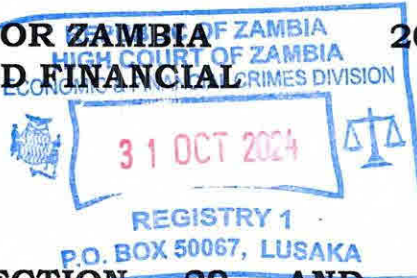


IN THE HIGH COURT FOR ZAMBIA 2022/HPEF/13
AT THE ECONOMIC AND FINANCIAL
CRIMES COURT
HOLDEN AT LUSAKA



(Civil Jurisdiction)

**IN THE MATTER OF: SECTION 29 AND 31 OF THE
FORFEITURE OF PROCEEDS OF CRIME
ACT NO. 19 OF 2010**

**IN THE MATTER OF: SECTION 19 (1) OF THE ANTI
CORRUPTION ACT NO. 3 OF 2021.**

**IN RE PROPERTY: SIMONGA FARM NO. 132a, CHIKANKATA
SOUTHERN PROVINCE OF THE
REPUBLIC OF ZAMBIA**

BETWEEN:

ANTI- CORRUPTION COMMISSION APPLICANT

AND

STARDY MWALE 1ST INTERESTED PARTY

MICHEAL WILLIAM ARNOLD 2ND INTERESTED PARTY

SUSAN CAROLYN ARNOLD 3RD INTERESTED PARTY

SIMONGA FARM LIMITED 4TH INTERESTED PARTY

STARDY MWALE GROUP 5TH INTERESTED PARTY

TRENDS STATIONERS AND 6TH INTERESTED PARTY

BUSINESS MACHINES

***BEFORE THE HONOURABLE JUSTICES S. M. WANJELANI, I. M.
MABBOLOBOLO AND S. V. SILOKA ON THE 31ST DAY OF
OCTOBER, 2024.***

For the Applicant:

*Ms. G. M. Muyunda, Assistant
Director Legal-Anti-Corruption
Commission*

***For the 1st, 5th & 6th Interested Parties: Mr. J. Tembo, Messrs Linus Eya &
Partners***

*Mr. L. Lemba, Mulungushi
Chambers*

For the 2nd, 3rd & 4th Interested Parties: Mr. L.K. Phiri and Ms. C. Z.
Mwansa, Messrs KBF &
Partners

JUDGMENT

MABBOLOBOLO, I. M. J, DELIVERED THE JUDGMENT OF THE COURT

A. CASES REFERRED TO:

1. *Various Items of Personal Property v United States* (1931)282. US 577
2. *Kumarnath Mohunram & Shelgate Investments Cc v The National Director of Public Prosecutions, BOE Bank Limited and The Law Review Project (As Amicus Curiae)*19/06[2007] ZAAC
3. *National Director of Public Prosecutions v RO Cook Properties (PVY)LTD 2004 (8) BCLR 844(SCA)*
4. *Ethics and Anti – Corruption v Patrick Ochieno Abachi & 6 Others* (2021) EKLK
5. *Nkobi Holdings (PTY) Limited & Another v The State* CCT86/66/20081
6. *Johaness Kenneth Siogopi (T/A Nam Transport Co A Partnership) v Director of Public Prosecutions Appeal 196 of (2020) ZMCA 45*
7. *Ventriglia and Manuela Sebastain Ventriglia v The People* Appeal No 37 OF2015
8. *BJ Poultry Farms Ltd v Nutrifeds Zambia Limited Appeal No.166 of 2015*
9. *Khalid Mohammed v The Attorney* (1982) Z.R. 49 (S.C)
10. *Zulu v Avondale Housing Project Limited Judgment No.31of 1982*
11. *Anti-Corruption Commission v Barnett Development Corporation Limited Appeal No. 10 of 2016*
12. *Rapid Global Freight Limited v Zambia Railways Appeal No.2016/2019*
13. *Nachanga Transport v The Director of Public Prosecutions CAZ Appeal 25 of 2020*
14. *Mpangwe Farms Limited and Others v The Attorney General 2004/HP/0010*

15. *Zambia Revenue Authority v Felimart Investments* 2020/HPA/0022
16. *Shuko Willie Chungu v Hilda Mwanza & 2 Others* (2022/HPH/053
17. *KACC v James Mwathethe Mulewa & Another* (2019) KEHC 3325 (KLR)
18. *Assets Recovery Agency v Joseph Wanjohi & Others.*
19. *Stanley Mombe Amuti v Kenya Anti-Corruption* (2019) eKLR
20. *Director of Public Prosecution v Dhiraj Dhumphuth* 2020/HP/1287
21. *U Rest Foams Limited v Puma Botswana PTY Limited & Another*, Appeal No.222 of 2016
22. *The People v Austin Chisangu Liato*, Appeal No.291/2014
23. *DPP v In Re Properties, Chiyeso Lungu*, 2020/HPEF/26
24. *OTK Limited v Amanita Zambiana Limited, Diego Gan Mana Casilli. Amanita Premum Oils Ltd* 2005 (HPC/0199 (2011)
25. *Kenneth Madungwe and Royd Kabwe Kashimoto v Albatros Mining* (2019/HP/0763) (2019) ZMHC2

B. LEGISLATION REFERRED TO:

1. *The Constitution of Zambia Chapter 1 of the Laws of Zambia*
2. *The High Court Act Chapter 27 of the Laws of Zambia*
3. *The Forfeiture of Proceeds of Crime Act No.19 of 20210*
4. *The Anti-Corruption Act No. 3 of 2012 of the Laws of Zambia*
5. *The Evidence Act Chapter 43 of the Laws of Zambia*
6. *The Electronic Communications and Transactions Act No. 4 of 2021 of the Laws of Zambia*
7. *The Lands Acquisition Act No. 189 of the Laws of Zambia*

1.0. INTRODUCTION AND BACKGROUND

- 1.1. This is the Judgment in an Application for a Non Conviction Based Forfeiture Order that was filed pursuant to **Sections 29 and 31 of the Forfeiture of Proceeds of Crime Act No. 19 of 2010** and **Section 19 (1) of the Anti – Corruption Commission Act No. 3 of 2012** as read together with **Order**

30 Rule 15 and 17 of the High Court Act Chapter 27 of the Laws of Zambia.

- 1.2. The Application filed on 3rd October, 2022, was accompanied by an Affidavit and Skeleton Arguments.
- 1.3. The Application was opposed by the 2nd, 3rd and 4th Interested Parties who filed their Affidavit in Opposition and Skeleton Arguments on 1st February, 2023.
- 1.4. On 7th February, 2023, the 1st Interested Party also filed his Affidavit in Opposition with accompanying Skeleton Arguments.
- 1.5. Along the way, the Advocates for the 2nd, 3rd and 4th Interested Parties, stopped making appearances even when Notices were sent out and consequently the Matter proceeded without them.
- 1.6. When the Matter came up on 2nd February, 2024, Mr. L. C. Lemba informed the Court that the 1st Interested Party had been in discussion with the Applicant on the observations made regarding certain Paragraphs in the Affidavit in Support of the Application and that the Parties had agreed to proceed by way of Consent. Ms. Chipanta on behalf of the Applicant confirmed that position. By Consent of the Applicant and the 1st Interested Party which Consent was duly endorsed by Court on 3rd April, 2024, the Parties agreed that the:

- 1.6.1. Applicant be allowed to amend the offending Paragraphs in the Affidavit in Support of the

Originating Notice of Motion filed on 3rd October, 2022, and that the same be filed by 9th April, 2024.

1.6.2. Interested Parties be allowed to file Affidavit in Opposition to the Amended Affidavit in Support of the Originating Notice of Motion by 16th April, 2024.

1.6.3. Applicant be at liberty to file Reply by 20th April, 2024, and that;

1.6.4. Matter comes up for hearing on 21st May, 2024.

2.0. AFFIDAVIT EVIDENCE

2.1. The Amended Affidavit in Support of the Originating Notice was sworn and filed on 9th April, 2024 by Clement Chipasha, an Investigations Officer in the employ of the Applicant and the case Office in the Matter.

2.2. The genesis of the Affidavit is that on 1st April, 2019, the Applicant received a Complaint as may be gleaned from Exhibit marked 'CC1' of alleged possession of unexplained property against the 1st Interested Party, then a Permanent Secretary in the Ministry of Defence, in the manner he purchased Simonga Farm No. 132a (the Farm) located in Chikankata, Mazabuka of Southern Province of Zambia at a cost of USD 2.5. Million. That consequently a team of Officers including himself were assigned to the case.

2.3. Mr. Chipasha averred that he did investigate the case and his period of interest was between the years 2016 and 2019 around which time the 1st Interested Party purchased the

Farm using both cash and Bank Transfer payments to the 2nd and 3rd Interested Parties.

- 2.4 According to the Deponent, his investigations established that on 11th August, 2018, the 2nd and 3rd Interested Parties being Shareholders of the 4th Interested Party by Letter marked '**CC2**' offered the 6th Interested Party to purchase Sub1 of Farm 132a in Southern Province at a value of USD 3, 000 (ZMW 3,000,000) and that this offer was accepted by the 1st Interested Party.
- 2.5. The Deponent stated that in the course of his investigations, he also discovered that a Contract of Sale marked "**CC3a-c**" was also executed on the same day when the Offer was made and the contract sum for the sale of Sub1 of Farm 132a in Southern Province was USD3,000 (ZMW3,000.000).
- 2.6. That upon perusal of the Contract of Sale, he discovered that Parties to the same were the 4th and 5th Interested Parties though the 2nd Interested Party signed as the vendor in his capacity as Managing Director/owner while the 3rd Interested Party witnessed the said Contract in her capacity as Director/Secretary. Further that on the other part, the 1st Interested Party executed the Contract as purchaser for and on behalf of the 5th Interested Party trading as the 6th Interested Party and it was witnessed by Mr. Zulu the Sales Manager despite the other Party to the said Contract being the 5th Interested Party.
- 2.7. It was the Deponent's averment that he conducted a search at the Patents and Companies Registration Agency (PACRA)

and established that the 4th Interested Party is a Company which was incorporated on 1st October, 1979, in Zambia whose nature of business is mixed farming as can be seen from the Certificate of Incorporation marked “**CC4**”. That upon perusal of the (**PACRA**) printout, marked “**CC5a-b**” the Deponent established that the majority Shareholder in the 4th Interested Party is the 2nd Interested Party with 3333333 ordinary shares with Saket Talwar as Secretary. That the search further established that the 1st Interested Party is the sole Shareholder of the 6th Interested Party, a Company incorporated and registered in Zambia.

- 2.8. A related deposition is that the search conducted at **PACRA** referred to in the preceding Paragraphs also established that there was no Company registered under the 5th Interested Party’s name, despite the Contract of Sale in the Parties’ clause reflecting the Parties as being the 4th Interested Party of the one part and the 5th Interested Party of the other part.
- 2.9. It was deponed that his investigations further established that despite the 1st Interested Party having purchased Sub1 of Farm 132a in Southern Province on 11th August, 2018, and ownership of Title has not passed to the 1st Interested Party as may be gleaned from the copy of the Certificate of Title marked “**CC6**”. That upon further perusal, the Deponent discovered that the extent of the land as per Certificate of Title for Farm No. 132a is 1227.1673 hectares while the Contract of Sale indicated that what was being sold to the 1st Interested

Party was Sub1 of Farm 132a which is in extent of 170.0915 hectares.

2.10. According to the Deponent, he then went to conduct a search at the Ministry of Lands and upon perusal of the Lands Register, he discovered from the Lands Print Out marked **"CC7"** that it does not indicate anywhere that the 1st, 5th, or 6th Interested Parties are intended purchasers of Farm No. 132a in Southern Province or any of its Subdivisions. That in the company of Mr. Ferguson Kombe, the Deponent then went to conduct a physical Inspection of Farm No. 132a in Southern Province and subsequently produced an Inspection Report dated 16th September, 2020, and marked **"CC8"**. Further that he consequently recommended that Farm No. 132a Southern Province be valued by the Government Valuation Department and, accordingly it was valued at ZMW 29,475,000 as indicated in the Government Valuation Report marked **"CC9"**.

2.11. It is the Deponent's further averment that he conducted a search at First National Bank (FNB) Mazabuka Branch where he was informed by Vincent Tembo, the then Relationship Manager, that the 4th Interested Party held a Kwacha Account No. 62340113232 and a Dollar Account No. 62472697196 as indicated in the copies of Kwacha and Dollar Bank Statements marked **"CC10 a-d"**. That the search also revealed that the signatories to the Dollar and Kwacha Accounts for the 4th Interested Party were the 2nd and 3rd Interested Parties and that on 25th August, 2018, there was

a Board Resolution to allow the 1st Interested Party to be added as a signatory on the 4th Interested Party's FNB Bank Accounts as shown in the FNB Account Mandate and Board Resolution marked "**CC11 a-d**". Further that the Deponent's investigations established that on 28th August, 2018, Mr. Vincent Tembo, the Relationship Manager for FNB Mazabuka Branch, received an instruction from the 4th Interested Party's Board of Directors to include the 1st Interested Party as a signatory to the said Farm Accounts as per Board Resolution.

2.12. The Deponent averred that he further conducted a search at First Capital Bank where he established that the 1st and 6th Interested Parties maintained personal and Company Accounts respectively as shown in copies of Bank Statements marked "**CC12a -b**".

2.13. According to the Deponent, he further established that the 1st Interested Party was employed as Permanent Secretary for the Ministry of Defence between December 2016 to early 2020. That his investigations also established that prior to the execution of the Contract of Sale for Sub1 of Farm 132a, the Government of the Republic of Zambia acting through the Ministry of Defence (MoD), entered into a Contract with African Security Academy (ASA) on 18TH July, 2016 for the supply and delivery of uniforms to the Zambia National Service for a Contract sum of USD 47,197,129.00, as maybe gleaned from exhibit marked "**CC13**".

