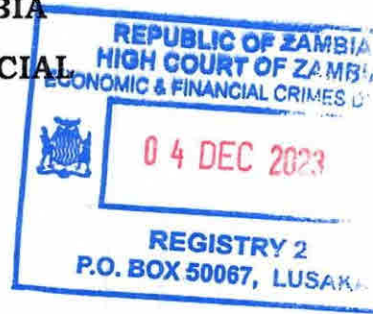


ZAMBIA

2022/HPEF/16

FINANCIAL



SECTIONS 29, 30, 31 AND 71 OF THE FORFEITURE
OF PROCEEDS OF CRIME ACT NUMBER 19 OF 2010
OF THE LAWS OF ZAMBIA

IN THE MATTER OF: SECTIONS 351 AND 358 OF THE PENAL CODE,
CHAPTER 87 OF THE LAWS OF ZAMBIA

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

IN RE PROPERTY:

TOYOTA HIACE MINI BUS REGISTRATION NUMBER BAP 4748 ZM, TOYOTA
HIACE MINI BUS REGISTRATION NUMBER BAP 2505 ZM, TOYOTA HIACE
MINI BUS REGISTRATION NUMBER BAV 7611, TOYOTA HIACE MINI BUS
REGISTRATION NUMBER BAL 7651, TOYOTA HIACE MINI BUS
REGISTRATION NUMBER BAT 397 ZM, 1 HP LAPTOP, CANON PRINTER
SERIAL NUMBER KMWV75578 AND HP PRINTER SERIAL NUMBER
CN7AQ3QOTT.

HENRY BANDA

1ST INTERESTED PARTY

ELIAS BANDA

2ND INTERESTED PARTY

ELICH SERVICES LIMITED

3RD INTERESTED PARTY

Before the Honorable Justices A. Malata-Ononuju, I. M. Mabbolobolo and
S.V. Siloka on.....

For the Applicant: Ms. R. M. Jackson, Senior State Advocate - National Prosecutions Authority

For the 1st and 2nd Interested Party: Mr. Bentry Banda, Senior Legal Aid Counsel - Legal Aid Board

For the 3rd Interested Party: No Appearance

JUDGMENT

A. Malata- Ononuju J., delivered the Judgment of the Court.

Cases referred to:

1. *Simons Prophet v the National Director of Public Prosecutions, Case CCT 56/05;*
2. *The DPP Vs Jessie Bwalya Kapyelata Tapalu 2018/HP/1888;*
3. *The DPP Vs Dhiraj Dhumputha 2020/HP/1287;*
4. *Kumarnath Mohunram & Shelgate Investments Cc Vs The National Director of Public Prosecutions, BOE Bank Limited & The Law Review Project (As Amicus Curae) CCT 19/06 2007 ZACC 4;*
5. *National Director of public Prosecutions Vs RO Cook Properties (Pty) Ltd. 2004 (8) BCLR 844(SCA);*
6. *Johannes Kenneth Soigopi (T/A Nam Transport Co. A Partnership) Vs Director of Public Prosecutions (Appeal No. 196 of 2020) (2022) ZMCA;*
7. *Assets Recovery Agency Vs Peter Oluwafemi Olawon Civil Suit No. E002 of 2022;*
8. *The People Vs Austin Chisangu Liato Appeal No. 291/2014(2015) ZMSC 26;*
9. *C&S Investment Limited, Ace Car Hire Limited and Sunday Maluba Vs Attorney General SCZ Appeal No. 32/2003;*
10. *Teckla Nandjila Lameck Vs President of Namibia and Others (54 of 2011) [2012] NAHC 31 (20 February 2012);*
11. *Assets Recovery Agency Vs Joseph Wanjohi & 3 Others (2020) eKLR;*
12. *Access Bank (Zambia) Group Vs Group Five/ZCON Business Park Joint Venture (2016) ZMSC 24;*

13. *NFC Mining plc Vs Techpro Zambia Limited SCJ No. 22 of 2009; and*

14. *R. Vs John Rondo (2001) 126 A Crim. R. 562.*

Legislation referred to:

1. *The High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;*
2. *The Forfeiture of Proceeds of Crime Act No. 19 of 2010 of the Laws of Zambia;*
3. *The Penal Code, Chapter 87 of the Laws of Zambia;*
4. *The Prohibition and Prevention of Money Laundering Act No. 14 of 2002 of the Laws of Zambia.*

1. INTRODUCTION

1.1 On 15th May, 2023, the Director of Public Prosecutions, the Applicant herein, filed Originating Notice of Motion for a Non-Conviction Based Forfeiture Order of tainted property pursuant to **Order XXX Rules 15 and 17 of the High Court Rules** as read together with **sections 29 and 31 of the Forfeiture of Proceeds of Crime Act, Number 19 of 2010 of the Laws of Zambia**, and **sections 351 and 358 of the Penal Code, Chapter 87 of the Laws of Zambia.**

2. APPLICANT'S APPLICATION

2.1 The Originating Notice of Motion was accompanied by an Affidavit in Support of even date sworn by Joseph Kakumba Chitanika, employed by the Zambia Police Service as a Police Officer and based at the Zambia Police Services Headquarters under the Criminal Investigations Department.

- 2.2 He deposed that having received intelligence from members of the public that someone in Kabanana Site and Services Compound of Lusaka was making counterfeit Zambian Kwacha notes, a team of investigators was constituted and together with the Deponent, they rushed to the Compound to verify the information.
- 2.3 It was deposed that armed with a Search Warrant, the Team proceeded to search the house and, in a bedroom, found suspected counterfeit Zambian Kwacha notes.
- 2.4 The Deponent averred that he recovered and seized K75,050.00 counterfeit notes, being K100.00 and K50.00 notes on plain papers and others already cut. That a HP laptop, a Canon and HP printer, two plastic bags containing implements, a pressing iron, four White Books for Toyota Hiace mini buses, five Toyota Hiace mini buses and implements for making money were also seized and recovered between the 20th and 21st July, 2022, via a Seizure Notice. That pictures were also taken and the photographic album was produced by the Forensic Wing Criminal Investigations.
- 2.5 The Deponent avowed that having written a letter to the Chief Security Officer at Bank of Zambia on the 22nd July 2022 requesting an examination of the recovered suspected counterfeit notes, he received a response on the 25th July 2022 in the form of a Report which

concluded that the 441 K100 notes and 617 K50 notes submitted were counterfeit notes.

- 2.6 That a letter was written to the Road Transport and Safety Agency (RTSA) on 22nd December 2022 requesting information on the Toyota Hiace mini buses found with the 1st Interested Party and a printout confirmed that the said vehicles seized were in the name of Elich Service Limited of Plot No. A6076, off Munali Road, the 3rd Interested Party.
- 2.7 The Deponent averred that following investigations conducted at the Patents and Companies Registration Agency (PACRA) by him, it was revealed that the Directors of the 3rd Interested Party were the 1st and 2nd Interested Parties.
- 2.8 The Deponent submitted that he wrote to the Financial Intelligence Center (FIC) requesting for information on bank accounts held by the 3rd Interested Party and the response was that the Company had an account with Investrust Bank. A bank statement was obtained which revealed that the said account was only used for a year and was closed by the bank as it was inactive. The Deponent averred that he obtained statements from Enoch Simwanza, Whitson Sakala and Peter Tembo, who were employed as mini bus drivers for the 3rd Interested Party between 2019 and 2020.

