by the Court. The 1<sup>st</sup> Respondent contended that the seizure of property based on a warrant is covered by the claw-back clause of **Article 16(2)(c)** of the **Constitution**.
- 9.8 With respect to a declaration that **Sections 71** and **78 of the Forfeiture of Proceeds of Crime Act** are unconstitutional as they contravene **Article 18(2)(a)** and **clause (7)** of the **Constitution**, it was the 1<sup>st</sup> Respondent's position

that not all forfeiture proceedings are criminal in nature. That under that subject **Act**, the burden of proof is on a balance of probabilities and does not shift on to the suspect but imposes a duty on the suspect to substantiate or explain how he or she acquired the property. That at the same time the State is required to substantiate its allegation. It was submitted there are no proceedings against the Petitioner's Property for a Forfeiture Order and that this Matter is prematurely before Court as investigations are on-going.

9.9 It was further submitted that the Petitioner has not been charged with any criminal offence and thus the provisions of **Article 18 (7)** of the **Constitution** are inapplicable in this Matter.

9.10 On the claim for damages against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent for misfeasance in public office, it was submitted that the Officers acted for and on behalf of the 1<sup>st</sup> Respondent without malice or bad faith in enforcing the Warrant of Seizure and Restriction Notice, following a complaint of alleged possession of property suspected of being proceeds of crime. And that the Petitioner has not advanced any evidence that suggests that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents misconducted themselves.

## 10. **PETITIONER'S SUBMISSIONS IN REPLY**

10.1 The submissions in Reply were essentially a rehash of the initial submissions touching on the

Respondent's lack of grounds for their suspicion to be reasonable; failure to verify evidence; absence of the counter-evidence; prolonged investigations; and failure by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents to follow due process in verifying the information availed to them.

11. **CONSIDERATION AND DECISION OF THE COURT**

11.1 We have considered the Petition, the Affidavit verifying Petition, the Skeleton arguments, the Answers, the Amended Affidavit verifying the Answers, the Skeleton Arguments in Opposition, the oral testimonies and the submissions by respective Counsel, to whom we are indebted.

11.2 Our perusal of the evidence shows that the facts herein are common cause as can be seen from the Affidavits and the Witness testimonies. What is in dispute is interpretation of those facts which has culminated in the Petitioner seeking the reliefs herein.

11.3 We bear in mind that this is a Petition commenced pursuant to, *inter alia*, **Article 28** of the **Constitution** which provides as follows:

***“(1) Subject to clause (5), if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall—***

**(a) hear and determine any such application;**  
**(b) determine any question arising in the case of any person which is referred to it in pursuance of clause (2);**  
**and which may, make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of Articles 11 to 26 inclusive.”**

11.4 In this regard, we found two old High Court cases which dealt with the allegations of Constitutional violations which shed some useful insights on this issue. These are cases of **Kachasu v the Attorney General** <sup>(5)</sup> and **Patel V The Attorney-General** <sup>(6)</sup> wherein it was opined, with respect to the burden of proof, that:

**“... the applicant carries the burden of proving that his rights under the relevant provisions have been contravened.”**

11.5 We note that most of the reliefs sought by the Petitioner are declarations. In this regard, the Supreme Court has guided on what the Courts need to consider in dealing with declaratory reliefs. Notable is the case of **Communications Authority v Vodacom Zambia Limited**<sup>(7)</sup> wherein the Supreme Court stated, *inter alia*, that:

**“A declaration is a discretionary remedy. A party is not entitled to it as of right. Of**

*course, the discretion must be judiciously exercised. The Court:*

*(a) Will not pass a declaration judgment casually, lightly or easily. The remedy should be granted for good cause, on proper principles and considerations. It must be made sparingly; with care and utmost caution. It is a remedy which Courts discourage, except in very clear cases.*

*(b) Will not grant a declaration when no useful purposes can be served or when an obvious alternative and adequate remedy, such as damages, is available...”*

11.6 We also observe that the Petitioner seeks this Court to declare some provisions of the **Anti-Corruption Act** and the **Forfeiture of Proceeds of Crime Act** unconstitutional. These are provisions contained in statute passed by the Legislature. In this regard and as we noted, we found some invaluable insights in the already cited case of **Kachasu v the Attorney General**<sup>(5)</sup> wherein the then Chief Justice Blagden, sitting as a High Court Judge and citing Bate, J in the case of **Arzika v Gov. N Region**<sup>(8)</sup> stated:

*“There is, however, a presumption that the Legislature has acted constitutionally and that the laws which it has passed are necessary and reasonably justifiable”.*

11.7 In addition, we find it useful to cite Magnus J., in the case of **Patel V The Attorney General**<sup>(6)</sup>, where it was stated:

***“The "presumption in favour of constitutionality" is dealt with at some length by Basu in his “Commentary on the Constitution of India”, 4th Ed., Vol. 1, at page 199, et seq... In the United States, it has been held that all reasonable doubt of a statute's validity must be resolved in favour of the statute and it should not be pronounced to be unconstitutional unless it is clearly proved to be so... The presumption means that - "there should be such an opposition between the Constitution and the law that the judge should feel a clear and strong conviction of their incompatibility"...”***

11.8 We shall now proceed to determine the reliefs as sought by the Petitioner. We intend to deal with the first relief on its own, then second, third and fourth reliefs together as they are inter-related and finally the last relief and costs.

*a) A declaration that the Petitioner's Property subject to the Respondent's seizure was legally and genuinely acquired based on the documents provided.*

11.9 The Petitioner has alleged that he has provided all the relevant documents to show that he lawfully acquired the Property. The 1<sup>st</sup> Respondent has alleged that when the Petitioner was invited for interviews to explain how he acquired the Property, under Warn and Caution, he opted to remain silent. His explanation was that the matter was *sub judice* as it was before Judge Bowa, while the Respondent countered that what was before that Court was the issue in relation to the legality

or otherwise of the Restriction Notice and Warrant of Seizure. The 1<sup>st</sup> Respondent averred that there are on-going investigations in relation to the subject Property including a Valuation exercise.

11.10 We have considered the submissions as well as the various copies of documents attached to the Petitioner's Affidavit verifying Facts. It is our considered view that this Court has no jurisdiction or competence to verify the said documentation nor is it our role to investigate the allegation of whether or not the Property was acquired through suspected proceeds of crime.

11.11 In addition, granting the declaration being sought by the Petitioner that the Property was legitimately acquired would effectively curtail the investigations by the Respondent. This would fly in the teeth of established principle that civil matters cannot stop criminal investigations as alluded to in the cases of **C & S Investments Limited and Others v The Attorney General** <sup>(9)</sup> and that of **Rajan Lekhraj Mahtani & John Sangwa v The People** <sup>(10)</sup>.

11.12 Based on the foregoing facts and authorities, we find no merit in this claim and decline to grant the declaration sought.

*b) A declaration that the Respondent's decision to seize the Petitioner's dwelling house which is real property is arbitrary and contravenes Article 17 of the Constitution;*

- c) *A declaration that the Seizure Notice issued by the Respondent dated 27<sup>th</sup> April, 2022, is illegal and therefore void ab initio and contravenes Articles 17 and 18 of the Constitution;*
- d) *A declaration that Sections 58 and 59 of the Anti-Corruption Act are unconstitutional as they deprive the Petitioner's right to privacy of home and other properties without following the due process of the law.*

11.13 The Petitioner submitted that **Article 17(1)** of the **Constitution** provides for protection against arbitrary searches and seizures without consent and as such, ensures that an individual cannot be deprived of their property without due process and a legal basis. It was averred that the Respondents entered his Property without his consent or Court Order.

11.14 In addition, the Petitioner argued that **Sections 58** and **59** of the **Anti-Corruption Act** potentially encroach upon the fundamental right to privacy as enshrined in the **Constitution** and that the mandate for individuals to declare their assets and liabilities represents a significant intrusion into their private affairs.

11.15 It was further contended that the issuance of the Seizure Notice contradicts the presumption of innocent until proven guilty as the Petitioner has not been given an opportunity to defend himself against these allegations of acquiring property through suspected proceeds of crime contrary to

the fundamental right in **Article 18** of the **Constitution**.

11.16 The Respondent in turn submitted that the Warrant of Seizure issued under **Section 58** of the **Anti-Corruption Act** is a Court Order and together with the Restriction Notice under **Section 58** fall under the claw-back clause of **Article 17** of the **Constitution** as investigative tools. That **Article 18** of the **Constitution** is inapplicable as the Petitioner has not been charged with any offence.