2.14. That the Deponent conducted another search at **PACRA** where he established that ASA is a Polish Company, with a Zambian representative company registered with **PACRA** as African Security Academy Limited and that the shareholding for the Zambian representative company is 7000 held by Dariusz Prigan, a Polish national and 3000 held by Savenda Academy of Excellency Limited as shown in the PACRA print out marked "**CC14**". Further that the search conducted also revealed that Savenda Academy of Excellency had Mr. Clever Siame Mpoha, a Zambian National as one of its Directors as indicated in the **PACRA** print out marked "**CC15**".

2.15. It was averred that the Deponent's investigation also established that prior to the said Contract for the supply and delivery of uniforms between MoD and ASA, ASA had entered into a Service Agreement with Savenda Management Service which entitled Mr. Mpoha 50% of the funds emanating from ASA Contracts secured in Zambia. That the search conducted by the Deponent at **PACRA** also revealed that Savenda Management Services also had Mr. Clever Siame Mpoha, a Zambian national as one of its Directors as shown in the **PACRA** Print Out marked "**CC17**".

2.16. According to the Deponent, he established further that on 12th August, 2016, the Government through the Ministry of Finance (MoF) subsequently entered into a Supplier Credit Agreement marked "**CC18**" with ASA for financing of the contract of the supply and delivery of uniforms at a cost of USD 47,197,120. That on perusal of the said Agreement, the

Deponent discovered that the Government of the Republic of Zambia, was required to make an upfront payment to ASA as Arrangement Fees of USD 353,978.40, Management fees of USD 471,971.20 and Insurance Premium of USD 849,548.16 aggregating USD 1, 675, 497,76.

2.17. According to the Deponent, his investigations revealed that on 6th September, 2017, the 1st Interested Party was engaged in his capacity as Permanent Secretary for Ministry of Defence MoD by ASA to facilitate the securing of a payment amounting to USD 1, 675, 494.76 which was owed to ASA by Ministry of Finance (MoF), as shown in the copy of a Letter marked **“CC19”**. That further the Deponent’s investigations established that the 1st Interested Party subsequently wrote a Letter marked **“CC20a-b”** to the Secretary to the Treasury on 7th September, 2017, as Permanent Secretary and submitted a copy of the invoice relating to the said payment as Management and Insurance Fees claimed by ASA and requesting facilitation of the financing of the purchases.

2.18. The Deponent averred that his investigations revealed that on 1st November, 2017, Ministry of Finance MoF made a transfer of USD 1, 675, 497.76 from its Account No. 001100370149 to ASA Poland of Account No. 57160014621833279 20000002 held at BGZBNPPARIBAS S.A as payment of facility fees as shown in proof of payment marked **“CC21”**. That the Deponent’s investigations established that despite the payment of USD 1, 675, 497.76 being paid to ASA on 1st November, 2017, no evidence had been found to suggest that

the Secretary to the Treasury approved this expenditure in accordance with the Law and that procedure was followed in the manner the payment was processed as the money was not budgeted for nor was the Credit Supplier Agreement entered in the Debt Management Financial Analysis System at MoF.

2.19. Deponing further, it was averred that the Deponent established that on 8th November, 2017, Eagle Trading International Limited received USD 527, 448.88 with the narration African Security Academy SPZ00LILZECKA 263/P invoice SMS 012-2017. That further investigations established that this was less 50% claim from payment received from MoF as Arrangement Fee, Management Fee and Insurance fee according to the Bank Statement marked **“CC22”** for the supply Credit Agreement dated 12th August, 2016.

2.20. The Deponent averred that his investigations also established that on 4th April, 2018, Eagle Trading International invoiced (SMS 012- 2017B) ASA Poland USD 837, 748.88 with the narration being 50% claim from payment received from MoF as Arrangement Fee and Insurance Fee, for the Supply Credit Agreement dated 12 August, 2016. That it was further observed that Eagle Trading International indicated that the amount could be paid to its Standard Chartered Dollar Account No. 8700260963000 with Swift Code: SCBIZMLX, Bank Sort Code: 060017 as shown in the Invoice marked **“CC23”**.

2.21. According to the Deponent, his analysis of the Bank Statement of Eagle Trading ("**CC22**") and the Invoice from Eagle Trading to ASA showed that the payment of USD 527, 448.88 made to Eagle Trading was paid before the company issued an invoice. That the invoice was issued on 4th April, 2018 and yet the payment was made on 8th of November, 2017. Further that the Deponent's analysis above also showed that the Invoice number for the payment of USD 527, 448.00 was the same as the Invoice number of USD 837, 748.88.

2.22. According to the Deponent, his search at PACRA revealed that Eagle International Trading is a Zambian Registered Company whose nature of business includes transportation support activities, mining, retail sales and support services for other mining activities in which Clever Mpoha is a Director and Majority shareholder and Esther Chanda is the other Director as shown in the PACRA print out marked "**CC24**".

2.23. Further that the Deponent's investigations also revealed that Eagle International Trading holds a Dollar Account No. 8700260963000 with Standard Chartered Bank domiciled at Central Mall Branch, Lusaka as shown in the Bank Statement marked "**CC25**". That his investigations also revealed that on 18th April, 2018, Mr. Mpoha effected a transfer of USD 200,000 from Eagle Trading International Limited Account No. 87002693000 to the 4th Interested Party's Account number 63472697196 held at FNB with the narration 'Farm Equipment' as shown in the Bank transfer

and Bank Statement marked **“CC26a-b”**. That this was prior to the execution of the Contract of Sale from Simonga Farm being Sub 1 of 132a Southern Province between the 4th and 5th Interested Parties.

2.24. According to the Deponent, his analysis of the Bank Statement above reveals that the sum of USD 200,000.00, was transferred but USD 35 was deducted by the Bank as sending fee hence only USD 199,965.00, was received in the 4th Interested Party's Account Number 62472697196 held at FNB as shown in the proof of payment marked **“CC27”**.

2.25. The Deponent averred that he in the company of other Officers, further conducted a search at Eagle Trading International Limited where one of the Officers from the Applicant by the name of Moonga Shamwiinga collected the phone belonging to Mr. Mpoha and later took screenshots of conversations marked **“CC28a-j”** between the 1st Interested Party and Mr. Clever Mpoha from the said phone which showed that the 1st Interested Party was asking for help to settle part payment towards the purchase of Simonga Farm. That the Deponent then analyzed the said screen shots and discovered that the 1st Interested Party and Mr. Clever Mpoha had these conversations way before USD 200,000.00, was made by Eagle Trading International Limited to the 4th Interested Party.

2.26. A related averment is that the Deponent witnessed the recording of the Warn and Caution Statement by Mr. Ferguson Kombe from the 1st Interested Party. That the 1st

Interested Party upon being shown the screenshots confirmed that Mr. Clever Mpoha helped him to settle part of the payment of the purchase of Simonga Farm on 18th April, 2018, by transferring a USD 200,000.00 from Eagle Trading International of Account No. 8700260963000 to the Simonga Farm Dollar Account No. 62472697196 as shown in the certified true copy of the typed and handwritten Warn and Caution Statement dated 10th November, 2020, marked **“CC29”**.

2.27. It was averred that the Deponent was informed by Mrs. Mkosi Munalula Shikaputo, the Branch Manager for Cavmont Kalingalinga Branch, that on 28th September, 2018, she received a Loan and Overdraft Application form marked **“CC30”** from the 1st Interested Party amounting to ZMW 2,000.000 and ZMW 400,000 meant for the purchase of Simonga Farm being Sub 1 of 132a Southern Province and working capital for a period of two (2) years and 12 months respectively.

2.28. A follow up averment is that the Branch Manager for Cavmont Kalingalinga Branch also advised the Deponent that the 1st Interested Party provided an Evaluation Report for his Property Plot No. 18 of Block 24, off Simon Mwansa Kapwepwe Road as security, Audited Cash Flow Projections, Contract of Sale relating to the sale of Simonga Farm being Sub1 of 132a between the 4th Interested Party and the 5th Interested Party and an accompanying Certificate of Title for Simonga Farm No. 132a. Further that the Branch Manager

advised the Deponent that the Bank declined the Laon application based on the fact that the 1st Interested Party had not provided the financial statements for the Simonga Farm to help the Bank assess the client's repayment ability.

2.29. According to the Deponent, his investigations also established that on 13th October, 2017, the 1st Interested Party made payment of ZMW 2,500,000 which he remitted from his Account held at First Capital Bank to the 4th Interested Party's Account held at First National Bank for purposes of purchasing the Farm and that again this was before the Contract of Sale for Simonga Farm was executed as shown in the bank transfer and a proof of payment marked **"CC31 a-b"**.

2.30. Deponing further, it was stated that the Deponent interviewed a Mr. Regis Mada who was the Farm Manager for Simonga Farm in early 2015, he found two trucks (a Mercedes Benz and a blue Toyota Dyna), white Mahindra van and one green John Deere Tractor, one Bailing Machine, two Grinding Mills, one Feed Mixer, a Disc Harrow, a Boom Sprayer and a Roller and confirmed that all the vehicles were operational by then including the two Grinding Mills.

2.31. It was averred that the Deponent's investigations also revealed that while the Contract of Sale for Sub 1 of 132a was quoted at ZMW 3, 000,000, what was paid towards the purchase of the Farm is USD 200,000 (ZMW 2,000.000.00) and K.2.5 Million thus exceeding the said contractual sum.

- 2.32. The Deponent averred that he has reasonable suspicion that although the Contract of Sale was for Sub 1 of 132a, the said contract was only generated for purposes of obtaining a loan from the Bank which unfortunately was declined. That however, the agreement between the parties, although no Contract of Sale was found during his investigations, was for the sale of the entire farm being Farm No. 132a and this is based on the fact that the payment towards purchase of the farm exceeded the contractual sum.
- 2.33. Further that the Deponent requested that information regarding tax statuses of, among others, the 6th Interested Party be availed by the Zambia Revenue Authority as shown in the Tax Compliance Report marked "**CC32**" and dated 28th July, 2023. That upon analysis of the Tax Compliance Report, it revealed that there was no Property Transfer Tax paid in respect of the Sale of the said Farm, thus the Interested Parties evaded paying Tax as provided by the law.
- 2.34. The Deponent avers that he has reasonable suspicion to believe that the funds transfer by Mr. Mpoha for the purchase of Sub1 of 132a Farm were corruptly paid for the benefit of the 1st Interested Party for having facilitated the payment of USD 1, 675, 497 to ASA of Poland, a company in which Mr. Mpoha owns 3000 shares through his company called Savenda Academy of Excellence Limited.
- 2.35. According to the Deponent, he discovered through his investigations that the 1st Interested Party purchased Simonga Farm through funds co-mingled with funds

reasonably suspected of being proceeds of crime. That the Applicant seized Simonga Farm through a Warrant of Seizure dated 2nd June, 2022 as deposed by one Ferguson Kombe and the same was handed over to the Deponent. Further that based on the foregoing, the Deponent recommended that the Applicant applies for the entire Farm No. 132a to be forfeited to the State for having been purchased using funds reasonably suspected to be proceeds of crime.

2.36. The Affidavit in Opposition to the Amended Affidavit in support of Originating Notice of Motion was filed by Stardy Mwale, the 1st Interested Party. The gist of it is that he has been involved in several business ventures as shown from PACRA printouts collectively marked “**SM1**” from as back as late 1990 as follows:

2.36.1. *Chisanga Chilima Farms Limited with an estimated annual turn over of above ZMW 2, 000.000.00*

2.36.2. *Trends Stationers and Business Machines with an estimated annual turnover of above ZMW 3,000,000.00.*

2.36.3 *Masaiti Beams Motel with an estimated annual turnover of above ZMW 2, 000,000.00 per annum.*

2.36.4. *Riso Trends Zambia Limited with an estimated annual turnover of above 2,000,000.00.*

2.37. A related averment was that Trends Stationers and Business Machines is a business specialized in the Distribution, Supply and Maintenance of various business machines with

international business reputation spanning a number of years as may be seen from copies of various dealership appointments collectively marked “**SM2**”. That Trends Stationers and Business Machines has been procuring Business Machines from authorized dealers and supplying the same to the Zambian market as shown in a copy of Bank Transfer and other invoices for purchases of business machines and consumables collectively marked “**SM3**”.

2.38. Averting further, it was stated that Trends Stationers and Business Machines and Riso Trends Zambia Limited have been dominant suppliers of office machines and consumables on the Zambian market and enjoys massive share of the market supplying Universities, Government Schools, Private Schools and many other businesses as may be seen from the list of clients, copies of Contracts, Invoices and payment vouchers collectively marled “**SM4**”.

2.39. According to the Deponent, he also served as Permanent Secretary in the Government of the Republic of Zambia from 2014 to 2020 and that in 2017, he was paid gratuity in excess of K2,500,000.00, part of which he invested into his business activities which included placing some money in Fixed Deposit Accounts.

2.40. It was averred that sometime in 2015, the Deponent engaged the 2nd and 3rd Interested Parties in their capacities as Directors and Shareholders in the 4th Interested Party with a view of purchasing a portion of Farm No. 132a in Chikankata District of Southern Province. That some time in 2017, the

2nd and 3rd Interested Parties on behalf of the 4th Interested Party informed the 1st Interested Party that a resolution had been reached on behalf of the 4th Interested Party to sell a portion of Farm No. 132a in Chikankata District Southern Province at a consideration of ZMW 3, 000,000.00 and a variety of livestock as proposed in the negotiation with the 1st Interested Party.

2.41. The Deponent stated that acting in his capacity as owner of the business referred to above, he verbally agreed with the 2nd, 3rd and 4th Interested Parties that he would purchase from them a portion of Farm 132a. That in pursuance of the agreement, the Deponent caused to be sent to the 4th Interested Party's Farm a number of animals that included cattle, goats and sheep as part consideration for the purchase of the Farm.