- 2.9 It was deposed that Enoch Simwanza submitted that he was paid K1,200.00 per month and that he made weekly cash payments to the 1st Interested Party of K300.00 and that Sunday cashings were paid directly to the 2nd Interested Party. That later on, the 2nd Interested Party instructed Enoch Simwanza to start cashing to Bridget Banda.
- 2.10 The Deponent averred that Whitson Sakala submitted that he was cashing K300.00 weekly, which was later increased to K350.00, to the 1st Interested Party.
- 2.11 The Deponent averred that Peter Tembo submitted that he was the driver for Toyota Hiace Registration Number BAV 7611 and was cashing K350.00 per week.
- 2.12 The Deponent affirmed that he further recorded a statement from Bridget Banda who stated that in 2019 her brother, the 1st Interested Party, bought a mini bus and employed a driver who cashed to the 1st Interested Party and that both the 1st and 2nd Interested Parties continued to buy mini buses until they had five. That the 1st Interested Party moved away from the family home and the drivers started cashing the money to her and that her mother instructed her to send the money to the 1st Interested Party for the purposes of banking it.
- 2.13 The Deponent averred that investigations revealed that the 1st Interested Party used the counterfeit notes to

purchase goods and would get genuine notes as his change and that he engaged people to deposit counterfeit notes into his MTN Mobile Money account and later withdraw genuine notes.

2.14 That the 1st Interested Party was charged and arrested for the offence of being in possession of forged bank notes contrary to **section 358** of the **Penal Code** and under a warn and caution statement he admitted to having been found in possession of the counterfeit notes.

2.15 It was deposed that the 1st and 2nd Interested Parties were arrested and charged with the offence of being in possession of property suspected to be proceeds of crime contrary to **section 71** of the **Forfeiture of Proceeds of Crimes Act (FOPCA)**.

2.16 The Deponent averred that in the warn and caution statements, the 1st Interested Party denied any knowledge of the five mini buses. That the 2nd Interested Party stated that in 2019 he opened a Company, the 3rd Interested Party, in which the 1st Interested Party was a co-director. That in the same year, he bought a bus and started a transport business and the cashing realised was kept by the 1st Interested Party. That in February 2020, he bought another bus and the cashing realised was again kept by the 1st Interested Party. That in the same year, he bought another bus whose cashing was

kept by the 1st Interested Party. That in May 2021 and March 2022 two buses were bought. That the 2nd Interested Party stated that when he started buying buses, he opened a bank account and instructed the 1st Interested Party to be depositing the cashing in the account.

2.17 It was averred that investigations showed that neither the 1st nor 2nd Interested Party had any other income generating activities apart from the transport business. It was the Deponent's belief that the cited properties are tainted properties, which are liable for forfeiture to the State as they are proceeds of crime. That the offence under **section 71** of the **FOPCA** and **sections 351** and **358** of the **Penal Code** are serious offences.

3. JOINT AFFIDAVIT IN OPPOSITION

3.1 The Joint Affidavit in Opposition to the Applicant's Notice of Motion was filed on 25th July 2023 and was deposed jointly by the 1st and 2nd Interested Parties.

3.2 The Deponents averred that they were facing criminal trial in the Subordinate Court and denied the contents of the Applicant's Affidavit in Support above and made allegations of misconduct and lack of following procedure by the Police Officers involved.

3.3 It was further averred that not only was the search conducted illegal, but that no fake currency notes were found in the possession of the 1st Interested Party. That

the five White Books for the mini buses were collected from their mother's home in Meanwood Chamba Valley and that the counterfeit notes were planted and the deposits made in the MTN Mobile Money account were not counterfeit notes but genuine Zambian currency notes.

- 3.4 The Deponents avowed that it was true that they did employ the said bus drivers but that the cashings were K350.00 and not K300.00 per day and that in total, cashings were K2,100.00 from Monday to Saturday. That the statement from Bridget Banda in the Affidavit in Support is not true as the monies used to buy the bus was from the 2nd Interested Party, the 3rd Interested Party and their mother realised from between 2016 and 2022 and therefore, that the buses are not tainted property. That the 1st Interested Party neither purchased nor contributed monies towards these purchases. That his role was to collect cashings from the buses.
- 3.5 It was averred that the 2nd Interested Party had stable sources of income. That the 2nd Interested Party had contracts as an electrician where between 2016 and 2022 he earned K430,000.00, his mother injected K50,000.00 into the 3rd Interested Party towards the purchase of a bus and that the 3rd Interested Party made profits which were re-invested into purchasing

new buses. The Deponents submitted Statements as exhibits to show income used to purchase the first bus (BAL 7651) in 2019 at the cost of K108,000.00, in February and April 2020 the purchase of two buses (BAP 2505 and BAB 4748), the second via bank transfer made to the seller, and the other two buses (BAT 397 and BAV 7611) bought from collections or income deposited into the account from the other buses of K220,000.00.

- 3.6 The Deponents prayed that this Court dismisses the Application for forfeiture to the State property that is legitimately owned by innocent Zambians who have worked hard to acquire the same disputed properties.

4. AFFIDAVIT IN OPPOSITION

- 4.1 The 2nd Interested Party filed an Affidavit in Opposition on 26th July 2023 to which he deposed on behalf of the 3rd Interested Party.
- 4.2 The Deponent averred that the 3rd Interested Party owns the buses which were purchased from the profits of K72,000.00 that were re-invested and are shown in the Financial Statements exhibited in the Joint Affidavit in Opposition. That over K900,000.00 was invested by the 2nd Interested Party in his matrimonial properties and personal asset and including in the 3rd Interested Party which funds came from his personal earnings from contracts as an electrician he had amounting to

K493,000.00 as well as unrecorded income exhibited as “EB1” and “EB2” being Statements of Director’s Financial Position.

- 4.3 It was deposed that the 1st Interested Party neither invested nor paid for his shares allocated to him and was only a nominal director in the 3rd Interested Party.
- 4.4 That the 3rd Interested Party has closed its business following the seizure of its buses since 27th August 2022 by the Zambia Police Service. That the business has been crippled, forcing the five drivers employed by the 3rd Interested to be out of employment.
- 4.5 It was prayed that this Court dismisses the Application for forfeiture to the State of the buses which are legitimately and genuinely owned by the 3rd Interested Party.

5. AFFIDAVIT IN REPLY TO THE JOINT AFFIDAVIT IN OPPOSITION

- 5.1 This Affidavit in Reply was deposed by Joseph Simuchembu, employed by the Zambia Police Service at its Headquarters as an Assistant Superintendent under the Criminal Investigations Department on 3rd August 2023. He deposed that he jointly investigated the matter with Joseph Kakumba Chitanika.
- 5.2 It was deposed that the 1st Interested Party’s assertions in the Affidavit in Opposition regarding the allegations of misconduct and lack of following procedure by the

Police Officers involved were false. That the 1st Interested Party was warned and cautioned and signed the Seizure Notice and made the admission freely and voluntarily without being beaten or threatened. That contrary to the 1st Interested Party's assertions, the search was conducted during the day and fake currency notes were recovered as exhibited in the Affidavit in Support marked "**JKC8**".