11.17 We have considered the Parties respective arguments. The relevant provisions of **Section 58** and **59** of the **Anti-Corruption Act** provide, respectively, as follows:

***“58. (1) Where in the course of an investigation into an offence under this Act, an officer has reasonable grounds to suspect that any movable or immovable property is derived or acquired from corrupt practices, is the subject matter of an offence or is evidence relating to an offence, the officer shall, with a warrant, seize the property.***

***(2) ....***

***(3) An officer shall serve a copy of the list referred to in subsection (2) on the owner of the property or on the person from whom the property was seized, not later than thirty days from the date of seizure.***

***(4) For the purpose of this section, “property” means real or personal property of any description, and includes money and any interest in the real or personal property”.***

***59.(1) An officer shall effect a seizure by removing the movable property from the custody or control from whom it is seized and placing it under the custody or control of such other***

*person or authority and at such place as the officer may determine.*

*(2) An officer shall, where its not practicable or desirable to effect the removal of any property under subsection (1) leave it at the premises in which it is seized under the custody or control of such other person or authority and at such place as the officer may determine...”*

11.18 It is evident that the Warrant of Seizure that has been exhibited as “**RKC 86**” was issued by the Magistrate Court after the 3<sup>rd</sup> Respondent, from the 1<sup>st</sup> Respondent Institution, swore an Affidavit exhibited as “**RKC87**” to the Petitioners Affidavit verifying the Petition. The issuance of the Warrant of Seizure was apparently challenged before that Court and not determined, albeit, no evidence was brought before this Court.

11.19 In any event, this Court cannot delve into a Matter regarding whether there was reasonable basis for issuance of the Warrant of Seizure, as that is before the Subordinate Court. Ample guidance has been given on this issue by the Constitutional Court including in the case of **Lloyd Chembo v the Attorney General** <sup>(11)</sup> on how the Courts ought to operate in relation to matters before another Court as they stated that:

*“There is comity between the Courts. This Court works hand in hand with other Courts so that Matters before it and other Courts are heard and determined in an orderly manner.”*

11.20 Therefore, this Court cannot comment or determine a matter that is before another Court

and not properly raised before us. So, for all intents and purposes, there is a valid Warrant of Seizure that was issued by the Subordinate Court and which was used to effect the seizure of the Petitioner's Property. Consequently, the only issue that will be for determination before this Court is whether a Warrant of Seizure contravenes the provisions of the **Constitution**.

11.21 **Section 58** of the **Anti-Corruption Act** authorises an Officer in the circumstances outlined therein to seize a property with a warrant while **Section 59** of the **Act** merely relates to entrusting custody of the seized Property to a person or authority that the officer may determine.

11.22 The Petitioner's claim is that the Warrant of Seizure infringes the right to privacy enshrined in **Article 17** of the **Constitution**. The subject **Article** provides:

***"17. (1) Except with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others on his premises.***

***(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision –***

***(a) that is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilization of mineral resources, or in order to secure the development or utilisation of any property for a purpose beneficial to the***

*community;*

*(b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;*

*(c) that authorises an officer or agent of the Government, a local government authority or a body corporate established by law for a public purpose to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully*

*on those premises and that belongs to the Government, authority or body corporate, as the case may be; or*

*(d) that authorises, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or entry upon any premises by such order;*

*and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.”*

11.23 There is no dispute that fundamental rights enshrined in the **Constitution** are not absolute but are subject to derogations as for instance contained under **Article 17(2)** cited above. In addition, the Warrant of Seizure was issued pursuant to the provisions of **Section 58** of the **Anti-Corruption Act** which is an Act of Parliament and it is actually a Court Order as it is issued under the hand of a Magistrate and thus falls under the derogation in **Article 17(2)(d)** of the **Constitution**.

11.24 Indeed, we agree with the Respondent's submission that the derogation in **Article 17(2)(d)** does not only relate to civil proceedings but also

to warrants issued in criminal proceedings. In addition, the Petitioner has not adduced any evidence to show that **Section 58 Anti-Corruption Act** is not reasonably justifiable in a democratic society as alluded to in **Article 17(2) of the Constitution**. In this regard, we find that a Warrant of Seizure does not contravene the provisions of the **Constitution**.

11.25 The Petitioner has also submitted that the mandate for individuals to declare their assets and liabilities represents a significant intrusion into their private affairs, without specifying the mandate. We have not come across the requirement to declare assets or liabilities in the impugned **Sections** of the **Anti-Corruption Act**. Be that as it may, it is our considered view that the protection of fundamental rights including the right to privacy does not extend to assets whose origin may be questionable.