2.42. That sometime in 2017, the Deponent paid into the 4th Interested Party's Account a sum of ZMW 2,500,000.00 as part consideration for the purchase of a portion of Farm No. 132a. That it was agreed that the 4th Interested Party would commence the process of subdividing the property and marking off the proposed subdivision after the payment of the consideration as the papers had been submitted to the 4th Interested Party's Lawyers.

2.43. It was averred that sometime in 2018, the 2nd and 3rd Interested Parties approached the 1st Interested Party and offered for sale to him the remaining extent of Farm No. 132a in Chikankata as they had made a decision to relocate to

Australia. That it was agreed that the 1st Interested Party would assume control of the business of the 4th Interested Party and use the proceeds from there to pay for the purchase of the remaining extent of Farm No. 132a.

2.44. A related averment is that the 1st Interested Party took vacant possession of subdivision 1 No. 132a in 2017 and there was no agreed time frame for the payment of the purchase price of the remaining extent of Farm 132a as the same was tied to the business of the 4th Interested Party as a going concern and the approval of the loans by the various Financial Institutions that the 1st Interested Party and his entities had approached for financing.

2.45. Averring further, it was stated that following the failure by the financial institutions approached by the 1st Interested Party to finance the purchase of the Farm, the 4th Interested Party took out an action against the 1st Interested Party in the High Court for Zambia on 23rd April, 2021, claiming *inter alia* the payment of USD 530,000.00, as the balance of the purchase price as may be gleaned from copies of the Writ of Summons, Statement of Claim, Amended Defence and Counterclaim marked “**SM6**”.

2.46. The Deponent stated that sometime in February, 2022, he was arrested by Officers from the Applicant and that he is currently appearing before Honorable Sylvia Munyinya in the Lusaka Subordinate Court as may be seen in the copy of indictment marked “**SM7**” and that in these proceedings, he

has heard no evidence adduced to support the charges of corruption levelled against him.

2.47. According to the Deponent, he was informed by Mr. Moonga Shamwiinga during Court Proceedings that he did not find anything of evidential value during his interaction with an iPhone 8 seized from Mr. Clever Mpoha during the conduct of his forensic analysis as indicated in the copy of the Report by Mr. Moonga Shamwiinga marked **“SM8”**. That he was informed by Moonga Shamwiinga during Court Proceedings that a Digital Forensic Report marked **“SM9”** is generated every time something of evidential value is found on a digital device.

2.48. It was deposed that the 1st Interested Party had been shown a copy of an interview marked **“SM10”**, which the Applicant through Mr. Clement Chipasha had conducted with Mr. Dariusz Prigan. That in the same video between 18 minutes to 19 minutes, the Deponent heard Mr. Clement Chipasha asking Mr. Dariusz Prigan to confirm the contents of a purported letter that talks about a USD 527,000.00 used to distribute to the PS at Ministry of Defence at the Ministry of Finance and Darius Prigan refused to attest to that information and in fact confirmed that the transaction was business to business.

2.49. That between 23 minutes to 26 minutes, the Deponent heard a Dr. Musonda clarifying the allegations that Mr. Mpoha had given money to the Secretary to the Treasury, Permanent Secretary Ministry of Defence and the three Directors.

Further that in the same video, he heard Mr. Musonda confirm that Mr. Mpoha did not pay anyone in the Ministry of Defence and Finance to facilitate for the payment of the money and that he heard Mr. Prigan confirm that Mr. Mpoha was not involved with the Contract except for the bidding process.

2.50. The Deponent averred that in the same video referred to above, he heard Mr. Clement Chipasha constantly asking Mr. Dariusz Prigan to confirm the contents of a purported letter that talks about a USD 527,000.00 allegedly used to distribute to the PS at the Ministry of Defence and at the Ministry of Finance and Dariusz Prigan refused to attest to that information and repeatedly, told Mr. Chipasha that the payment was a business to business arrangement.

2.51. That despite the transaction being labelled corrupt, the Deponent had seen a document from the Ministry of Finance and a copy of the Bank Statement for Mr. Dariusz Prigan showing that sometime in July, 2023, the Ministry of Finance did pay the money for the financing supply and delivery of uniforms to African Security Academy through the medium of Muleza Mwimbu and Company as shown in the documentation trail of payments marked **“SM11”**. Further that the allegations in the criminal charges are the same as the claims in this application.

2.52. According to the Deponent, sometime in April, 2022, the Anti-Corruption Commission sent Officers with what purported to be a Seizure Notice and evicted him from Subdivision 1 of

Farm No. 132a on allegation that he had purchased the entire farm 132a using proceeds of crime.

2.53. He averred that he did not purchase the entire Farm No. 132a but instead paid for a Subdivision 1 of Farm No. 132a using proceeds from his gratuity and business activities. That he has never received any money from Mr. Clever Mpoha or Eagle Trading Limited for the purchase of Farm No. 132a as an inducement for him to facilitate for the payment of money to African Security Academy. Further that he has never admitted nor confirmed to anyone including the Applicant having received help from Mr. Clever Mpoha for purposes of purchasing Farm No. 132 on 18th April, 2018 and neither had he confirmed to anyone that he received a USD 200,000.00 from Clever Mpoha.

2.54. It was deposed that the Deponent had read the 2nd and 3rd Interested Parties' Affidavit filed into Court and wished to refer the Court to Paragraph 48 where the 2nd and 3rd Interested Parties confirm receipt of USD 200,000.00 as payment for Farm Development Equipment. That he is informed by Mr. William Arnold that the USD 200,000.00 paid by Eagle Trading Limited to the 4th Interested Party was meant for Farm Development Equipment which equipment was collected from Simonga Farm in 2018 as indicated in the acknowledgment for the farm equipment marked **"SM12"**.

2.55. Concluding his deposition, the 1st Interested Party stated that he is a party to the dispute over the completion of the sale of the remaining extent of Farm No 132a which is still active in

Court before Honorable Madam Justice C. C. Zulu under Cause No. 2021/HP/0452.

2.56. As indicated in Paragraph 1.3. above, the 2nd, 3rd and 4th Interested Parties filed an Affidavit in Opposition on 1st February, 2023, deposed to jointly by Micheal William Arnold and Susan Carolyn Arnold in their capacity as Directors and shareholders in the 4th Interested Party.

2.57. The Deponents averred that sometime in 2017, the 4th Interested Party through its Directors (the 2nd and 3rd Interested Parties) agreed to sale to the 6th Interested Party a portion of Farm No. 132a Chikankata, Southern Province measuring approximately 170.0915 hectares and the same to be marked off from the mother title relating to Farm No. 132a, Chikankata, Southern Province. That further to the foregoing, by verbal agreement sometime in July, 2018, the 4th Interested Party through its Directors agreed to sale to the 6th Interested Party the remaining extent of Farm No. 132a Chikankata Southern Province at a consideration of USD 550,000.00 based on a recent Valuation Report marked **“MWASCA1”** which had pegged the same at USD 560,000.00.

2.58. It was deposed that the 4th Interested Party sometime in 2020, obtained from the Ministry of Lands Certificate of Title No. 73999 relating to Subdivision 1 of Farm No. 132a Chikankata, Southern Province and Certificate of Title No. 73996 relating to the remaining extent of Farm 1321 Chikankata, Southern Province as shown in the true copies of Titles collectively marked **“MWASCA2”**. That in respect of

the sale relating to the remaining extent of Farm No. 132, it was agreed that the 1st Interested Party would pay a deposit of USD 275, 000 to the 2nd and 3rd Interested Parties upon obtaining a loan from a Bank.

2.59. A related averment is that it was agreed between the 1st Interested Party and the 2nd, 3rd and 4th Interested Party that the 1st Interested Party was allowed to take vacant possession of the Remaining Extent of Farm No. 132a as well as take full control of the operations of the 4th Interested Party's business for reason that the 2nd and 3rd Interested Parties were relocating from Zambia to Australia. That to that effect a Board Resolution was passed in order that the 1st Interested Party be put on the Bank Mandate by reason that the operations including finances of the 4th Interested Party was now in the control of the 1st Interested Party as agreed by the Parties. Further that the 1st Interested Party was in control of the finances of the 4th Interested Party upon taking vacant possession of the Remaining Extent of Farm No. 132a Chikankata, Southern Province.

2.60. According to the Deponents, it was agreed that the 1st Interested Party and the 2nd and 3rd Respondents as Directors of the 4th Interested Party that the 2nd and 3rd Interested Parties would proceed to either

2.60.1. Transfer all the shares in the 4th Interested Party to the 1st Interested Party upon payment of the full contract price relating to the sale of the

*Remaining Extent of Farm No. 132a Chikankata,
Southern Province, or*

2.60.2. The 4th Interested Party would be liquidated upon receipt of the full purchase price relating to the remaining Extent Farm No. 132a, Chikankata, Southern Province.

2.61. It was averred that the 2nd and 3rd Interested Parties relocated to Australia in August 2018.

2.62. A further averment by the Deponents is that the 1st Interested Party unsuccessfully applied for a loan with Cavmont Bank and First National Bank in order to pay the agreed deposit of US\$ 275,000.00 relating to the purchase of Farm No. 123a, Chikankata, Southern Province. That the 1st Interested Party failed to pay the deposit for the purchase of the Remaining Extent of Farm No. 132a Chikankata, Southern Province as agreed despite having taken vacant possession and assuming full and exclusive control of the operations of the 4th Interested Party's business.

2.63. According to the Deponent, in January, 2019, the 1st Interested Party promised the 2nd and 3rd Interested Parties that he would advance a sum of US\$ 200,000.00 by 14th February, 2019, and US\$ 10,000.00 by 28th February, 2019, to go towards the purchase of the Remaining Extent of Farm No. 132a Chikankata, Southern Province. That the 1st Interested Party failed to pay as agreed and consequently promised the 2nd and 3rd Interested Parties that he would instead borrow US\$200,000.00 as part payment of the

Remaining Extent of Farm No. 132a Chikankata, Southern Province and that further the 2nd and 3rd Interested Party could withdraw US\$5,000.00 from the 4th Interested Party's Account which sums would be deducted from the purchase price until full and final settlement of the contract price. Further that the 2nd and 3rd Interested Parties were only paid US\$31,000.00 through monthly deductions/withdraws from the 4th Interested Party's Account and nothing more thereby leaving the out-standing balance of US\$ 519,000.00.

2.64. It was deposed that the 1st Interested Party having failed to pay the consideration price for the purchase of the Remaining Extent of Farm No 132a, the 4th Interested Party commenced an action against the 1st Interested Party on 23rd April, 2021, under cause No. 2021/HP/0450 before Honourable Madam Justice C.C. Zulu as shown in the true copy of the Writ and Statement of Claim, Defence and Counter claim, Reply to Defence and Counterclaim and Reply to Defence and Counterclaim collectively marked "**MWASCA3**". That the reliefs being sought by the 4th Interested Party against the 1st Interested Party under the said cause are, among others.

2.64.1. *Payment of the sum of USD 530,000.00 being the balance of the purchase price of part of Farm No. 132a.*

2.64.2. *In the alternative, an order for possession of Farm No. 132a together with all machinery and poultry equipment therein.*

2.64.3 *An order for repayment and/or to account for all income collected from the operations of the Farm since 1st August, 2018.*

2.64.4. *Order for mesne profits*

2.64.5. *An Order that the Defendant therein is liable for the payment of all NAPSA contribution and outstanding penalties on NAPSA contributions that have accrued on the Simonga Farm Account during the period that he has been operation on the Farm being an agent and/or an officer of the Plaintiff company.*

2.64.6. *Damages for breach of contract.*

2.65. The Deponent reiterated that the 1st Interested Party has never purchased Simonga Farm No. 132a at a cost of USD 2.5 Million but rather acquired Subdivision 1 of Farm No. 132a whose title is still in the 4th Interested Party's name and is being held as a lien in respect of amounts owing for the contract for the purchase of the Remaining Extent of Farm No. 132a, Chikankata, Southern Province pending determination of the proceedings under Cause No. 2021/HP/0452.

2.66. It was deposed that the 2nd and 3rd Interested Parties have never offered to the 6th Interested Party to sale Simonga Farm at a value of USD 3,000 (ZMW 3,000,000) but rather Subdivision 1 of Farm No. 132a at the value of US\$ 550,000.00.

2.67. The Deponents' averment is that Title to the Remaining Extent of Farm 132a belongs to the 2nd, 3rd and 4th Interested Parties and has never been acquired by the 1st or indeed the 5th or 6th Interested Parties. That the 1227.1673 hectares relate to the mother Title of Simoonga Farm No. 132a before the subsequent subdivision of 17.0915 hectares which relates to what was Subdivision 1 of Farm 132a, Chikankanta, Southern Province.

2.68. According to the Deponents, payment of ZMW 2, 500,000.00 made by the 1st Interested Party into the 4th Interested Party's Bank Account relates to the purchase by the 6th Interested Party of Subdivision 1 of Farm No. 132a and not the Remaining Extent of Farm No. 132a Chikankata, Southern Province. That the 1st Interested Party was given vacant possession of the Remaining Extent of the farm 132a as well as full control over the 4th Interested Party's business and finances and Mr. Regi's Mada remained an employee of the 4th Interested Party responsible for invoicing all egg sales, organizing procurement of stock feed and running the wages programme which included National Pension Scheme Authority (NAPSA) contributions and Pay As You Earn (PAYE) for employees.

2.69. The Deponents reiterated that the Contract of Sale for K3,000,000.00, was executed to aid the 1st Interested Party to obtain a loan to pay off the Contract price relating to the sale of the Remaining Extent of Farm No. 132a. That furthermore, the 1st Interested Party or indeed the 5th or 6th

Interested Parties have never paid to the 2nd, 3rd and 4th Interested Parties USD 200,000.00, for the purchase of either Subdivision 1 of Farm No. 132a or the Remaining Extent of Farm No. 132a Chikankata, Southern Province, but the same was payment for farming equipment as indicated on the Bank transfer form.