- 5.3 It was averred that the five White Books for the buses, the laptop, printers and implements for making counterfeit notes were recovered from the 1st Interested Party's house and not from his mother's house and were not planted on the 1st Interested Party and that the 1st Interested Party deposited the counterfeit notes into his MTN account in order to get genuine notes.
- 5.4 The Deponent avowed that the deposits or cashings were K300.00 as per "**JKC22**" and that buses in question were purchased by the 1st and 2nd Interested Party and there were no contributions made to the purchases by the mother as per the 1st Interested Party's warn and caution statement marked "**JKC29**" and that no evidence was tendered to substantiate the assertion.
- 5.5 The Deponent averred that a statement recorded from Bridget Banda, the 1st and 2nd Interested Party's sibling, marked "**JS1**", confirms that the buses were bought by

the 1st and 2nd Interested Parties. Further that exhibit marked "**JKC13**" of the Affidavit in Support shows the 1st Interested Party stating that he was printing the fake money.

- 5.6 The Deponent avowed that the Interested Parties had no known income generating activities and that the 2nd Interested Party had stated in his warn and caution statement ("**JKC29**") that he bought the buses from the income generated from the transport business.
- 5.7 It was the Deponent's contention that the contracts marked exhibit "**HEB1**" do not contain the date the contract was made, and further it was difficult to ascertain when the contract was executed as it does not have an execution clause. That it was difficult to ascertain whether the contract existed before this date.
- 5.8 It was deposed that with regards to the deposit slips, they do not prove that the money was deposited into the 3rd Interested Party's account and the same are for the period between December 2022 and February 2023, after the buses in question were bought and the 1st and 2nd Interested Parties were warned and cautioned.
- 5.9 The deponent submitted that the exhibits marked "**HEB2**" do not prove that the 2nd Interested Party used the monies he was paid to buy the buses and fails to show any expenses incurred by the Interested Party during the period and hence misleading. Further that

exhibit marked “**HEB3**” does not prove that the properties in question are not proceeds of crime and does not show the source of the said income. That the Interested Parties have not exhibited any bank transfers showing that the money was coming from the 3rd Interested Party’s account and sent to Japan for the purchase of the buses.

5.10 It was deposed that the properties in question are proceeds of crime and that they should be forfeited to the State.

6. AFFIDAVIT IN REPLY TO AFFIDAVIT IN OPPOSITION

6.1 The Affidavit in Reply to the 2nd Interested Party’s Affidavit in Opposition sworn on behalf of the 3rd Interested Party was sworn by Joseph Simuchembu whose credentials are as above and dated 3rd August, 2023.

6.2 The Deponent averred that it is not in dispute that the 3rd Interested Party owned the properties in question, hence it being cited as an interested party. That the 3rd Interested Party did not purchase the buses using the business profits as they were no Company bank statements exhibited showing the cash flow of the Company for the Court to see the alleged profits. That the 3rd Interested Party has not exhibited any proof of the alleged investments in it and the 2nd Interested Party has failed to exhibit the 3rd Interested Party’s bank

statements to show that he invested in the Company upon being paid for the works he allegedly did. It was further averred that the 3rd Interested Party arrived at the total income without showing the expenses, hence the figures are misleading.

- 6.3 It was averred that the 1st Interested Party invested in the 3rd Interested Party by virtue of the exhibit marked “**JS1**” wherein Bridget Banda stated that the buses were bought by the 1st and 2nd Interested Parties. That the properties in question are proceeds of crime and should be forfeited to the State.

7. SKELETON ARGUMENTS IN SUPPORT

- 7.1 In the accompanying Skeleton Arguments in Support of the Applicant’s Application, it was submitted that non-conviction based forfeiture rests on the legal fiction that the property and not the owner has contravened the law and does not require a conviction or even a criminal charge against the owner. Reference was made to the South African Constitutional Court case of **Simons Prophet v the National Director of Public Prosecutions**⁽¹⁾, where this proposition was highlighted and in which the Court was called upon to strike an appropriate balance between guarding against arbitrary deprivation of property and the State’s obligation to protect members of the public from criminal predations.

- 7.2 The Applicants submitted that they were further fortified by the cases of **The DPP Vs Jessie Bwalya Kapyelata Tapalu** ⁽²⁾ which states that non-conviction based forfeiture is constitutional, and **The DPP and Dhiraj Dhumputha**³ where in the Court held that whether or not there is a criminal prosecution or conviction, it does not affect the case of recovery of assets reasonably believed to be proceeds of crime. That a non-conviction based forfeiture can run parallel with criminal trials. That this position is reiterated in **section 31(4)** of the **FOPCA**.
- 7.3 It was submitted that the Notice of Motion herein is against the properties and the Affidavit in Support shows that the properties in issue are tainted as the 1st Interested Party was found in possession of counterfeit notes and charged with offences under **sections 351** and **358** of the **Penal Code**.
- 7.4 The Applicant submitted that there is evidence that when the Investigating Officers conducted a search at the 1st Interested Party's house, they found and recovered counterfeit notes amounting to K75,050 and implements of making money. Further that under warn and caution statement the 1st Interested Party admitted to having been found in possession of the counterfeit money and told the Officers that he was printing it to improve his printing skills. That the Report from the

Bank of Zambia confirms that the notes in the 1st Interested Party's possession were counterfeit money.

7.5 The Applicant submitted that the laptop and printers were tainted property as they were used as an instrumentality in the commission of the offence and enabled the 1st Interested Party commit the offence hence the Application that they be forfeited to the State.

7.6 It was the Applicant's submission that in relation to the buses, the 1st and 2nd Interested Parties had no capacity to buy them and failed to give sufficient and reasonable explanation on how they acquired the said properties. It was submitted that the money collected in the period would not justify the buying of the other buses and further, that the 1st Interested Party was not keeping the cashings as alleged by the 2nd Interested Party because if he was, the monies, being genuine notes, would have been found in the house with the counterfeit notes. That from the foregoing, it is evident that the mini buses which the Interested Parties possess are proceeds of crime and offends **section 71** of the **FOPCA**. The Applicant went on to define proceeds of crime as per the **FOPCA** and **The Prohibition and Prevention of Money Laundering (Amendment) Act**.

7.7 The Applicant further submitted that the Officers recovered five White Books from the 1st Interested Party's house, but when asked about the buses, he

stated that he does not know anything about the issue. It was the Applicant's contention that this shows that the 1st Interested Party had no explanation, reasonable or otherwise, of how the buses were bought and where he got the money from. Further, that he was hiding the source of the buses as circumstances point to him having used the notes he got as change after buying things using counterfeit notes and also monies he withdrew from his MTN Mobile Money account after depositing counterfeit notes and getting genuine notes.

- 7.8 It was the Applicants argument that the explanation given by the 2nd Interested Party on how he acquired the buses over the years was not sufficient as it is not supported by evidence that shows how much money he was making on a monthly basis. That it was suspicious that despite opening an account, the Interested Parties only used it for a year and decided to keep the money earned by way of cashings given to the 1st Interested Party at his home; and further that the 1st Interested Party was found with the five White Books clearly showing that the buses are proceeds of crime which in this case is the making of counterfeit notes, That the transport company (the 3rd Interested Party) opened by the Interested Parties was only opened as a way of cleaning the money.