11.26 We therefore find no basis to declare **Sections 58** and **59** of the **Anti-Corruption Act** unconstitutional and decline to do so.

11.27 The Petitioner has also alleged that the Seizure Notice contravenes **Article 18** of the **Constitution** because it contradicts the presumption of innocent until proven guilty as the Petitioner has not been given an opportunity to defend against these allegations of acquiring property through suspected proceeds of crime.

11.28 We, however, note from the evidence on Record that the Petitioner was called for interviews at the 1<sup>st</sup> Respondent's Office and with respect to the subject Property, he opted to remain silent under Warn and Caution. He stated that that was because there was a Matter before Justice Bowa, but he has rendered the explanations in this Petition before that same Matter was determined. We, therefore, do find that the Petitioner was given an opportunity in the course of investigations to dispel the allegations that the Property was acquired through suspected proceeds of crime.

11.29 In relation to the contravention of presumption of innocent until proven guilty, the relevant **Article 18** of the **Constitution** provides in part as follows:

***“(1) If any person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within reasonable time by an independent and impartial Court established by law.***

***(2) Every person who is charged with a criminal offence –***

***(a) shall be presumed to be innocent until he is proved guilty or has pleaded guilty---” (underline by Court)***

11.30 In *casu*, there is no evidence that the Petitioner has been charged with any criminal offence and that he has been denied a fair trial. It is our considered view that **Article 18** of the **Constitution** has been wrongly invoked as it is

only applicable where a person has been charged with a criminal offence. We find no merit these claims.

11.31 We now deal with the next claim which is framed as:

*“ e) A declaration that Sections 71 and 78 of the Forfeiture of Proceeds of Crime Act are unconstitutional as they contravene Article 18 (2) (a) and (7) of the Constitution;*

11.32 The Petitioner also seeks a declaration that **Sections 71 and 78** of the **Forfeiture of Proceeds of Crime Act** are unconstitutional as they shift the burden of proof onto the Accused Person and further the standard of proof is on a balance of probabilities contrary to the established principle in criminal matters, which is that the Prosecution has to prove the offence beyond reasonable doubt.

11.33 The Respondents have argued that the Supreme Court, in the case of **The People V Austin Liato**<sup>(2)</sup> held these provisions to be constitutional.

11.34 We note that the Petitioner has not been charged with any offence relating to the subject statute or suspected proceeds of crime nor has he alleged that his Property is subject to a Forfeiture Order under the Sections in contention. Essentially, no action has been taken nor is there evidence of threatened action other than that the

1<sup>st</sup> Respondent is carrying out investigations into how the Petitioner acquired the subject Property based on a complaint that it has been acquired from proceeds of crime.

11.35 In this regard, we bear in mind and agree with the opinion expressed by the Court of Appeal, the forerunner of the Supreme Court, in the case of **Nkumbula v Attorney General** <sup>(12)</sup> wherein Baron J.P., said:

***"If there is on the statute book an Act of Parliament, or subsidiary legislation, which it is alleged contravenes the Constitution, it is not open to any individual to come to Court, and ask for a declaration to this effect: before the individual has locus standi to seek redress, there must be an actual, or threatened action in relation to him."***

11.36 It is our understanding that any action that may be taken against the Petitioner can only be done after the investigations are concluded.

11.37 Furthermore, we agree with the Respondent's submission that the Supreme Court did pronounce its position on the constitutionality of the **Sections 71 and 78**, and referred to **Article 18(12)** of the **Constitution**, stating, in the case of **the People V Austin Liato**<sup>(2)</sup> *inter alia*, that:

***"...and the law does, in appropriate instances, cast the evidentiary burden on the accused person to prove certain facts...For the avoidance of doubt, we***

***must state that the fundamental law of the land, the Constitution of Zambia, does recognize this reality.”***

11.38 The Petitioner has also submitted that the subject Sections are in breach of **Article 18 (7)** of the **Constitution** as they do not ensure that the affected individual are afforded adequate compensation for loss of their Property. That this omission renders the provisions susceptible to arbitrary application thereby infringing upon the Constitutional protection against arbitrary deprivation of property.

11.39 The appropriate Article that deals with deprivation of property is **Article 16** not **Article 18(7)** of the **Constitution** as has been submitted. We however note that the Petitioner had referred to the Warrants of Seizure in his Skeleton Arguments as being contrary to **Article 16** as the Respondent took over his dwelling house without undergoing any Court process, be it civil or criminal.