2.70. In the Affidavit in Reply to the 1st Interested Party's Affidavit in Opposition filed by Mr. Clement Chipasha on 9th October, 2023. He stated that they had received a complaint as stated in the Affidavit in Support as per exhibit "**CC1**".

2.71. According to the Deponent, his investigations established that contrary to the assertion by the 1st Interested Party, their business ventures do not date as far back as the early 90s as can be seen from the exhibit marked "**SM1**" in the 1st Interested Party's Affidavit in Opposition which show that:

- (i) Trends Stationers and Business Machines was incorporated on 20th October, 2003.*
- ii) Masaiti Beam Motel was incorporated on 20th January, 2010.*
- iii) Riso Trends was incorporated on 12th April, 2007 and*
- iv) Chisanga Chilima Farms was incorporated on 3rd November, 2020.*

Further that the said allegation of the 1st Interested Party being in Possession of Property Suspected of being Proceeds of Crime occurred between 2017 to 2018 which is before Chisanga Chilima Farms was incorporated.

- 2.72. It was deposed that although the 1st Interested Party is alleging that his companies stated above have been operational and making huge amounts of profits and turnovers, a search conducted at Zambia Revenue Authority (ZRA) revealed that Chisanga Chilima Farms and Riso Trends had either been filing Nil Returns or they had not been Tax Compliant as confirmed by the documents from ZRA marked **“CCZa-b”**. That it was also established that Trends Stationers and Business Machines and Masaiti Beam Motel had no record of registration with ZRA.
- 2.73. Further that contrary to the 1st Interested Party’s assertion that he was earning a salary and was paid gratuity that was partly used to invest into his business, the 1st Interested Party purchased Simonga Farm No. 132a from funds comingled with funds suspected to have been corruptly acquired and paid into the 4th Interested Party’s Bank Account. That contrary to the assertion that the 1st Interested Party has never received any money from Clever Mpoha, Mr. Mpoha paid USD 200,000.00 in the 4th Interested Party’ Bank Account
- 2.74. The Deponent averred that on 1st June, 2020, Clever Mpoha was called by the Applicant to give a Statement of Account on how the USD 200,000.00 was paid into the 4th Interested Party’s Bank Account and he stated that the payment was for the purchase of farm development equipment and an invoice marked **“CC3”** had been issued by the 4th Interested Party.

- 2.75. It was deposed that Mr. Clever Mpoha had admitted that his company Eagle Trading International Limited received a portion of profits from Africa Security Academy Poland by the Ministry of Finance as shown in his Witness Statement marked **“CC4”** dated 1st June, 2020.
- 2.76. A further averment by the Deponent is that Mr. Clever Mpoha stated that the 2nd Interested Party had approached him to buy farm equipment at the value of USD200,000.00. That Mr. Clever Mpoha through Eagle Trading International remitted a sum of USD200,000.00 into the 4th Interested Party’s Bank Account as exhibited in **“CC30-32”** in the Applicant’s Affidavit in Support.
- 2.77. It was deposed that in Clever Mpoha’s Statement, he alleges that the transaction to purchase farm equipment from the 2nd Interested Party was never concluded. That however, the Deponent’s investigations established that Clever Mpoha neither made any efforts to claim a refund for the payment towards the farm development equipment or to get part of the equipment.
- 2.78. The Deponent stated that his investigation established that the 1st Interested Party in his capacity as Permanent Secretary at the Ministry of Defence facilitated the payment of Arrangement Fees, Management Fees and Insurance Fees amounting to USD1,675,497,76 from Ministry of Finance to Africa Security Academy. That he discovered that after this was paid into Africa Academy Account, USD 527,448.88 was then paid to Eagle International Trading Limited Bank

Account by Africa Security Academy and thereafter Eagle International Trading paid USD200,000.00 into the 4th Interested Party's Account. Further that as illustrated in the Applicant's Affidavit in Support, Clever Mpoha is Director and majority share holder at Eagle International Trading and also in Savenda Academy of Excellence which is a shareholder in Africa Security Academy.

- 2.79. The Deponent averred that he recorded a Warn and Caution Statement marked **"CC5"** from the 1st Interested Party and he confirmed after being shown a What's App message in which he was asking Clever Mpoha to assist him pay for the purchase of Simonga Farm, that Clever Mpoha helped him to settle part payment for the purchase of Simonga Farm.
- 2.80. In the Affidavit in Reply to the 2nd, 3rd and 4th Interested Party which had been filed on 6th October, 2023, Clement Chansa averred that having perused the Affidavit in Opposition by the 2nd, 3rd and 4th Interested Parties, the 2nd Interested Party sold Property No. F/132a to the 4th Interested Party which was 1.237.1670 Ha in extent. That he had been advised by Counsel and believes the same to be true that the Amended Defence and Counterclaim exhibited as **"MWASCA3"** in the 2nd, 3rd and 4 Interested Parties' Affidavit in Opposition, the 1st Interested Party stated that he bought the entire Farm 132a and not a Subdivision of Farm 132a.
- 2.81. According to the Deponent, he recorded a Warn and Caution Statement on 10th November, 2020, from the 1st Interested Party who stated that the 2nd Interested Party sold him the

Farm at Six Million Kwacha. That this appears to agree with the assertion by the 2nd, 3rd and 4th Interested Parties in their Affidavit in Opposition that the purchase price for Subdivision 1 of Farm 132a was ZMW800,000.00 and that for the remaining extent the purchase price was USD550,000.00 (approximately ZMW 5,200,000.00 at the time) bringing the total to ZMW6,000,000.00 as exhibited in **“CC5”** in the Affidavit in Reply. That in the same Warn and Caution Statement, the 1st Interested Party also admitted to paying ZMW400,000.00 to the 2nd Interested Party.

2.82. The Deponent averred that his investigations revealed that on 13th October, 2017, the 1st Interested Party paid an amount of ZMW2,500,000.00 in the Account of the 4th Interested Party held at First Capital Bank with a narrative of “Purchase of Farm” as exhibited in the Proof of Payment marked **“CC23-24”** on the Affidavit in Support by the Applicant.

3.83. Further that the Deponent’s investigations established that an amount of USD200,000.00 (approximately ZMW200,000.00 at the time) was paid on 18th April, 2018, from Eagle Trading International Limited authorized by one Clever Mpoha into the 4th Interested Party’s Account held at FNB with the narration “Farm equipment”. That in addition, the 2nd and 3rd and 4th Interested Parties state in Paragraph 19 of the Affidavit in Opposition that they were paid only USD31,000.00 (which is approximately ZMW310,000.00 at the time) which brings the total amounts allegedly paid

towards the purchase of Simonga Farm to ZMW5,210,000.00.

2.84. The Deponent reiterated his averments as reflected in Paragraph 3.79 of this Judgment.

2.85. The Deponent also reiterated his averments regarding payment effected to the 4th Interested Party as stated in Paragraph 3.23 above.

2.86. According to the Deponent, he had been advised by Counsel with conduct of the Matter and believed that it is true that on 23rd April, 2019, way after the Interested Party instituted investigations into these transactions on 1st April, 2019, the 4th Interested Party went ahead and filed into Court a Writ of Summons and Statement of Claim claiming among others, payment of USD530,000.00 (which is approximately ZMW5,300.00) as being payment for the purchase of Simonga Farms.

2.87. The Deponent averred that on 17th April, 2020, the 4th Interested Party went ahead and applied for a separate Certificate of Title for Subdivision 1 of Farm 132a as shown on page 61 of the 2nd, 3rd and 4th Interested Parties

3.0. SKELETON ARGUMENTS

3.1. The Application by the Applicant was made pursuant to **Sections 29 and 31 of the forfeiture of Proceeds of Crime Act** (hereinafter referred to as “**FPOCA**”) and **Section 19 (1) of the Anti – Corruption Act No. 3 of 2012** as read together

with **Order 30 Rule 15 and 17 of the High Court Act Chapter 27 of the Laws of Zambia.**

- 3.2. It was submitted that the evidence deposed in the Affidavit in Support of the Application shows that the 1st Interested Party whilst working in the Ministry of Defence as Permanent Secretary corruptly received gratification in the sum of USD 200,000.00 from Mr. Clever Mpoha, a Director at Eagle International Trading Limited and Savenda Management Services for having facilitated the payment of USD 1,765,497.76 to African Security Academy, a company which Mr. Mpoha was a shareholder.
- 3.3. Submitting further, it was stated that investigations revealed that the said USD 1,675,497.76 was payment for Management fees which emanated from a Contract between Ministry of Defence and Africa Security Academy for the supply and delivery of uniforms and that Mr. Mpoha corruptly paid a gratification of USD 200,000.00, directly into the 4th Interested Party's Bank Account with the narration "Farm Equipment" on behalf of the 1st Interested Party.
- 3.4. Further that thereafter, the 1st Interested Party entered into a contract for the sale of Simonga Farm with the 4th Interested Party and it was established that the money used to pay for the said Farm was a result of corrupt practices in the manner he facilitated the payment of USD 1, 675, 497. 76 as Management Fees to African Security Academy. That therefore this action is in contravention **of Section 19 (1) of the Anti-Corruption Act** and contention is that the farm is

tainted property premised on the fact that the concerned provisions in **FPOCA** and **Anti – Corruption Act** create serious offences.

- 3.5. It was submitted that the Applicant has on a balance of probability established from the evidence that the Farm in question is both tainted property and proceeds of crime and the Court was urged to so find. The Applicant placed reliance of **United States Supreme Court** case of **Various Items of Personal Property v United States**¹, the South Africa's Constitution Court case of **Kumarnath Mohunram & Shelgate Investments Cc v The National Director of Public Prosecutions, BOE Bank Limited and The Law Review Project (As Amicus Curiae)**² wherein her ladyship cited with approval the holding of the Supreme Court of South Africa in the case of **National Director of Public Prosecutions v RO Cook Properties**³.
- 3.6. The cases were cited for the effect that a civil recovery of property provides for Orders to be made for Forfeiture of tainted property even if no one has been convicted of having used the property or of having been guilty of the unlawful activities of which the property is said to be the proceeds of crime.
- 3.7. The submissions are that the Applicant has on a balance of probability demonstrated that the 1st Interested Party corruptly acquired Simonga Farm in the manner that a gratification of USD 200, 000.00. was paid for his benefit by Mr. Clever Mpoha when he transferred USD 200,000.00, into

the 4th Interested Party's Account for the purchase of the said Farm after the 1st Interested Party facilitated a payment of USD 1, 675,497.76 to Africa Security Academy.

- 3.8. The Kenyan case of **Ethics and Anti – Corruption v Patrick Ochieno Abachi & 6 Others**⁴ was adverted to for the position that an individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset. The rider was that the 1st Interested Party during investigations failed to offer a satisfactory explanation as to how he acquired the Simonga Farm and that for this reason, the said Farm should be forfeited to the State.
- 3.9. In concluding the arguments, the Constitutional Court of South Africa case of **Nkobi Holdings (PTY) Limited & Another v The State**⁶ was referred to for the position that the primary purpose of confiscation or forfeiture proceedings, as the case may be, was to ensure that no person benefits from his or her wrong doing and that illegally acquired property deserves no protection under the Law.
- 3.10. In the Skeleton Arguments filed on behalf of the 1st Interested Party **Section 2 of FPOCA** was cited on the definition of tainted property. The submission is that in order to answer the question whether the property is tainted or not, there must be evidence that the 1st Interested Party committed a serious offence or a foreign serious offence.
- 3.11. According to the 1st Interested Party, the Affidavit deposed to by Mr. Clement Chipasha contains allegations that are not

supported by evidence and do not prove the commission or involvement of anyone of the Interested Parties in the commission of a serious offence. That this is confirmed by the fact that the same allegations are subject of a Criminal Trial in the Subordinate Court where the State is attempting to prove that there was corruption in the manner the 1st Respondent allegedly acquired Farm No. 132a in Chikankata. Further that the only way a property can be said to be tainted is upon production of proof that it was used in the commission of a serious offence.

3.12. In concluding the argument on behalf of the 1st Interested Party, we were referred to the Court of Appeal of Zambia case of **Johaness Kenneth Siogopi (T/A Nam Transport Co A Partnership) v Director of Public Prosecutions**⁶ for the position that in order for a property to be tainted, commission of a serious offence must be shown. Further that the Applicant has not shown Court that Farm No. 132a is a tainted property.

3.13. The 2nd, 3rd, and 4th Interested Parties, in the submission filed on their behalf referred Court to **Sections 2, 29,30,31 and 78 of FPOCA** together with **Section 19 (1) of the Anti-Corruption Act No. of 3 of 2012**. The thrust of the submission is that the burden of proof in an application for Non – Conviction based Forfeiture rests upon the Applicant herein to prove that Farm No. 132 a Chikankata, Southern Province was purchased by the 1st Interested Party, a public

servant and used funds corruptly received contrary to **Section 19 (1) of the Anti-Corruption Act.**

3.14. Our attention was drawn to the case of **Ventriglia and Manuela Sebastain Ventriglia v The People**⁷ for the position that proceedings under FPOCA are Civil and the case of **BJ Poultry Farms Ltd v Nutrifeds Zambia Limited**⁸ for the position that the standard of proof required in civil matters is balance of probabilities and a Plaintiff can not rely on a failed Defence to sustain a claim against the defendant. Further, for this proposition, the cases of **Khalid Mohammed v The Attorney General**⁹ and **Zulu v Avondale Housing Project Limited**¹⁰ were called in aid.