- 7.9 The Applicant contended that the Affidavit evidence chronicled the investigations which resulted in the seizure of the cited properties which are the subject of the Application as tainted properties. The Applicant went on to define tainted property and serious offence and quoted **section 31** of the **FOPCA** and submitted that on a balance of probabilities from the evidence set out, it can be clearly seen that the property in question was tainted, that the offences of being in possession of property suspected to be proceeds of crime and being in possession of counterfeit notes are serious offences because one can be sentenced to twelve months or more when found guilty.
- 7.10 Being mindful that it is only persuasive, the Applicant urged this Court to adopt the reasoning of Van Heerden AJ in the South African Constitutional Court case of **Kumarnath Mohunram & Shelgate Investments Cc Vs The National Director of Public Prosecutions, BOE Bank Limited & The Law Review Project (As Amicus Curae)**⁴ wherein the learned Judge cited with approval the holding of the **Supreme Court in National Director of public Prosecutions Vs RO Cook Properties (Pty) Ltd.**⁵ and submitted that they have established on a balance of probabilities that the cited properties are tainted and that the Affidavits and exhibits therein placed sufficient evidence to satisfy this

Court that the properties were tainted and prayed that they be forfeited to the State.

8. SKELETON ARGUMENTS IN OPPOSITION

- 8.1 The 1st and 2nd Interested Parties filed the Skeleton Argument in Opposition on 21st July, 2023.
- 8.2 The Interested Parties begun by analysing the Affidavit evidence submitted in this matter and argued that it proved on a balance of probability, firstly that the five buses seized by the State which are the subject of their Application herein are owned by the 3rd Interested Party and that this ownership is further corroborated by the Affidavit in Support filed by Joseph Kakumba Chitanika in exhibit “**JKC14**” and that this is an undisputed fact.
- 8.3 Secondly, that the 1st and 2nd Interested Parties have proved that the 3rd Interested Party’s interest in the disputed buses is free of any serious crime committed either by itself or any of its agents directly or indirectly or indeed knowingly or unknowingly.
- 8.4 Thirdly, that the 2nd and 3rd Interested Parties were unaware of any of the alleged criminal acts associated with the 1st Interested Party.
- 8.5 The 1st and 2nd Interested Parties went on to cite **section 31(2)** of the **FOPCA** in support of their submissions.
- 8.6 In applying the law to the facts, the Interested Parties submitted that the 2nd Interested Party and Grace Banda, who was stated as being a “third party”,

disclosed in the Affidavit in Opposition that they invested funds in Elich Services Limited (the 3rd Interested Party) and that these funds were used to procure the buses in issue and were owned by the 3rd Interested Party. It was argued that this meant that the 3rd Interested Party had interest in the buses while the 2nd Interested Party and Grace Banda only had interest in the shares held and the Partnership Agreement respectively.

8.7 It was submitted that the 1st Interested Party has no ownership in both the buses and the Company's share capital as he holds unpaid shares and never injected funds into the 3rd Interested Party. It was their contention therefore, that the 3rd Interested Party has satisfied **section 31(2)(a)** of the **FOPCA** that it has interest while the 2nd Interested Party and Grace Banda have indirect interest in the buses by virtue of owning shares and the Partnership Agreement respectively in the 3rd Interest Party.

8.8 It was argued that the issue of proof of interest suffices as a defence against the Application for non-conviction based forfeiture of tainted goods and that this was also confirmed by the Court of Appeal in **Johannes Kenneth Soigopi (T/A Nam Transport Co. A Partnership) Vs Director of Public Prosecutions**⁶.

- 8.9 The Interested Parties submitted that the Affidavit in Opposition demonstrated that the 2nd and 3rd Interested Parties and Grace Banda invested their funds into the 3rd Interested Party for purposes of purchasing the buses and that the sources of the funds were not criminal in nature but genuine income from their earnings.
- 8.10 It was their submission that the Affidavit in Support submitted by the Applicant does not in any way show that the 2nd and 3rd Interested Party and Grace Banda were directly or indirectly connected to the alleged printing of currency noted by the 1st Interested Party. That there is no evidence to connect them to the said monies or to show that they received the said monies from the 1st Interested Party. That the State has failed to bring evidence that the 2nd and 3rd Interested party and Grace Banda were involved in some serious crime in line with **section 31(2)(b)** of the **FOPCA**.
- 8.11 The case of **National Director of Public Prosecutions Vs R. O. Cook & Others**⁵ *supra*, was cited by the Interested Parties and it was submitted that the Court in that case guided that there must be sufficient close link or functional relation between the property and the crime; that the property must be instrumental in the commission of illegal activities and not simply incidental.

8.12 The Interested Parties argued that the Affidavit evidence adduced by the Applicant asserts that the 1st Interested Party was found in possession of implements suspected to be used in illicit printing of currency notes at his home and not the 2nd or 3rd Interested Parties home or business premises. That there is no nexus between the commission of the alleged offence(s) and the 2nd and 3rd Interested Parties, hence the forfeiture order cannot be granted as guided by the above cases which have persuasive effect in our jurisdiction.

8.13 In conclusion, the Interested Parties submitted that there is no evidence on a balance of probabilities deposed by the State that links the owners of the buses to committing an offence or offences for non-conviction based forfeiture of tainted property claims to succeed and that therefore, the Application for an order for forfeiture must fail.

9. SKELETON ARGUMENTS IN REPLY

9.1 The Applicant filed Skeleton Arguments in Reply on 4th August 2023 in support of the Affidavit in Reply filed by one Joseph Simuchembu.

9.2 The Applicant submitted that in non-conviction based forfeiture proceedings are conducted in *rem* and not *persona* and that the provisions of **section 34** of the **FOPCA** rests the onus of proof with the Applicant and does not shift to the Interested Party. In support, they

cited the case of **Assets Recovery Agency Vs Peter Oluwafemi Olawon**⁷. The Applicants then applied the case to the Supreme Court of Zambia by citing the case of **The People Vs Austin Chisangu Liato**⁸ which held as followed:

“Section 71(2) of the FOPCA does not impose any obligation on the accused person to prove any ingredient of the offence under Section 71(1) of the Act, but it does afford the accused an opportunity to explain the absence of reasonable grounds of suspicion that the property he was found in possession of under Section 71(1) were proceeds of crime.” (Emphasis theirs.)

- 9.3 It was submitted that the above case shows that the Interested Party has an obligation to show that the properties in question are not proceeds of crime and has to offer satisfactory explanation and evidence that is solid, honest and beyond peradventure.
- 9.4 It was the Applicant’s submission that the explanation offered by the Interested Parties in their Reply to the Affidavit in Support of the Notice of Motion creates more doubts and leaves more questions than answers and is unhelpful. That the Interested Parties have failed to discharge the evidentiary burden borne by them in this Application.
- 9.5 It was submitted that the exhibit “**EB1**” only shows the value of the assets that the Company owns but does not explain or show how the assets were purchased. That

“**EB2**” equally does not show any proof that all the money that the Interested Parties received was invested in the 3rd Interested Party to buy the buses and that the deposit slips exhibited are for the period between December 2022 and February 2023 after the buses in question were bought and the 1st and 2nd Interested Party were warned and cautioned.