11.40 The Respondent submitted that the Warrant of Seizure is merely an investigative tool and does not take away the Petitioners legal ownership of the Property.

11.41 The **Anti-Corruption Act** defines “Seizure” as meaning:

***“temporary prohibiting the transfer, conversion, disposition or movement of***

***any property or temporary assuming custody or content of property on the basis of an Order issued by a Court or a notice by the Director-General.”***

11.42 The above definition clearly does not mean that the affected property owner loses his/her legal ownership or rights over the Property. There is and has been no transfer of ownership or interest in the property or deprivation of the Property let alone compulsory acquisition without compensation for the Seizure Warrant to fall foul of **Article 16** of the **Constitution**. In fact, **Article 16 (2)(t)** allows for this as it states:

***(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of clause (1) to the extent that it is shown that such law provides for the taking possession or acquisition of any property or interest therein or right thereover—***

***(a)...(omitted)***

***(t) for so long as may be necessary for the purpose of any examination, investigation, trial or inquiry or...”***

11.43 It is evident that the Petitioner has misconstrued the intent of the Warrant of Seizure and the Restriction Notice and thus the issues of deprivation of property or compensation for loss of property do not arise.

11.44 For the foregoing reasons, we find that the declaration being sought lacks merit as it has, additionally, already been dealt with and

determined by the Supreme Court in the **People V Liato**<sup>(2)</sup> case.

- 11.45 The last substantive claim is as follows:  
e) *Damages against the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents for misfeasance of public office.*
- 11.46 With respect to damages against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents for misfeasance in public office, the Petitioner submitted that had the said Respondents properly investigated the Matter, they would not have taken the malicious decision that they took to purport to seize the Property, and chase his family from the dwelling house. That the failure by the Respondents to call him to provide information amounted to abuse of power.
- 11.47 The Respondents submitted that they did call the Petitioner but he opted to remain silent, hence the issuance of the Warrant of Seizure.
- 11.48 Misfeasance in public office has been defined in *Black's Law Dictionary* as:  
***“the excessive malicious, or negligent exercise of statutory powers by a public officer.”***
- 11.49 It is not in dispute that it was under **Sections 61(1) and 58** of the **Anti-Corruption Act** that the Restriction Notice and the Warrant of Seizure were issued and served on the Petitioner. It is also not in dispute that the Petitioner was called and he did respond to a call for interviews at the Respondent's Office, where on 20<sup>th</sup> April,

2022 and under Warn and Caution, he opted to remain silent on the ground that the Matter was in Court.

11.50 The Warrant of Seizure was issued on 27<sup>th</sup> April, 2022, and the Petitioner filed this Petition on 3<sup>rd</sup> May, 2022, providing the explanation and documentation on how he acquired the subject Property, not to the Respondents but to the Court.

11.51 In our view, the Respondents inviting the Petitioner for interviews was part of the investigations the Commission is mandated to carry out where the Director-General determines that an investigation is warranted after receipt of a complaint as per **Section 52 (3)** of the **Anti-Corruption Act**.

11.52 We also accept that the Press Statement was likely released in response to press queries as no doubt the Petitioner is a public figure and such issues are bound to garner public interest in the Matter.

11.53 In addition, there has been no evidence adduced, as alleged by the Petitioner, that his family was thrown out of the dwelling house as he stated himself that he was out of jurisdiction.

11.54 No evidence was led to show what damage the Petitioner suffered. In any event, we do not find any malice or negligence in the manner the 1<sup>st</sup> Respondents' Officers carried out their functions. We find that the Petitioner has failed

to prove misfeasance in public office to warrant being awarded damages against all the Respondents. This claim is dismissed.

12. **CONCLUSION**

12.1 Based on the foregoing facts and cited authorities, we find the Petitioner has failed to show that the impugned **Sections 58** and **59** of the **Anti-Corruption Act** and **Sections 71** and **78** of the **Forfeiture of Proceeds of Crime Act** are incompatible with the **Constitution** to warrant them being declared unconstitutional.

12.2 On the whole, we find that the Petitioner has failed to prove his claims on a balance of probabilities and they are dismissed in their entirety.

12.3 Costs are for the Respondents severally to be taxed in default of agreement.

**Delivered at Lusaka this 20<sup>th</sup> day of August, 2024.**



.....

**S. M Wanjelani**  
**Judge**



.....

**P.K Yangailo**  
**Judge**



.....

**S. V Siloka**  
**Judge**