3.15. It was submitted that the Applicant herein has lamentably failed to lead cogent evidence proving that Farm No. 132a, Chikankata is tainted property i.e that the property is proceeds of an offence. That the evidence on the Record clearly shows that Farm No. 132a Chikankata, Southern Province no longer exists and that the properties that exist are Subdivision 1 of Farm No. 132a Chikankata, Southern Province as can be seen from exhibit marked **"MWASCA2"** which properties are in the names of the 4th Interested Parties and have never been conveyed to the 1st Interested Party. Further that Subdivision 1 of Farm 132a is still in the name of the 4th Interested Party and the same is in the possession of the 2nd and 3rd Interested Parties as a lien against an agreement to sale the Remaining Extent of Farm 132a Chikankata to the 6th Respondent. That the submission

therefore is that the Applicant has not led any cogent evidence to prove, on a balance of probability, that the 1st Interested Party or indeed the 5th or 6th Interested Parties acquired any land as Farm No. 132a Chikankata, Southern Province.

3.16. A further submission is that the Applicant has lamentably failed to provide any proof that the 1st Interested Party while working in the Ministry of Defence as Permanent Secretary acquired Farm No. 132a, Chikankata, Southern Province using funds i.e USD 200,000.00 corruptly received as gratification from Mr. Mpoha, a Director at Eagle International Trading Limited and Savenda Management Services Limited for having facilitated the payment of USD 1, 675, 497 to Africa Security Academy, a company in which Mr. Mpoha was a shareholder.

3.17. A related submission is that in an attempt to prove that the 1st Interested Party had corruptly received USD 200,000.00 from Clement Mpoha, the Applicant had exhibited **“CC30”**, **“CC31”** and **“CC32”** which only go to show that Eagle Trading International remitted to the 4th Interested Party USD 200,000.00 as payment for equipment for farm development pursuant to invoice No. INV. 74DD15-03-2018. That there is no proof on the said document to show that payment of the sum of USD 200,000.00 by Eagle Trading International to the 4th Interested Party was for the purchase of Farm No. 132a, Chikankata, Southern Province. Further that there is equally no proof that the said USD 200,000.00 was paid by Eagle

Trading Limited for and on behalf of the 1st Interested Party as gratification for facilitating payment of USD 1, 675, 497.76 by the Government of the Republic of Zambia to African Security Academy as the Applicant seems to suggest.

3.18. It was submitted that the 2nd, 3rd and 4th Interested Parties have objected to the Applicant's Application for Non-Conviction Forfeiture primarily because they have sufficient interest in Subdivision 1 of Farm No. 132a and the Remaining Extent of Farm No. 132a Chikankata, Southern Province, pursuant to **Section 31 of FPOCA** as the legal and registered owner of Certificate of Title No. 73999 relating to the Remaining Extent of Farm No. 132a, Chikankata, Southern Province. Further that the 2nd, 3rd and 4th Interested Parties commenced an action under cause No. 2021/HP/0452 prior to the commencement of the proceedings herein, against the 1st Interested Party claiming, inter-alia, USD 550,000.00 being the contract price for the Remaining Extent of Farm No. 132a.

3.19. Our attention was drawn to **Section 54 of the Lands and Deeds Act Chapter 185 of the Laws of Zambia** and the case of **Anti-Corruption Commission v Barnett Development Corporation Limited**¹¹ for the position that a certificate of title is conclusive evidence of ownership of land by the holder of the certificate. The case of **Rapid Global Freight Limited v Zambia Railways**¹² was also cited for the proposition that a lien is a common law right and can not exist unless the lien

holder is in possession as the 2nd and 3rd Interested Parties are in possession in this case.

3.20. It was submitted that the 2nd, 3rd and 4th Interested Parties satisfy the criteria set out under **Section 31 (2) of FPOCA** as read together with **Section 2 of FPOCA** on the definition of interest which was also stated by the Court of Appeal on an Application for Non- Conviction Forfeiture in the case of **Nachanga Transport v The Director of Public Prosecutions**¹³.

3.21. Contending further, it was stated that having satisfied that 2nd, 3rd and 4th Interested Parties have sufficient interest in the subject properly, an Order for Forfeiture of the same will have the consequence of compulsorily acquiring property belonging to the 4th Interested Party in breach of its proprietary rights as guaranteed under **Article 16 of the Constitution of Zambia**.

3.22. Further that such acquisition would have been effected without following the properly laid down procedure under the provisions of the **Lands Acquisition Act Chapter 189 of the Laws of Zambia** to exercise the power of eminent domain meaning land would be taken away from the legal proprietor not for a public purpose and without compensation thereby faulting the due process of the law and principles of the Rule of Law. To bolster this argument, the case of **Mpangwe Farms Limited and Others v The Attorney General**¹⁴ was cited.

3.23 It was finally submitted that this Application constitutes a multiplicity of actions and therefore an abuse of Court process. That the 2nd, 3rd and 4th Interested Parties have demonstrated by evidence that there is an active matter before Honorable Madam Justice C.C Zulu under Cause No. 2021/HP/0452 wherein the 4th Interested Party has sued the 1st Interested Party in respect of the agreement to purchase the Remaining Extent of Farm No. 132a, Chikankata, Southern Province. Further that there is a very high likelihood or potential of there being two conflicting judgments rendered by High Court Judges of equal power and jurisdiction much to the embarrassment of the Judiciary as an Institution leading to multiplicity of actions which the Court frowns upon as stated in the persuasive case of **Zambia Revenue Authority v Felimart Investments**¹⁵.

3.24. In the Skeleton Arguments in Support of Reply to the 1st Interested Party's Affidavit in Opposition, the Applicant submitted that although the 1st Interested Party has an interest in the Farm No. 132a, the disputed Property was acquired as a result of serious offence of corrupt practices. That the nexus between the USD200,000.00 transferred from one Clever Mpoha to Simonga Farms Limited after the 1st Interested Party facilitated a successful payment to a company in which Clever Mpoha is a shareholder.

3.25. It was submitted that although the 1st Interested Party alleges that he has businesses which have been making huge amounts of profits and turnovers, exhibit "**CC2a-b**" shows

that his companies have either been filing Nil Returns or they had not been Tax Compliant and therefore that the alleged turnover of over ZMW 2,000,000.00 has not been substantiated.

3.26. Submitting further, it was the Applicant's position that the property in issue is tainted as it is connected to the serious offence of corrupt practices by and with a public officer contrary to **Section 19 of Anti- Corruption Act** but the Applicant need not prove the offence for purposes of Non Conviction Based Forfeiture. The cases of **Various Items of Personal Property v United States**¹ and **Director of Assets Recovery Agency a & Others, R (on the application of) v Green & Others** were called in aid to support the submission. That in the latter case the Court guided that a civil recovery action is not concerned with establishing criminal guilty but rather with 'Unlawful Conduct' solely for the purpose of identifying property with a sufficient relationship to that conduct to render it recoverable.

3.27. It was submitted that based on the above authorities the funds used to acquire Farm No. 132a were comingled with funds that are reasonably suspected of being proceeds of crime, thus making the Property tainted Property. That the Applicant in these Proceedings has no obligation to establish the alleged corrupt conduct beyond reasonable doubt but on a balance of probabilities.

3.28. **Section 33 (1) of the Forfeiture of Proceeds of Crime Act** was referred to for the position that any application made

thereunder is not a criminal proceeding. That it is therefore grossly erroneous for the 1st Interested Party to contend that the Applicant needs to discharge its criminal burden of proof when all the Applicant has to do is discharge it on a balance of probabilities.

3.29. The Applicant urged Court to accept that the evidence presented by the Applicant on the ground that the 1st Interested Party has not presented any evidence in rebuttal as was the instance taken in the case of **KACC v James Mwathethe Mulewa & Another**¹⁷ in which the High Court accepted the evidence presented by the Applicant which had not been rebutted by the Respondent.

3.30. The closing Submission in this regard is that this Court is only required to determine whether on a balance of probabilities Simonga Farm No. 132a sought to be forfeited is tainted property. Reliance for this submission was placed on the case of **Asserts Recovery Agency v Joseph Wanjohi & Others**¹⁸.

3.31. In the Skeleton Arguments in Support of the Affidavit in Reply to the 2nd, 3rd and 4th Interested Parties Affidavit in Opposition the Applicant submitted that the case of **Nachanga Transport v Director of Public Prosecution**¹³ cited by the Interested Parties explained that **Section 31 of FPOCA** and Non Conviction Based Forfeiture in general does not require a conviction or even a criminal charge. The Court's attention was drawn to the **United Nations Conventions Against Corruption**. That in line with these

authorities, regardless of the outcome of the Criminal Matter in the Subordinate Court involving the 1st Interested Party and Others who are not a party to this Matter, the criminal verdict will not affect this case.

3.32. The case of Stanley **Mombo Amuti v Kenya Anti-Corruption**¹⁹ was called in aid for the position that in forfeiture proceedings there is no need to prove that the 1st Interested Party actually committed an offence under the **Anti-Corruption Commission Act** as all that needs to be established is the conduct in relation to the Property. The submission therefore was that the Applicant in its Affidavit in Support, specifically exhibit marked **“CC1-CC35”** has demonstrated on a balance of probability that the 1st Interested Party corruptly acquired Simonga Farm after receiving USD200,000.00 into the 4th Interested Party’s Account from Clever Mpoha. That the Applicant had demonstrated a nexus of the sale of Simonga Farm, Bank transfer of the purchase price in the sum of USD2,500,000.00 Bank transfer USD200,000.00 from Eagle Trading International into the 4th Interested Party’s Bank Account, facilitation of payment of USD1,675,497.76 by the 1st Interested Party.

3.33. Our attention was drawn to **Black’s Law Dictionary** on the definition of Balance of Probability and that according to the meaning the Applicant has clearly shown how the Property in question was acquired by the 1st Interested Party, a connection between Clever Mpoha and the 4th Interested

Party. **Section 78 of FPOCA** was also cited to bolster the Applicant's argument.

3.35. On whether this action amounts to compulsory acquisition of property belonging to the 1st Interested Party, it was submitted that the argument by the 2nd, 3rd and 4th Interested Party is misconceived as this action has nothing to do with the provisions of the **Lands Acquisition Act**. That the basis of the Applicant's claim is that Simonga Farms is tainted because it was bought through money which is suspected of being proceeds of serious crime and that the fate of tainted property is that it has to be forfeited to the State. The case of **National Director of Public Prosecutions v Pro Cook Properties (PTY) Limited³ and 37 Gillespie Street Duban (PVT) Limited and Boule Saad Nominees (PTY) Limited** was cited.

4.0. THE HEARING

- 4.1. At the hearing held on 21st May, 2024, Mrs G. M. Muyunda on behalf of the Applicant placed reliance on the Amended Affidavit in Support of Origination Notice of Notion filed on 9th April, 2024 and Skeleton Arguments as well as the Affidavit in Reply filed on 6th October, 2023.
- 4.2. In opposing the Application, Mr. J. Tembo on behalf of the 1st Interested Party informed Court that he would be relying on the Affidavit in Opposition to the Amended Affidavit in Support of Originations Summons filed on 18th April, 2024 and Skeleton Arguments filed on even date. He augmented orally.

- 4.3. In his oral submission, he took issue with Paragraph 42 of the Applicant's Amended Affidavit on grounds that the Paragraph and exhibits referred to lacked certification as the authenticity of the data messages. We were urged to note that the exhibit consists of what the Deponent avers to be images he had captured from the electronic device of one Mr. Clever Mpoha.
- 4.4. That **Section 9 (4) of the Electronics Communications Act No, 4 of 2021** demands that such data message must be certified to be correct by an officer in the service of the person who wishes to adduce the data message. That short of that the High Court in the matter of **Shuko Willie Chungu v Hilda Mwanza & 2 Others**¹⁶, Justice W. Mweemba clearly emphasized that there must be a certificate filed in accordance with **Section 9 (4)**.
- 4.5. Further that short of that, the Deponent is supposed to lay evidential foundation to prove the reliability of the manner in which the data message was generated and the reliability in which the data message was maintained. That the laying of foundation becomes a condition precedent to the admissibility of the data message, the 1st Interested Party in the premises strongly objected to the said Paragraph 42 and we were urged to expunge it from the record or to ignore it as we render our final decision.
- 4.6. In Reply, Ms. G. M. Muyunda orally submitted that the paragraph sought to be impugned had by and large laid the foundation upon which the said exhibits had been tendered

and therefore the requirement to have the said exhibits certified did not become necessary.

5.0. CONSIDERATION AND DECISION OF THE COURT

5.1 We have considered the Application for a Non Conviction Based Forfeiture Order, the Parties' respective Affidavits, Skeleton Arguments and Oral Submissions for which we are indebted.

5.2 **Sections 29** and **31 of FPOCA** partly pursuant to which the Application has been brought provide as follows:

Section 29

“A Public Prosecutor may apply to Court for an Order forfeiting to the State all or any property that is tainted property”.

Section 31 (1)

“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.

5.3. The Application has also been anchored on **Section 19 (1) of the Anti-Corruption Act** which is couched in the following terms:

“A public officer who, by oneself, or by or in conjunction with, any other person, corruptly solicits, accepts or obtains, or agree to accept or attempts to receive or obtain from any person for oneself or any for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, anything in relation to any matter or transaction, actual or proposed, with which any public body is or may be concerned, commits an offence”.

- 5.4. Having perused the evidence before us, it clear to us that at the very least, a portion of Simonga Farm No. 132a, located in Chikankata, Southern Province (“Simonga Farm”) was sold by the 2nd, 3rd and 4th Interested Parties to the 1st Interested Party who claims an interest in the 5th and 6th Interested Parties. What appears to be in dispute is the extent of Simonga Farm that was sold and the manner and source of the purchase price that was paid by and/or on behalf of the 1st Interested Party and received by the 2nd, 3rd, and 4th Interested Parties in consideration for the sale.
- 5.5. The Applicant’s position is that it, has on a balance of probabilities demonstrated that the 1st Interested Party corruptly acquired Simonga Farm in the manner that a gratification of USD 200,000.00, was paid for his benefit by Mr. Clever Mpoha when he transferred the said amount into the 4th Interested Party’s Account for the purchase of the said

Farm after the 1st Interested Party facilitated a payment of USD 1,675,497.76 to Africa Security Academy. That the import of this is that the funds used to acquire Simonga Farm were comingled with funds that are reasonably suspected of being proceeds of crime thus making the Property tainted Property.