- 9.6 It was the Applicant’s submission that exhibit “**HEB2**” does not prove that the 2nd Interested Party used the money he was paid to buy the buses, and further it does not show any expenses that the Interested Party had during the period hence, it is misleading.
- 9.7 The Applicants alluded to “**HEB3**” and submitted that the same does not prove that the properties in question are not proceeds of crimes and does not show the source of the said income. That the 2nd Interested Party has not exhibited any bank transfer showing that the money he used to buy the buses was from the 3rd Interested Party’s account and sent to Japan.
- 9.8 It was argued by the Applicant that there is evidence that the Interested Parties invested in the 3rd Interested Party as seen by exhibit “**JS1**” in which Bridget Banda stated that the buses were bought by the 1st and 2nd Interested Parties. The 2nd Interested Party never mentioned that the mother contributed to the buying of the buses under his warn and caution statement

exhibited as “**JKC29**”, instead he indicated that that the money used to buy the buses was from the transport business and failed to exhibit any business records to support his assertion. The Applicant argued that this clearly shows that the 2nd Interested Party was not being truthful and contradicted himself.

- 9.9 It was the Applicant’s contention that the 1st Interested Party purchased the buses in question as shown in exhibit “**JS1**” as he was collecting the cashings from the bus drivers and keeping the White Books for the buses in question. That further, the properties in question are proceeds of crimes as the 1st Interested Party used the counterfeit notes by buying items and getting genuine notes as change. Additionally, he deposited the counterfeit notes in his MTN account and withdrew genuine notes which he used to buy the properties in question.
- 9.10 The Applicant submitted that the 2nd Interested Party and his mother have not shown any proof in the form of bank statement, money transfer records, business records or any official records to show that they invested in the 3rd Interested Party or in the buying of the properties in question.
- 9.11 In conclusion, the Applicant contended that the Interested Parties have failed to demonstrate that the properties in question are not proceeds of crime and

that the Applicant has shown that there are indeed grounds to support reasonable suspicion that the properties might be direct or indirectly proceeds of crime. It was their prayer that this Court finds that the cited properties are tainted properties and orders that the same be forfeited to the State.

10. HEARING

10.1 At the hearing held on 8th August 2023, Counsel for the Applicant and the 1st and 2nd Interested Parties, were present however, the 3rd interested Party was not represented. Counsel for the Parties both submitted that they would rely on the documents filed into Court.

10.2 Counsel for the 1st and 2nd Interested Parties did make an application for leave to call one witness. Counsel for the Applicant in response to this Application submitted that in non-conviction based forfeiture proceedings the evidence is produced in the form of documents and written submissions. That unless the witness is bringing evidence that has not been covered in the filed documents before the Court, she had no objection to the Application. Counsel stated that however, and in hindsight, if the evidence is new, it will mean that the Applicant will not have an opportunity to reply to it as they have already made their Reply and therefore, they object to the Application.

10.3 In response, Counsel for the 1st and 2nd Interested Parties submitted that they intend to call a witness who is not a party to the proceedings who would not ordinarily be required to file an affidavit in opposition. That Parties to proceedings generally have a right to call witnesses and cited **Order 3 Rule 2** of the **High Court Rules** as giving discretion to the Court to make decisions with regards to their Application. Further that the Applicant will have an opportunity to rebut and test the evidence given by the witness they wanted to call through cross examination. That therefore, no ambush or prejudice will be suffered by the State and the basis of the objection by the State is unfounded.

10.4 After standing down, this Court returned and ruled as follows:

“Order 30 of the High Court Rules pursuant to which this application has been made makes no provision for oral evidence. It only refers to affidavit evidence. We therefore, decline to grant the application made by the 1st and 2nd Interested Party’s Counsel to have a witness present oral evidence before us, whose evidence should have been presented via affidavit and exhibits therein.”

The matter was then adjourned for Judgement.

11. CONSIDERATION AND DECISION OF THE COURT

11.1 We are grateful to the Parties for their insightful and spirited submissions, both in writing and orally, for our consideration. We wish to state here that we have taken

note of the warn and caution statements presented and referred to in the Parties submissions as well as the allegations of misconduct on the part of the Applicant herein, however this Court's only concern is the property in question and the application made against it.

11.2 The Applicant commenced this action by way of Notice of Motion for a non-conviction based forfeiture Order of tainted property pursuant to **section 29, 31 and 71** of the **FOPCA**.

11.3 The law on civil forfeiture is provided for in the **FOPCA** who's preamble states, *inter alia*:

“An Act to provide for the deprivation of any proceeds of crime, provide for the deprivation of any person of any proceeds, benefit or property derived from the commission of any serious offence...”

11.4 **Section 29** of the **FOPCA** empowers this Court to grant an applicant a non-conviction based Order and states that:

“A public prosecutor may apply to a court for an order forfeiting to the State all or any property that is tainted property”.

11.5 The standard of proof required in a non-conviction based forfeiture is prescribed in **section 31(1)** as follows:

“Subject to subsection (2), where a public prosecutor applies to the court for an order under this section and the court is satisfied on a balance of probabilities that the property is tainted property, the court may order that the property, or such of the property as is specified by the court in the order, be forfeited to the State”.

(Emphasis is ours.)

11.6 Therefore, in the case in *casu*, the preponderance of evidence, being a standard of proof in civil matters, as provided by the Applicants, should show that there is a 50% likelihood or that it is more likely than not true, that the property in question, is tainted property.

11.7 According to **section 2 of the Act**, “tainted property” in relation to a serious offence means:

(a) “any property used in, or in connection with, the commission of the offence;

(b) property intended to be used in, or in connection with, the commission of the offence; or

(c) proceeds of the offence;

and when used without reference to a particular offence means tainted property in relation to a serious offence;”

11.8 **The FOPCA** further defines a “serious offence” as:

“...an offence for which the maximum penalty prescribed by law is death, or imprisonment for not less than twelve months;”

11.9 **Section 2 of the FOPCA** provides a definition of “proceeds of crime” as follows:

“proceeds of crime” in relation to a serious offence or a foreign serious offence, means property or benefit that is –

(a) wholly or partly derived or realised directly or indirectly, by any person from the commission of a serious offence or a foreign serious offence;

(b) wholly or partly derived or realised from a disposal or other dealing with proceeds of a serious offence or a foreign serious offence;

(c) wholly or partly acquired proceeds of a serious offence or a foreign serious offence;

and includes, on a proportional basis, property into which any property derived or realised directly from the serious offence or foreign serious offence is later converted, transformed or intermingled, and any income, capital or other economic gains derived or realised from the property at any time after the offence; or...”

11.10 To add more to what civil forfeiture entails, and to assist this Court in determining this application, we will allude to some foreign authorities. In doing so, we are guided by the holding of the Supreme Court in the case of **C&S Investments Limited, Ace Car Hire Limited, Sunday Maluba Vs The Attorney General**⁽⁹⁾, wherein it was stated that:

“While cases cannot be decided on the basis of foreign law, the legal situation prevailing in other jurisdictions

is helpful to enable a court to look at issues objectively from a wider verse.”

11.11 In the Namibian case of **Teckla Nandjila Lameck Vs President of Namibia**⁽¹⁰⁾ the High Court stated as follows:

“Asset forfeiture is... a civil remedy directed at confiscation of the proceeds of crime and not at punishing the accused...even if there is a prosecution, the remedy is not affected by the outcome of the criminal proceedings. The remedy is thus directed at the proceeds and instrumentalities of the crime and not the person having possession of them...”

11.12 We are further guided by the Kenyan case of **Assets Recovery Agency Vs Joseph Wanjohi & Others ACEC**⁽¹¹⁾ *supra* wherein the High Court stated, *inter alia*, that:

“The proceedings before this court are to determine the criminal origins of the property in issue and are not a criminal prosecution against the accused.”