- 5.6. On his part, the 1st Interested Party's contention is that the Affidavit in Support deposed on behalf of the Applicant, contains allegations that are not supported by evidence and do not prove the commission or involvement of any of the Interested Parties in the commission of a serious offence. That this is confirmed by the fact that the same allegations are subject of a criminal trial in the Subordinate Court where the State is attempting to prove corruption in the acquisition of Simonga Farm by the 1st Interested Party.
- 5.7. The 2nd, 3rd and 4th Interested Parties' position is that the thrust of **Sections 2, 29, 30, 31 and 78 of FPOCA** as read together with **Section 19 (1) of the Anti-Corruption Act No. 3 of 2012**, in an application for Non Conviction Based Forfeiture rests upon the Applicant to prove that Simonga Farm was purchased by the 1st Interested Party as a public servant using funds corruptly received contrary to the said provisions of the Law.
- 5.8. We wish to quickly dispense with the notion by the 1st Interested Party that this Court can place reliance on and consider the fact that the allegations in this matter are subject of proceedings in the Subordinate Court. The

provisions of **Section 31 (4) of FPOCA** make it very clear that the validity of an Order under the Subsection is not affected by proceedings, or an investigation with a view to institute proceedings in respect with which the property is in some way associated. Giving effect to this provision, it was stated in the case of **Director of Public Prosecution v Dhiraj Dhumphutha**²⁰ 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”.

5.9. For avoidance of doubt, we also find the provisions of **Section 33 (1) of FPOCA** very instructive as:

“Any proceeding on an application for a Restraining Order, Forfeiture Order or confiscation Order is not a criminal proceeding”
(emphasis ours).

5.10. Further, **Section 33 (2) (b) of FPOCA** provides the following on the standard of proof in civil proceedings which this one is:

“The rules of evidence applicable in civil proceedings apply, and those applicable only in criminal proceedings do not apply under this Act”.

5.11. The kernel of the matter, as we see it, is whether the Applicant has proved to the required standard that Simonga

Farms is tainted Property. By **Section 2 of FPOCA**, tainted Property is defined in the following terms:

“Tainted Property in relation to a serious offence or foreign serious offence means:

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

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

5.12. In summation, if a property is tainted, it is tainted in relation to a serious offence which by **Section 2 of FPOCA** is one in which the sentence provided for by law is death or imprisonment for not less than 12 months.

5.13. The Applicant has placed reliance on what is properly termed as belief evidence based on materials in the Affidavit and exhibits which we have scrupulously examined and whose salient issues are summarized as below

5.13.1. *Exhibit marked “CC2” is a letter dated 11th August, 2018, on Simonga Farm Letterhead addressed to “whom it may concern” confirming that the Shareholders of Simonga Farm had offered for sale to Trends Stationers to purchase land to the value of USD300,000 (ZMK3,000,000.00). This was endorsed on the same day by the 1st Interested Party that he had*

accepted the offer and was requesting that all documents be prepared after payment.

5.13.2. **“CC9”** is a Valuation Report by the Government Valuation Report placing the market value of Simonga Farm at ZMW29,475,000.00 for crime investigations purposes. The valuation date was taken to be 3rd January, 2022, which is the date of instruction.

5.13.3. On 25th August, 2018, a Board Resolution was passed by the 2nd and 3rd Interested Parties to allow the 1st Interested Party to be a signatory on Simonga Farm Ltd for the Kwacha Account No. 62340113232 and the FNB Dollar Account No. 62472697196.

5.13.4. **“CC13”** exhibits a Contract between the Government of the Republic of Zambia and African Security Academy (ASA) for the supply and delivery of uniforms for the Zambia National Service executed on 18th July, 2016. The then Permanent Secretary of Defence Mbololwa Muyaba signed on behalf of the Government of Zambia while Dariuzs Prigan signed as Chief Executive Officer for African Security Academy. It was witnessed on behalf of GRZ by a Mwepu, Head of Procurement, Zambia National Service, Ministry of Defence and witnessed on behalf of ASA by Patricia Chabula.

5.13.5. **“CC14”** is a PACRA print out for African Security Academy whose Directors are Patricia Mwale Chabula, Clever Siame Mpoha and Dariusz Prigan. The

Business entity appearing under the print out is Savenda Academy of Excellence.

5.13.6. Exhibit marked **“CC15”** is a print out for Savenda Academy of Excellence whose Shareholders are Clever Siame Mpoha and Esther Chanda Mpoha. The Business entities named thereunder are Sanjiza Investment Limited, Sasumwinse – Kundo Clesther Family, Trust Registered Trustees and Savenda Management Services.

5.13.7. At exhibit **“CC17”** is the PACRA print out for Savenda Management Services Limited whose Shareholders appear as Esther Mpoha, Clever Siame Mpoha and Esther Chanda Mpoha. The Business entities appear as Sansumwinse – Kundo Clesther Family and Trust Registered trustees.

5.13.8. At Exhibit **“CC18”** shows a Supplier Credit Agreement between the Government of the Republic of Zambia (Ministry of Finance) and Africa Security Academy on extending “Tied Aid Credit”. The Agreement has signatures on behalf of the Parties respectively with no names or designations of the persons who signed on behalf of the Parties.

5.13.19. On 6th September, 2017, a letter marked **“CC19”** was written by African Security Academy Authored by Dariusz Prigan to the Permanent Secretary, then, the 1st Interested Party herein making reference to Invoice No. 88/01/2017 dated 8th January, 2017, for

US1,675,494.75 being the remaining outstanding amount for Arrangement Fees, Management and Insurance Fees for the Supplier Credit Agreement executed on 12th August, 2016.

- 5.13.20. **“CC20a”** is a letter dated 7th September, 2017, from the Permanent Secretary, Ministry of Defence (1st Interested Party) to the Secretary to the Treasury attaching Invoice for Contract No. MOD/MPC/ZNS 032-16 for finance and purchase of uniforms for ZNS, Ministry of Defence from African Security Academy.
- 5.13.21. **“CC21”** shows a Ministry of Finance Foreign payment voucher being payment for facility fees for the Buyer Credit Agreement to purchase uniforms for Zambia National Service in the sum of USD1,675,497.76. The payment was made on 1st November, 2017, as may be gleaned from the date stamp indicating paid.
- 5.13.22. According to the exhibit marked **“CC22”**, on 18th November, 2017, Eagle Trading International Limited received the sum of USD427,448.88 with the narration Africa Security Academy SP Z00 2/ILZECKA 26 3/P invoice SMS 012-2017. According to the Investigations by the Applicant, this amount was 50% claim from the payment received from Ministry of Finance as Arrangement Fee, Management Fee and Insurance Fee, for the Supply credit Agreement. Our simple arithmetic calculation does confirm this aspect.

- 5.13.23. **“CC23”** is an invoice issued on 30th January, 2017, by Eagle Trading International to Africa Security Academy in the sum of USD837,748,88 with the narration being 50% payment on Arrangement Fee, Insurance Fee and Insurance for the Contract for the Supply Credit Agreement dated 12th August, 2016.
- 5.13.24. **“CC24”** is a PACRA print out for Eagle Trading International Limited. The nature of Business for Eagle Trading appears as other transportation support activities, mining of other non-ferrous metal ones, other retail not in stores, stalls or markets and support activities for other mining and quarrying. The individuals named are Esther Chanda Mpoha, Clever Mpoha and Kelvin Chileshe.
- 5.13.25. Exhibit marked **“CC25”** is an Overseas Remittance Application by Eagle Trading International with the recipient appearing as Simonga Farm Limited in the sum of USD 200,000.00 and the payment details showing “Equipment for farm development”. The confirmation of the transaction was done and signed for as such in person by Clever Mpoha on 18th April, 2018. This is also reflected in exhibit marked **“CC26”** which is a Statement of Account for the Foreign Currency Account for Eagle Trading, trading at Standard Chartered Bank Zambia Plc, Kabulonga Branch.

5.13.26. **“CC29”** is a Warn and Caution Statement administered on the 1st Interested Party on 16th November, 2020. In part of the Statement, the 1st Interested Party states that:

“The recording officer has shown me the Whats App message where I was asking Clever for help to pay for the purchase of Simonga Farm. I can confirm that Clever helped me to settle part of Simonga Farm, the transaction in quotation dated 18th April, 2018 in an amount of USD 200,00.00”.

5.13.27. Further in responding to the question whether the 1st Interested Party had at any point instructed Clever Mpoha to make a payment for the purchase of Simonga Farm, the response was;

“yes, I have done that, like I said, we help each other in the borrowing of money. The transaction in question concerns the payment to C.S Arnold’s Account No. 1055250 with swift code CTBAAU25XX, Commonwealth Bank. I want to state that Clever is a friend of mine, we have come a long way. We have lent each other money from time to time and he also borrows from me sometimes through cash and sometimes through services and goods”.

5.13.28. **“CC31a-b”** shows a Remittance Application Form dated 13th October, 2017, in which the 1st Interested Party remitted K2,500,000.00 from his Standard Chartered Bank Account to Simonga Farms Limited FNB Account No. 62340113232 Domiciled at Mazabuka for the purchase of the Farm.

5.13.29. **“CC32”** is a Tax Compliance Report by the Zambia Revenue Authority (ZRA) regarding the 6th Interested Party which as indicated earlier was offered to purchase land from the 2nd, 3rd and 4th Interested Parties. It shows that no Tax Returns have been filed by the 6th Interested Party and that no Property Transfer Tax was paid on the transaction for the sale and purchase of Simonga Farm.

5.14. The 1st Interested Party has urged this Court to expunge certain aspects specifically Paragraph 42 of the Applicant’s Amended Affidavit in Support because according to his Advocates no foundation has been laid and that such data message must be certified by an officer in the service of the person who wishes to adduce the data message in accordance with **Section 9 (4) of the Electronics Communication Act No 4 of 2021** as held in the case of **Shuko Willie Chugu v Hildah Mwanza and Others**¹⁶.

5.15. In determining the objection by the 1st Interested Party, we have also focused our attention on the Affidavit in Opposition filed on behalf of the 1st Interested Party. We have not found anywhere in the 1st Interested Party’s Affidavit where he

denies that the conversations with Mr. Clever Mopha took place way before the payment of USD 200,000.00 was made by Eagle Trading International. What the 1st Interested Party denies is that he received help from Mr. Mpoha or that he received USD200,000.00.

5.16. Apart from not unequivocally denying that the said conversations were had, the 1st Interested Party does not allege that the WhatsApp messages were fabricated, or in any way altered by the Applicant. In a nutshell there has been no challenge of the said conversations. Given what we have stated, the objection taken by Counsel on behalf of the 1st Interested Party appears to be a veiled attempt to actually assail the Applicant's evidence which should have been done by the 1st Interested Party if he felt that the averments by the Applicant were incorrect. The 1st Interested Party has not made any rebuttal to the Warn and Caution Statement as exhibited having been recorded from him, save to deny that he did not receive any help from Clever Mpoha.

5.17. Taking counsel from the case of **U Rest Foams Limited v. Puma Botswana PTY Limited and Another**²¹, prohibition on reference to criminal matters is restricted to the outcome as opposed to the evidential material leading to such outcome. It is our view that the evidence in the Warn and Caution Statement taken from the 1st Interested Party showing that 1st Interested Party and Clever Mpoha were known to each other is relevant evidence.

5.18. We have conducted an overall evaluation of belief evidence which is admissible as adduced in the Affidavits. We are fortified in taking this position regarding such depositions by **Order 30 Rule 1 of the High Court Rules** on Chamber Matters. This was relevant in our overall assessment of whether the evidence presented establishes *prima facie* or reasonable suspicion that Simonga Farm purchased by the 1st Interested Party is proceeds of crime. On what is reasonable suspicion, Malila, JS (as he then was) in the case of **The People v Austin Chisangu Liato**²² stated that:

“..... whether grounds for suspicion actually existed at the time the suspicion is formed is to be tested objectively. Consequently, a suspicion may be reasonable even though subjectively it was based on unreasonable grounds. In our considered view, proof of reasonable suspicion never involves certainty of the truth. Where it does, it ceases to be suspicion and becomes fact.”

5.19 In order to assess the material underpinning conclusions of the Applicant we necessarily examined the Bank Records among other documents which involved the trail of money used to pay for Simonga Farm and the role played chiefly by the 1st Interested Party and in the alleged collusion with others. We have concluded that the belief evidence by the Applicant in relation to the purchase of Simonga Farm was reasonable and is supported by admissible evidence and other materials upon which the Applicant relied.

5.20. In the case of the **DPP v In Re Properties and Chiyeso Lungu**²³ we cited and were guided by the case of **The People v Liato** where Malila JS (as he then was) stated that;

“The passage of the Forfeiture of Proceeds of Crime Act in 2010 was therefore a deliberate act of the State, sequel to international clamour in this regard, to restate the burden of and standard of proof relating to the Forfeiture of Proceeds of Crime Act. The framing of Section 71 (1) changed the standard of proof and the evidentiary burden of proof. Section 78 of the Act which we quoted earlier makes the intention of the legislature quite obvious”.

5.21. Having come to the conclusions that are adverse to the Interested Parties, we necessarily must consider the explanations proffered by the Interested Parties. Put differently, we ought to consider whether the 1st, 2nd, 3rd and 4th Interested Parties have demonstrated to the Court’s satisfaction that Simonga Farm was legitimately sold and acquired.

5.22. Quite clearly, at this stage, the evidentiary burden of proving that the transaction for the sale and purchase of Simonga Farm Limited was above board and legitimate shifts to the Interested Parties. **Section 31 (2) of FPOCA** sets out the issues that the Interested Parties ought to adequately address to satisfy the Court that they have a legitimate interest in the alleged tainted properties. These are;

1. *That the Interested Party did not acquire the interest in the property as a result of any serious offence carried out by that person.*
2. *That the Interested Party had the interest before any serious offence occurred.*
3. *That the Interested Party 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 acquisition that the property was tainted.*

5.23. To demonstrate that the 1st Interested Party legitimately acquired Simonga Farm Ltd he has stated that he has been involved in several business ventures from as far back as the 1990's with a combined annual turnover of above ZMW9,000.00. That the 6th Interested Party enjoys international business reputation spanning a number of years. Further that in 2017, he was as Permanent Secretary, paid gratuity in excess ZMW2,500.00 part of which he invested into his business activities including placing some money in fixed Deposit Accounts.

5.24. Contrary to the blanket assertion by the 1st Interested Party, our perusal of his own exhibit marked **"SM1"**, shows that Riso Trends Zambia Limited was only incorporated on 12th April, 2007. Further exhibit marked **"CC5"** in the Applicant's Affidavit in Support shows that Trends Stationers and Business Machines was only incorporated on 20th October, 2003.

5.25. In our evaluation of the 1st Interested Party's evidence regarding his financial muscle and capacity, the averments appear, for most part, to be unsupported and speculative assertions. The averments appear to be general in nature and do not speak to the many issues highlighted in the evidence tendered on behalf of the Applicant.

5.26. A case in point of an aspect that has not been addressed by the 1st Interested Party is the averment by the Applicant that the 5th Interested Party, Stardy Mwale Group, is not an incorporated entity though it appears as the purchaser in the Contract of Sale for Simonga Farm.

5.27. Indeed, a perusal of the Contract of Sale only describes the purchaser as Stardy Mwale Group without stating the status of this entity. It does not state whether this entity is a registered business name or an incorporated entity. In our estimation, this may indeed be a non-existent entity which is why the averment by the Applicant has not been challenged. If indeed it existed as a legal entity, a search at PACRA would have revealed this fact pretty much the same way the other entities were found upon conducting searches as may be gleaned above. The question that begs a response is why would a Contract of Sale be in the name of a non-existent entity if the intention was not concealment. This certainly raises a red flag for any reasonable person.

5.28. Another aspect is the failure by the 1st Interested Party to address the averment by the Applicant that Nil and no Tax Returns were filed by his business entities and further that

no Property Transfer Tax was paid by the Parties for the sale and purchase of Simonga Farm.

5.29. Regarding the issue of noncompliance with filing Tax Returns and non payment of Property Transfer Tax which has not been disputed by the 1st Interested Party, this means **Section 46 of the Income Tax Act** was violated. This is because it is a legal requirement for any person or company running a business to pay tax and file Returns. Failure to pay tax is evasion and an offence punishable by law.

5.30. According to **Section 98 of the Income Tax Act of 2018**, the penalty for Tax Evasion upon conviction is a fine not exceeding One Hundred Thousand Penalty Units or imprisonment for a term not exceeding twelve months or both, while under **Section 102 (1)** the penalty for false returns is payment of a fine not exceeding Three Hundred Penalty Units or imprisonment for a term not exceeding three years or both.

5.31. The 1st Interested Party who highly projects his business acumen of international repute since the 1990's, according to him, bears the burden of providing proof that his businesses were conducted legally in accordance with the laws of the land. His deafening silence on the averment on behalf of the Applicant that the businesses in which the 1st Interested Party has interest, have not been filing Tax Returns and that no Property Transfer Tax was paid on the sale and purchase of Simonga Farm speaks volumes to say the least. Suffice to state that Tax Evasion is a serious offence within the meaning

of **Section 2 of FPOCA**. It bears reason that one of the 1st Interested Party's business which is said to have been a dominant supplier of office machines and consumables and enjoying a massive share of the Zambian market could lamentably fail to file Tax Revenue and remit requisite Taxes as by law required.

5.32. The 2nd and 3rd Interested Parties have contended that Property Transfer Tax was not paid because they are holding on to the Certificate of Title as a lien pending payment of the balance of the purchase price. From the indisputable evidence on the Record, actual possession of Simonga Farm is with the 1st Interested Party and not with the 2nd and 3rd Interested Parties. We are not satisfied by the feeble explanation by the 2nd and 3rd Interested Parties because conveyancing of land is a process and not an event. In the process of conveyancing which is a continuum, payment of Tax happens early in the process and certainly before change of Certificate of Title as the last stage.

5.33. If indeed the 2nd and 3rd Interested Parties on whose obligation for payment of tax falls had no intention of evading payment of Property Transfer Tax, nothing would have stopped them from paying requisite Tax on the transaction and still exercise their purported lien. There is undisputed evidence that a substantial amount was paid to the 2nd and 3rd Interested Parties from which a portion of Property Transfer Tax would have been paid.

5.34. In the case of the **Director of Public Prosecutions v In Re Property and Chiyeso Lungu**²¹, we cited the case of **Assets Recovery Agency v Peter Oluwafemi Olaiwon**¹⁸ on what would be considered by Court as sufficient or satisfactory explanation and which we adopted as our own in this jurisdiction where we are developing jurisprudence on Forfeiture Applications. We stated that:

“The explanation and evidence tendered must be solid, honest, beyond peradventure, beyond guesswork or misinformation. It must also be clear, logical, consistent, believable and convincing”.

5.35. We also take comfort in the case of **Nkobi Holdings (PTY) Limited and Another v The State**⁵ where the South African Constitutional Court pointed out that:

“The primary purpose of confiscation or forfeiture proceedings, as the case may be, was to ensure that no person benefits from his or her wrong doing. Like wise, we submit that illegally acquired property or/and used for criminal purposes deserves no protection under the law”.

5.36. The case of **Johannes Kenneth Siogopi (T/A Nam Transport Co, A Partnership**⁶) cited for the position that in order for a property to be tainted, commission of a serious offence should be shown, would not in light of the offence of Tax Evasion on the transaction, be helpful to the 1st Interested Party who sought to place reliance on it.

5.37. The 2nd, 3rd and 4th Interested Party have argued that the Applicant has lamentably failed to provide proof that the 1st Interested Party while working in the Ministry of Defence as Permanent Secretary acquired Simonga Farm using USD200,000.00 corruptly received as gratification from Mr. Mpoha, a Director at Eagle International Trading Limited and Savenda Management Services Limited for having facilitated the payment of USD1,675,497 to Africa Security Academy, a company in which Mr. Mpoha was a shareholder. That in an attempt to prove that the above was the case, the Applicant had exhibited “**CC30**” which only goes to show that Eagle Trading Limited remitted to the 4th Interested Party USD 200,000.00 as payment for equipment for farm development. The contention is that there is no proof that the USD200,000.00 was paid on behalf of the 1st Interested Party.

5.38. Referring to “**SMS**” in his Affidavit in Opposition, the 1st Interested Party stated that according to the said exhibit which is the Forensic Analysis Report, he was informed that nothing of evidential value was found against him. In our reading of the Report, what we discern from the relevant excerpt of the Report is that the 1st Interested Party has conveniently not stated the context in which that was stated. For completeness, we reproduce the excerpt

“Attempts to engage Zambia Information Communication Technology Authority for extraction services were made, but no data of evidential value could be extracted due to the phone having a higher

encryption. Only images, videos and audios, could be extracted.” (emphasis ours)

Read and understood in its proper context, it can not be stated there was no evidence at all. What the Report indicated was a reason why data which could have been of evidential value could not be extracted.

5.39. The 1st Interested Party also sought to place reliance on a copy of Video Interview recorded from an iPhone 8 and stored on a flash disc exhibited as **“SM10”**. The assertion is that on certain parts of the video, he heard the Deponent of the Affidavit in Support of the Application asking Dariusz Prigan to confirm the contents of a purported letter about USD527,000.00 used to distribute to the Permanent Secretary at the Ministry of Finance and that Dariusz Prigan refused to confirm the same maintaining that the transaction was business to business and that Mr. Mpoha was not involved in the contract except for the bidding process.

5.40. In our view, **“SM10”** is a data message which is governed by the **Electronic Communications and Transactions Act No. 4 of 2021 and the Evidence Act Chapter 43 of the Laws of Zambia**. By **Section 2 of the Electronic Communications and Transactions Act**,

“Data” means an electronic representation of information in any form”

“Data message” means data generated, sent, received or stored by electronic, optical or similar means and includes, but is not limited to electronic

data interchange (EDI), voice, stored record, electronic mail, mobile communications, audio and video recordings.

5.41. According to **Section 2 of the Evidence Act** “document” includes any device by means of which information is recorded or stored, and books, maps plans and drawings.

5.42. In our reading of the **Evidence Act**, it appears obvious that **Section 3** must be satisfied for a data message to be accepted as evidence. For avoidance of doubt, the Section is couched as:

“(1) In any Civil proceeding where direct oral evidence would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact if the following conditions are satisfied

(a) if the maker of the statement either;

(i) had perusal knowledge of the matter dealt within the statement; or

(ii) where the document is or forms part of the record made, the statement (in so far as the matters dealt with thereby are not within his personal knowledge) on the performance of a duty to record information supplied to him by a person who had, or might reasonable

be supposed to have personal knowledge of these matters; and

(b) if the matter of the statement is called as a witness in the proceedings.

5.43. Because of the digital nature of data messages, the **Electronic Communications and Transactions Act** in **Sections 8** and **9** provides additional safeguards or conditions that must be considered before it is safe for the Court to rely on data messages as follows:

“Section 8 (1) where a law requires information to be presented or retained in its original form, that requirement is met if-

(a) the integrity of the information from the time when it was first generated in its final form as a data message, or otherwise, has passed the assessment specified under Subsection (2); and

(b) that information is capable of being displayed or produced to the person to whom it is to be presented

(2) for the purposes of Subsection (1) (a), the integrity of any information is assessed

(a) by considering whether the information has remained complete and unaltered, except for the

addition of any endorsement and any change which arises in the normal course of communication, storage and display

(b) in the light of the purpose for which the information was generated; and

(c) by regarding regard to other relevant circumstances

Section 9 (1) *In any legal proceedings, the rules of evidence shall not be applied so as to deny the admissibility of a data message in evidence –*

(a) on the mere grounds that it is constituted by a data message; or

(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original format provided the substance is the same.

(2) *Information in the form of a data message shall be given due evidential weight*

(3) *In any legal proceedings when assessing the evidential weight of a data message, regard shall be had to –*

(a) the reliability of the manner in which the message was generated, stored and communicated;

(b) the reliability of the manner in which the integrity of the data message was maintained

(c) the manner in which its originator was identified; and

(d) any other relevant factor.

5.44. In the case of **OTK Limited v Amanita Zambiana Limited, Diego Gan Mana Cassilli, Amanita Premium Oils Limited, Aminita Milling Ltd²⁴**, Mutuna J (as he then was) stated, among others that:

“The lack of authentication as I have found earlier, arises from the Plaintiff’s witness’ failure to lay a proper foundation prior to the introduction of the e-mails I have in the earlier part of this Judgment highlighted the test for authentication as per Edward J. Imwinklerid. He states in this respect at page 41 that

“To authenticate an item of evidence, the proponent must present proof that the article is what the proponent claims that it is”

It is clear from all the authorities cited above that it is a condition precedent that certain conditions should be met before a document is produced. These conditions are akin to laying a foundation which invariably leads to authentication of the document.

5.45. In another case of **Kenneth Madungwe and Royd Kabwe Kashimoto v Albatros Mining Limited**²⁵ it was stated that

*“... as can be seen from Section 7 of the Electronic Communications Act No. 21 of 2009, an original data message shall only be produced in proceedings where the law requires, and it sets out the requirements that need to be satisfied for such data message to be admissible. However, Section 8 allows for secondary data messages to be admissible in evidence if it is the best evidence that can be obtained -
.....
.....
..... A perusal of the Affidavit in Reply shows that it does (not) depose to any element that are required in order to lay a foundation for the audio’s admission in evidence. Therefore, the requirement has not been met”.*

5.46. Lastly in a later case of **Shuko Willie Chunga v Nukwashe Hildah Mwanza and 2 Others**¹⁶, Mweemba J, adopted the decision of Mutuna J in the **OTK** case cited above for the position that what is essential in such matters is laying of a proper foundation which leads to authentication of the data message or electronic evidence. Further that the nature of digital evidence is such that it is easy to alter and as such it

is necessary to demonstrate its integrity and show that it can not have been tampered with after being recorded or copied.

5.47. Applying the above statutory provisions which we have generously set out for proper context and case law to this matter, it is glaringly evident that the 1st Interested Party has not laid down the proper foundation as required before this Court can admit **“SM10”** into evidence and permitting the 1st Interested Party to place reliance on it. The requirements for its admissibility have not been met.

5.48. The 1st Interested Party’s position is that he has never received any money from Mr. Clever Mpoha or Eagle International Trading Limited for the purchase of Simonga Farm as an inducement for him to facilitate for the payment of money to Africa Security Academy. Further that he had never admitted or confirmed to anyone having received help from Clever Mpoha for purposes of purchasing Farm No. 132a. According to the 1st Interested Party he was informed by Mr. William Arnold that the USD200,000.00 paid by Eagle International Trading Limited to the 4th Interested Party was meant for Farm Development Equipment which Equipment was collected from Simonga Farm in 2018 as exhibited in an acknowledgment marked **“SM12”**.