11.13 It is clear from the cases cited above, that the recovery of assets reasonably believed to be proceeds of crime is not affected or dependent on there being a criminal prosecution or conviction. It is the criminal origins of the assets and/or the instrumentalities of the crime that is the focus. The heading of **section 31 of the FOPCA**, which states that it is “non-conviction

based forfeiture order for tainted property” speaks to this.

11.14 In the case in *casu*, this non-conviction based application made pursuant to the provisions in the **FOPCA** lies against the cited property herein. Therefore, the Applicant must prove, on a balance of probabilities, that the properties, which are the subject matter of the application, are tainted as they were used as an instrumentality in or in connection with the commission of an offence that is considered a serious offence.

11.15 The following facts are not in dispute:

- a) That Investigations Officers from the Zambia Police Service conducted a legal search at the 1st Interested Party’s home, in his presence, where they found and seized counterfeit notes amounting to K75,050.00 as well as implements of making counterfeit money.
- b) That Investigations Officers found and seized five White Books for Toyota Hiace mini buses (hereinafter referred to as buses) at the 1st Interested Party’s home.
- c) That Investigations Officers seized the five buses.
- d) That the 1st Interested Party, under warn and caution and in a statement, admitted to printing the said counterfeit notes.

- e) That the 3rd interested Party, being Elich Services Limited, is the registered owner of the five buses and that the 1st and 2nd Interested Parties set up and are Directors in the 3rd Interested Party.
- f) That the 1st and 2nd Interested Parties were charged and arrested for offences contrary to **sections 351 and 358** of the **Penal Code** and **section 71** of the **FOPCA**.

11.16 Having established what is not in dispute and reiterated the Application before us, we shall address the following questions:

- a) *Whether, on a balance of probabilities, the properties in question are tainted property as defined under **section 2** of the **FOPCA** and therefore liable to be forfeited to the State under **section 31 (1)** of the **FOPCA**.*
- b) *Should we find in the affirmative, whether the 2nd and 3rd Interested Parties and Grace Banda, in claiming interest in the 5 buses which form part of the alleged tainted properties, have sufficiently satisfied the requirements under **section 31(2)** of the **FOPCA** to enable this Court afford them the protection therein.*

11.17 In order to answer the first question, this Court will deal with the alleged tainted properties separately.

Firstly, we will consider the items seized at the 1st Interested Party's home which have been described as implements of crime or indeed forgery. The exhibit marked "**JKC26**", the Seizure Goods Certificates, in the Applicant's Affidavit in Support has a list of the items or implements seized. However, for the purposes of this Application this Court's focus will be on the items listed in the Notice of Motion filed herein being, *inter alia*, a HP Laptop, Canon Printer and HP Printer.

11.18 The Applicant submitted having found K75,050.00 worth of counterfeit notes, the Officers also found the implements of crime or forgery which included *inter alia*, the HP Laptop, Canon printer and HP printer. The Counterfeit notes were confirmed as such by a Report submitted by the Bank of Zambia exhibited and marked "**JKC11**". Further, at the home of the 1st Interested Party, the Investigations Officers took pictures of the evidence and a Photographic Album, marked and exhibited as "**JKC8**" was produced. Some of the pictures taken include the 1st Interested Party. In a Warn and Caution Statement, the 1st Interested Party admitted to possessing and producing the counterfeit notes. The 1st Interested Party was later charged and arrested for offences contrary to **sections 351 and 358** of the **Penal Code**.

11.19 The Applicant submitted that the laptop and printers were tainted property as they were used as an instrumentality in the commission of the offence and enabled the 1st Interested Party commit the above offences, hence the Application that they be forfeited to the State

11.20 In the Joint Affidavit in Opposition the Interested Parties argued that no fake currency notes were found in the possession of the 1st Interested Party and further that the said notes were planted. Conversely, in their Skeleton Arguments it was submitted that the 2nd and 3rd Interested Parties were unaware of any alleged criminal acts associated with the 1st Interested Party, and that the Applicant has failed to show how they were directly or indirectly connected to the alleged printing of the notes done by the 1st Interested Party therefore they were not involved in any serious crime. The Interested Parties in their Skeleton Arguments go as far as stating that the Affidavit evidence produced by the Applicant asserts that the 1st Interested Party was found in possession of implements suspected to be used in illicit printing of currency notes at his home and not the 2nd or 3rd Interested Party's home or business premises.

11.21 What is apparent is that the Interested Parties have failed to adduce any evidence to show that the counterfeit notes and the implements suspected to be

used in illicit printing of currency notes were not found in the possession of the 1st Interested Party and/or that the said notes were planted on him.

11.22 It is our considered view that the Applicant, having adduced evidence as a result of the search conducted on the 1st Interested Party's home and the subsequent investigations done, has shown that the HP Laptop, Cannon Printer and HP Printer are implements used in the illicit printing of currency notes and are tainted property and further the making or having in possession paper or implements for forgery as prescribed under **section 351** of the **Penal Code** is a felony offence liable to seven years imprisonment and therefore, a serious offence all within the meaning of **section 2** of the **FOPCA**.

11.23 The other items seized by the Applicant and which form part of the properties cited in the Notice of Motion as being tainted property and suspected proceeds of crime and therefore liable for forfeiture to the State are the five buses used for transportation business by the Interested Parties. Having considered the arguments submitted by the Parties herein, and as with the implements of the crime of forgery, we must now consider, on a balance of probabilities, if the buses are equally tainted property reasonably suspected to be

proceeds of crime and therefore liable to forfeiture to the State.

11.24 The Applicants submitted that other than implements for making money and the counterfeit notes, they recovered White Books for the buses, copies of which were exhibited and marked “**JKC3-7**”. That a printout from RTSA marked and exhibited as “**JKC15-18**” revealed that the owner of the buses was the 3rd Interested Party and that investigations at PACRA established that the 1st and 2nd Interested Parties were Directors in the 3rd Interested Party as seen from the exhibit marked “**JKC19**”. The Applicant submitted that further investigations revealed that the 3rd Interested Party had a bank account with Investrust Bank and that the said account was operational for only a year and was closed for lack of activity. A copy of the account opening application, exhibited and marked “**JKC20**”, showed that the 1st and 2nd Interested Parties opened the account on 23rd October, 2019 and a statement of the account, exhibited and marked “**JKC21**” was obtained.

11.25 It was the Applicant’s submission that the five buses were seized on 21st July 2022 and the 1st and 2nd Interested Parties were charged and arrested with the offence of being in possession of property suspected to be proceeds of crime contrary to **section 71 of FOPCA**.

Based on the evidence gathered, the Applicants believed that the properties seized, including the five buses, are tainted property liable for forfeiture to the State because they are proceeds of crime, having charged and arrested the 1st and 2nd Interested Parties for offences contrary to **section 351** and **358** of the **Penal Code**.

11.26 The Interested Parties submitted that the 1st interested Party's role was to collect daily cashings from the transport business and he neither purchased nor contributed any money towards the purchase of the buses. That the buses were purchased by the 2nd and 3rd Interested Parties and Grace Banda and that the 2nd Interested Party and Grace Banda had independent sources of income which they invested in the 3rd Interested Party for purposes of purchasing the buses. It was submitted that the 1st Interested Party has no ownership in both the buses and the 3rd Interested Party's share capital as he holds unpaid shares and never injected any funds into the 3rd Interested Party.

11.27 The Interested Parties did not dispute that the buses were owned by the 3rd Interested Party, however asserted that the 3rd Interested Party's interest in the buses is free of any serious crime either by itself or any of its agents directly or indirectly or indeed knowingly or unknowingly. That the 2nd and 3rd Interested Party

were unaware of any alleged criminal acts associated with the 1st Interested Party.

11.28 Based on the copy of the Certificate of Incorporation submitted by the Applicant, the 3rd Interested Party was incorporated as a company limited by shares on 28th June 2019 and that the 1st and 2nd Interested Parties are stated as Directors and beneficial owners as well as ordinary shareholders of the 3rd Interested Party having made an initial investment of K7,500.00 each. Bank documents equally lists the 1st and 2nd Interested Party as Directors when they opened the 3rd Interested Party's bank account with Investrust Bank on 23rd October 2019, which account was closed for inactivity.

11.29 The Appellant submitted that the 1st and 2nd Interested Parties did not have capacity to purchase the same. The Applicant has submitted that the 1st and 2nd Interested Parties as well as Grace Banda and Bridget Banda and the Drivers hired to drive the buses have stated that cashings were largely given to the 1st Interested Party to bank. The Appellants have alleged that the monies collected from the transport business could not justify the purchase of the buses and that the buses were proceeds of crime, the crime being the making of counterfeit notes. Further it was alleged that the transport business was only opened for the purpose of "cleaning" the counterfeit notes being made by the 1st

Interested Party and that investigations revealed that his MTN Mobile Money account was used to deposit the counterfeit notes and to withdraw genuine notes. It was the Appellant's contention that consequently the properties, including the buses, were therefore, tainted properties as they were used in the commission of an offence and are proceeds of crime.

11.30 Both Affidavits in Opposition submitted by the Interested Parties assert that the buses were bought from income from the 2nd and 3rd Interested Parties and Grace Banda, the mother to both the 1st and 2nd Interested Parties, and not from the 1st Interested Party's income. The 2nd interested Party claims that income derived from contracts as an electrician between 2016 and 2022 amounting to K430,000.00, an injection of capital from Grace Banda of K50,000.00 into the 3rd Interested Party and profits made by the 3rd Interested Party are what bought the buses. It was submitted that in 2019 the first bus was bought for K108,000.00, in February 2020, two buses were purchased via bank transfer to SBT Japan who had an account in Zambia, and the last two buses were purchased in a similar manner from income from the collections or cashings from the transport business of about K220,000.00.

11.31 Statements of income were exhibited in the Affidavit in Opposition dated 25th July 2023. Exhibits marked

“**HEB1**” to “**HEB3b**” show deposits into Grace Banda’s account held at Indo Zambia Bank from December 2022 through to February 2023. There is a cheque from Indo Zambia Bank dated 13th July 2023 made out to Grace Banda for K9,876.00. There are also two loan statements from AB Bank Zambia for Grace Banda showing that loans amounting to 41,000.00 were disbursed on 29th May 2021 and 31st May 2021. There is no evidence tendered to show that the deposits and loan amounts received by Grace Banda were deposited with the 3rd Interested Party and thereafter used to purchase the buses.

11.32 The Interested Parties further exhibited Investor Agreements made between the 3rd Interested Party and the 2nd Interested Party and Grace Banda. These Agreements purport to show monies invested in the 3rd Interested Party for the purchase of the buses. None of these Investor Agreements are dated and there was no evidence tendered to show that the said monies were deposited with the 3rd Interested Party into its account/s held anywhere for the purpose of purchasing the buses.

11.33 Other exhibits are contracts and letters of support to show jobs done by the 2nd Interested Party as an electrician. The letters from Green Blox and Green Energy dated 24th November 2015 and 21st July 2023

respectively, are letters of recommendation and confirmation of work the 2nd Interested Party did, but do not show how much he was paid for the jobs done. No further evidence was tendered to show that these monies were deposited with the 3rd Interested Party and into any account owned by the 3rd interested Party for the purpose of purchasing the buses.

11.34 There is exhibited a typed list of electrical works done for various clients and amounts paid presumably to the 2nd Interested Party. There is also a typed list of works done for Africab Zambia of Mungwi Road entitled "My Project" amounting to K129,000.00 and a contact number for a Mr. Mansu. The date of these works done is not given. There is no evidence tendered that these monies earned were deposited into an account owned by the 3rd Interested Party for the purpose of purchasing the buses.

11.35 There is also exhibited an Independent Auditor's Report or Financial Statement for the year ended 31st December 2019 by JNMA Chartered Accounts dated 21st June 2020 for the 3rd Interested Party purporting to show sources of income for the purchase of the buses. It was not deposited where in the Report this evidence is nor is there collaborating evidence of these monies deposited into the 3rd Interested Party's account/s for the purpose of purchasing the buses.

11.36 In the Affidavit in Opposition sworn by the 2nd Interested Party on behalf of the 3rd Interested Party dated 26th July 2023, it is not only averred that the 3rd Interested Party owns the buses but that the money used to purchase the buses was from the business itself being profits reinvested. The 2nd Interested Party alludes to a K72,000.00 as reinvested profits as shown in the Financial Statements exhibited in the Joint Affidavit in Opposition. We have perused the Financial Statement and have found nothing within it that shows this reinvestment. The 2nd Interested Party also refers to over K900,000.00 which he deposed are earnings from contracts including a K439,000.00, which monies were, *inter alia*, invested in the 3rd Interested Party for the purchase of the buses. There is no evidence tendered of the monies reinvested into the 3rd Interested Party bank accounts for the purpose of purchasing the buses.

11.37 There was exhibited “**EB1**” and “**EB2**” which were referred to as Statement of Director’s Financial Position created by JNMA Chartered Accountants of Lusaka and the electrical contracts with amounts earned from various customers respectively. The Statement of Director’s Financial Position as at 31st December 2022 for the 2nd Interested Party is dated 1st of January 2023. It shows an investment into the 3rd Interested Party of

K900,000.00. There is also exhibited a Statement of Investor's Financial Position for Grace Banda showing an investment of K1,115,000.00 into the 3rd Interested Party. These averments were in an effort to show that the 3rd Interested Party purchased and owns the buses and that the 1st Interested Party neither invested nor paid for his shares allotted to him and that he was only a nominal director in the 3rd Interested Party. However, not only are the dates of the purported investments after the fact, there is no evidence tendered of such investment paid into the 3rd Interested Party's account/s or evidence of payments from the account/s for the purpose of purchasing the buses.

11.38 There is no proof of bank transfers from the 3rd Interested Party's account/s made to purchase the two buses in April 2020 through bank or other statements or deposits slips showing payment for the buses purchased to SBT Japan's accounts purportedly held in Zambia. It is also not possible to ascertain whether the monies purported to have been earned and invested by the 2nd Interested Party and Grace Banda were deposited into the 3rd Interested Party's account/s and used to purchase the buses.

11.39 A perusal of the MTN Mobile Money account statements from January 2022 to October 2022 exhibited and marked "**JKC12**" show monies being

deposited, withdrawn or transferred largely by the 1st Interested Party. There has been no evidence tendered to show that the 1st Interested Party had income or monies from other activities other than the transport business whose cashings were submitted to him for banking. The 3rd Interested Party has not produced any bank statements or any other financial statements showing that the cashings were being deposited into its account/s regularly, be they bank or mobile money accounts to enable it to purchase the said buses.

11.40 We have further taken note that nowhere in the Interested Parties' submissions have they produced their Taxpayer Identification Number (TPIN), a unique ten-digit computer generated number allocated to a taxpayer upon registration with the Zambia Revenue Authority (ZRA), which is a prerequisite for any transaction with ZRA concerning taxes be they Domestic Taxes or Custom Services to show proof of taxes remitted on the earnings they claim were used to purchase the said buses.

11.41 There is no legitimate paper trail to show the Interested Parties income and expenditure that would justify the purchase of the buses and the only inference therefore is that the properties in question, are tainted property being proceeds of crimes and used as an

instrumentality in the commission of an offence and therefore liable to forfeiture to the State.

11.42 We are guided by the case of **National Director of Public Prosecutions Vs Pro. Cook Properties (Pty) Limited and 37 Gillepsie Street Durban (Pty) Limited and Boule Saad Nominees (Pty) Limited**⁽⁵⁾

where it was held as follows:

“Property will be an instrumentality of an offence if it plays a reasonable direct role in the commission of the offence. In the real or substantial sense, the property must facilitate or make possible the commission of the offence.”

11.43 Forfeiture operates as a punishment to remove the offending property, that is, remove the incentive for crime as stated in the **FOPCA** preamble *supra*. It is our considered view that the Applicant has on a balance of probabilities shown that the buses were proceeds of crime and an instrumentality of crime as the monies realised from the transport business were co-mingled with counterfeit notes in order to purchase goods and receive change in real Kwacha notes, and to deposit into the MTN Mobile Money Account and withdraw or transfer real Kwacha notes used to buy the properties in question.

11.44 This Court will now consider the second question whether the 2nd and 3rd Interested Parties and Grace Banda, in claiming interest in the 5 buses, have

sufficiently satisfied the requirements under **section 31(2) (b)** of the **FOPCA**, which applies to non-conviction based forfeiture, to enable this Court afford them the protection therein.

11.45 **Section 31(2)** states as follows:

“(2) Where a person claiming an interest in property to which an application relates satisfies the court that the person—

(a) has an interest in the property; and

(b) did not acquire the interest in the property as a result of any serious offence carried out by the person and

i. had the interest before any serious offence occurred; or

ii. acquired the interest for fair value after the serious offence occurred and did not know or could not reasonably have known at the time of the acquisition that the property was tainted property;

the court shall order that the interest shall not be affected by the forfeiture order, and the court shall declare the nature and extent of the interest in question.”

11.46 We take note that **section 31(5)** of the **FOPCA** states as follows:

“Sections six and seven, subsections (2), (3), (4) and (5) of section ten and sections eleven, twelve, fifteen, and sixteen shall apply with the

appropriate modifications as are necessary to an application for a forfeiture order under this section.

11.47 As with **section 31, section 12(1)** of the **FOPCA** affords protection to persons or third parties who have interest in property for which an application for a forfeiture order, following a conviction, has been made to claim the same. Such an application may be made before or after a forfeiture order has been made by the court.

11.48 **Section 12(5)** reads as follows:

“A person who makes an application under subsection (1) or (3) shall give notice of the application to the Director of Public Prosecutions, who shall be a party to any proceedings in the application.”

11.49 Therefore, for this Court to consider affording such protection, the persons or third parties must make a separate application by way of notice accompanied with an affidavit, skeleton arguments and list of authorities in support. Notice of the application must be given to the DPP as a party for his response.

11.50 It follows therefore that we are unable to consider the Interested Parties application with regards to **section 31(2)(b)** of the **FOPCA** erroneously contained in their Skeleton Arguments in Opposition filed on 21st July 2023 as it is irregularly before us. We are we are buttressed by the Supreme Court’s decision in the case

of **Access Bank (Zambia) Group Vs Group Five/ZCON Business Park Joint Venture**⁽¹²⁾ in which Malila JS (as he was then) in delivering the judgment of the court stated as follows:

*“In **NFC Mining Plc Vs Techpro Zambia Limited**⁽¹³⁾ we warned that failure to comply with rules by litigant could be fatal to their case, we dismissed that appeal in that case on account of the appellant’s failure to comply with the rules. We stated among other things that Rules of Court are intended to assist in the proper and orderly administration of justice and as such must be strictly followed”.*

11.51 It is our considered view that the Applicants have proved their case on a balance of probabilities and had reasonable grounds for suspecting that the property in question was derived or realised directly or indirectly, from unlawful activity. In the case of **R. Vs John Rondo**¹⁴ the New South Wales Court of Appeal stated that:

“...reasonable suspicion involves less than a belief but more than a mere possibility. There must be some factual basis for the suspicion; reasonable suspicion is not arbitrary”.

11.52 In the case of **The People Vs Austin Chisangu Liato**⁽⁸⁾ the Supreme Court stated as follows:

“It is clear to us from the very definition of ‘suspicion’, that there is a call to prove what may well be inconclusive. Suspicion, being essentially a state of

mind, is not in itself easy to prove with certainty. In fact, we think it cannot be proved conclusively and is, in itself to a large extent, subjective. What however, calls for proof under section 71 (1) of the Act is 'reasonable suspicion'. This necessarily entails that the suspicion ought to be based on some factual basis which removes the subjectivity implicit in ordinary 'suspicion'. If there are no grounds which make suspicion reasonable, then such suspicion is mere suspicion or is unreasonable suspicion. It is that factual basis which makes suspicion reasonable, that require to be established."

11.53 It is our further considered view that the Applicant has established factual basis which has convinced us that their suspicion is reasonable. That is, the 1st Interested Party, by virtue of being a co-owner and Director in the 3rd Interested Party and being the main recipient of the cashings derived from the transport business could reasonably be said to have been co-mingling the counterfeit notes with genuine Kwacha notes from the transport business in the manner alleged by the Applicant thereby enabling the Interested Parties purchase the said buses.

12. CONCLUSION

12.1 We hereby grant the Applicant's application for non-conviction based forfeiture order of tainted property as prayed being Toyota Hiace mini bus registration number BAP 4748 ZM, Toyota Hiace mini bus registration number BAP 2505 ZM, Toyota Hiace mini

bus registration number BAV 7611 ZM, Toyota Hiace mini bus registration number BAL 7651 ZM, Toyota Hiace mini bus registration number BAT 397 ZM, 1 HP laptop, Canon printer serial number KMVW75578 and HP printer serial number CN7AQ3QOTT.

12.2 The Interested Parties' application under **section 31(2)(b)** of the **FOPCA** as contained in their Skeleton Arguments in Opposition has failed as it is irregularly before us;

12.3 Costs are for the Applicant to be taxed in default of agreement; and

12.4 Leave to appeal is hereby granted.

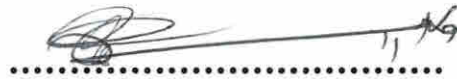
SIGNED AND DELIVERED AT LUSAKA THIS 4th **DAY**
OF DECEMBER, 2023.



.....
A. MALATA-ONONUJU
HIGH COURT JUDGE



.....
I. M. MABBOLOBOLO
HIGH COURT JUDGE



.....
S. V. SILOKA
HIGH COURT JUDGE