5.49. In our estimation, the issue is not whether the 1st Interested Party received money from Mr. Clever Mpoha or Eagle International Trading Limited because there is no dispute that he did not receive it directly. The assertion by the Applicant is that the amount of USD200,00.00 was

sanctioned by Mr. Mpoha and paid by Eagle International Trading Limited on behalf of the 1st Interested Party towards the purchase of Simonga Farm. The 1st Interested Party took possession of Simonga Farm in 2017. As Permanent Secretary at the Ministry of Defence, he wrote to Ministry of Finance on 6th September, 2017, requesting the Ministry to facilitate payment to African Security Academy (ASA). Payment to ASA was made on 1st November, 2017, then by ASA to Eagle International Trading Limited on 8th November, 2017, in the sum of USD527,488.88. The Invoice by Eagle International Trading Limited to ASA was issued on 4th April, 2018, and then payment to Simonga Farm was made on 18th April, 2018. Evidence shows that the 1st Interested Party and Clever Mpoha were friends. Payment was made to Simonga Farm following a request made by ASA to the 1st Interested Party as Permanent Secretary and payment was made to Simonga Farm while the 1st Interested Party was in Possession.

5.50. We have looked at the Warn and Caution Statement marked **“CC29”** and have established that the Statement was signed on every page and on the last one as read over by the 1st Interested Party who also signed it as correct. We have gone further to satisfy ourselves that the signature appearing on the Warn and Caution Statement is the same as the one appearing at exhibit **“CC2”** where the 1st Interested Party signed accepting the offer to purchase land from the 2nd and 3rd Interested Parties on behalf of the 4th Interested Party. It

is also the same signature appearing at exhibit “**CC3**” which the Contract of Sale dated 11th August,2018 between Simonga Farm Limited and Stardy Mwale Group relating to the sale of Simonga Farm. Further, it is the same signature appearing on exhibit marked “**CC11d**” which is a Signature Specimen Form attached to exhibit “**CC11c**” which is a Board Resolution to allow the 1st Interested Party to be a signatory to Simonga Farms Ltd. Finally, it is the same signature that appears on exhibit marked “**CC31a**” which is the Remittance Application Form dated 13th October, 2017 completed by the 1st Interested Party for the transfer of ZMW2,500,000.00 to Simonga Farm Limited FNB Account No. 0062340113232, Mazabuka Branch for purchase of Farm.

5.51. We have also addressed our minds and focused attention on exhibit “**SM12**” referred to us by the 1st Interested Party as an acknowledgment of receipt for collection of equipment from Simonga Farm by Eagle Trading. We take a very dim view of the document whose contents appear as a hastily prepared handwritten document on a plain piece of A4 paper. For clarity, the writings on the document are reproduced below.

“25/05/2018

I John Zulu have received the chicken cages and assorted farm equipments from Simonga Farms Ltd on behalf of EAGLE TRADING LTD

J. Zulu”

5.21. Our dissatisfaction with the exhibit above stems from the following:

5.52.1. It has no description of the quantities of the chicken cages that are said to have been collected on behalf of Eagle Trading International Limited

5.52.2. It has no description of the other farm equipment said to have been collected

5.52.3. It is not on headed paper which may have given it some semblance of authenticity and legitimacy.

5.52.4. The acknowledgment of receipt is dated 25th May, 2018. According to the Affidavit filed by the 2nd and 3rd Interested Parties, they only relocated to Australia in August, 2018. Earlier in 2017, as deposed by the 1st Interested Party vacant possession of Simonga Farm was given to the 1st Interested Party and according to exhibit marked "CC11c" the 1st Interested Party was allowed to be signatory on 25th August, 2018. According to the Affidavit in Support of the Application, the complaint of alleged possession of unexplained property against the 1st Interested Party was received on 1st April, 2019.

5.53. The import of what is outlined in the preceding Paragraph above is that the 1st, 2nd and 3rd Interested Parties, had ample time to have ensured that a proper inventory and record was prepared of chicken cages and itemized farm equipment purported to have been collected if there indeed was a

handover of any farm equipment as the 1st Interested Party would like to make us believe.

5.54. Furthermore, why should it be the 1st Interested Party to exhibit an acknowledgment of receipt purportedly on behalf of Eagle International Trading Limited and not the 2nd Interested Party who the 1st Interested Party avers informed him equipment was collected from Simonga Farm in 2018? The 2nd and 3rd Interested Parties make no such averment in their Affidavit in Opposition.

5.55. The inescapable conclusion we reach is that we do not believe or accept the document as being genuine or authentic. It appears to us to be a hastily drafted acknowledgment generated as an afterthought to bolster the claim that the USD200,000.00, paid by Eagle Trading Limited to the 4th Interested Party was for purposes of purchasing equipment for Farm Development. We accordingly attach no evidential weight to the exhibit marked **“SM12”**.

5.56. This takes us to exhibit **“CC24”** to examine the shareholding and nature of business that Eagle International Trading Limited is engaged in. The individuals appearing on the PACRA Form are Esther Chanda, Mpoha, Clever Mpoha and Kelvin Chileshe. Examination of the nature of business shows that of those listed, none of them refers to agricultural activities or anything closely allied to agriculture. Purchasing equipment for Farm Development would therefore be an outlier on the nature of business conducted by Eagle International Trading Limited.

- 5.57. Having perused the exhibit marked **“CC25”** as exhibited by the Applicant, what is clearly discernible is that it is Clever Mpoha who in person confirmed the remittance of USD200,000.00 from Account 87002696300 domiciled at Standard Chartered Bank to Simonga Farm FNB Account No. 62472697196 domiciled at Mazabuka. The narration that it was for purchase of farm equipment was in our view, a decoy.
- 5.58. Perusal of the PACRA print outs collectively reveals that Clever Mpoha is a Director in Eagle Trading International Limited, African Security Academy, Savenda Academy of Excellence and Savenda Management Services.
- 5.59. In terms of Agreements, there was a Service Agreement between African Security Academy and Savenda Management Services executed by Clever Mpoha and in counter party with the provision for Dariusz Prigan to also sign. There was also a supplier Credit Agreement between the Government of the Republic of Zambia.
- 5.60. There is evidence tendered by the Applicant that the 1st Interested Party and Clever Mpoha have known each other for a while since around the year 2000 as confirmed by the 1st Interested Party.
- 5.61. Our summation is that if Clever Mpoha and the 1st Interested Party have come a long way in the manner clearly stated, then at the time that the 1st Interested was writing to the Ministry of Finance on 7th September, 2017 in his capacity as Permanent Secretary for Ministry of Defence attaching an invoice from African Security Academy in which both Clever

Mpoha and Dariusz Prigan have an interest for payment, of the amount of USD1,675,497.76, the motivation was to assist his long time colleague who stood to benefit from that payment. The 1st Interested Party can not under these circumstances be said to have acted at arm's length and without personal interest of his own to serve.

5.62. Following payment of the amount of USD 1,675,497.76 by the Ministry of Finance to African Security Academy, Eagle International Trading Limited received the sum of USD837,748.88 representing 50% payment as Arrangement Fee, Management Fee and Insurance Fee for the supply Credit Agreements dated 12th August, 2016. Eagle International Trading Limited through authorization by Clever Mpoha in turn paid the amount of USD200,000.00 to the 4th Interested Party disguised as payment for Farm Development equipment which we believe was payment on behalf of the 1st Interested Party towards the purchase of Simonga Farms

5.63. Quite clearly, it is reasonable by any standard to question the conduct of the 1st Interested Party in the scheme of things. The explanation by the 1st Interested Party is far from being satisfactory to us. In our view, the nexus between the facilitation of payment by the 1st Interested Party for monies owed to African Security Academy, to Eagle International Trading Limited and finally to the 4th Interested Party on behalf of the 1st Interested Party has been established. It does not require rocket science to discern and unravel the

connection in the jigsaw puzzle touching on the relationship between and among the trio namely, Clever Mpoha, Dariusz Prigan and the 1st Interested Party.

5.64. To drive home the point, the Service Agreement dated 22nd August, 2016 was executed in counterparty by Clever Siame Mpoha on behalf of Savenda Management Services Limited with a provision for Dariusz Prigan to sign in counterparty on behalf of African Security Academy. The individuals named in the **PACRA** print out for African Security Academy Limited incorporated on 18th February, 2018 include Clever Siame Mpoha and Dariusz Prigan.

5.65. Evidently Dariusz Prigan is associated with Clever Siame Mpoha who is acquainted with the 1st Interested Party. The latter two have known each other from as far back as the year 2000 according to the 1st Interested Party,.

5.66. Dariusz Prigan wrote his letter on behalf of African Security Academy to the 1st Interested Party in his capacity as Permanent Secretary for the Ministry of Defence on 6th September, 2017 requesting assistance with securing payment from the Ministry of Finance. The 1st Interested Party promptly acted on this letter by writing to the Ministry of Finance the following day on 7th September, 2017 attaching the invoice issued by African Security Academy through Dariusz Prigan.

5.67. The questionable conduct by the 1st Interested Party in this maze would actually fall in the category of infractions envisioned under **Section 19(1) of the Anti-Corruption Act**

as broadly couched which we take the liberty to restate for avoidance of doubt as

“A public officer who, by oneself or by or in conjunction with, any other person, corruptly solicits, accepts or obtains, or agrees to accept or attempts to receive or obtain, from any person for oneself or for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, anything in relation to any matter or transaction, actual or proposed, with which any public body is or may be concerned, commits an offence”.

5.68. We are fortified by the Kenyan case of **Ethics and Anti-Corruption Commission v Patrick Ochieno Abachi & 6 Others**⁴ where the Court stated:

“An individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset”.

5.69. In another Kenyan case of **Assets Recovery Agency v Pamela Aboo: Ethics and Anti-Corruption Commission** (Interested Party) the High Court held that:

‘Where a person against whom allegations have been made does not give a satisfactory explanation to rebut the allegation, what has been presented has not been challenged’.

5.70. In yet another Kenyan Court of Appeal case of **Stanley Mombo Amuti v Kenya Anti Corruption Commission**¹⁹ it was stated that:

***“A claim for civil recovery of unexplained assets can be determined on the basis of conduct in relation to property without identification of any unlawful conduct; that in the instant matter, the respondent was not required to prove that the appellant actually committed an act of corruption in order to invoke the provisions of Anti Corruption Economic Crimes Act”.** (emphasis ours)*

5.71. In our jurisdiction, we find comfort in **Section 78 of FPOCA** as follows:

“Save as otherwise provided in this Act, any question of fact to be decided by the Court in proceedings under this Act is to be decided on the balance of probabilities”.

5.72. There is a meeting of minds between the Applicant and the Interested Parties that the 1st Interested Party remitted the sum of ZMW2,500,000.00 from his Standard Chartered Bank Account to Simonga Farms Limited Account No. 006234113232 domiciled at Mazabuka Branch for purchase of Farm as shown in exhibit marked **“CC31a”** which is a Remittance Application Form and confirmed by exhibit **“CC31b”** which is a customer copy of the Settlement Receipt. We have also found that the USD200,000.00 paid by Eagle Trading International, though disguised as payment for

equipment for farm development, was actually paid on behalf of the 1st Interested Party towards purchase of Simonga Farm as admitted by the 1st Interested Party.

- 5.73. What the above entails is that Simonga Farms was purchased with funds comingled with those reasonably suspected of being proceeds of crime within the meaning of **Section 2 of FPOCA** making the Property liable to forfeiture.
- 5.74. The 2nd and 3rd Interested Parties have argued that this action by the Applicant amounts to multiplicity of actions which may result in two conflicting judgments that may embarrass the Courts. The Applicant's position is that there are no pending issues relating to the same reliefs under this Matter and that what was sought in Case No. 2021/HP/0452 is different from the case in *casu*. Further that the Court Record will show that by Ruling dated 1st March, 2023, the Court Ruled among others that these proceedings are not an abuse of Court process and /or a multiplicity of action.
- 5.75. As stated by the Applicant and as may be gleaned from the 2nd and 3rd Party's Affidavit in Opposition, the reliefs sought in the matter that is before our Learned Sister Honorable Madam Justice C.C. Zulu are totally different from those in the matter before us for a Non Conviction Based Order for Tainted Property. Quite clearly, the two matters are miles apart and no stretch of imagination can reasonably lead to a

justifiable assertion that there would be a possibility of Courts rendering two conflicting judgments.

- 5.76. It has also been argued that the 2nd, 3rd and 4th Interested Parties have sufficient interest in the subject property and that an order of forfeiture of the same will have the consequence of compulsorily acquiring property belonging to the 4th Interested Party in breach of its property rights as guaranteed under **Article 16 of the Constitution**. Further that, such acquisition would have been effected without following the proper laid down procedure under the provision of **Lands Acquisition Act** thereby flouting the due process of the law and the principles of the Rule of Law. The Applicant's position is that the argument by the 2nd, 3rd and 4th Interested Parties is misconceived.
- 5.77. We agree with the position taken by the Applicant that the assertion on behalf of the 2nd, 3rd and 4th interested Parties is misconceived in as far it makes reference to the **Lands Acquisition Act** which in our view is wholly inapplicable in the circumstances of this case which is brought pursuant to the **Forfeiture of Proceeds of Crime Act**.
- 5.78. While we agree with the 2nd, 3rd and 4th Interested Parties regarding guarantees for property under **Article 16 (1) of the Constitution**, we wish to reaffirm our position which we stated in the case of the **Director of Public Prosecutions and In Re Property L/9390/M and LN-79093/1 and Chiyeso Lungu** as follows:

“We agree with the Interested Party that Article 16 (1) of the Republican Constitution guarantees the right of ownership to property. That notwithstanding Article 16 (1) is not couched in absolute terms meaning that property can be taken away from a person and the rights to it curtailed. In fact there can be no guaranteed right to a property whose origins can not be legally justified by a person claiming an interest in it”.

5.79. In our evaluation of the evidence and the documents, we have, as a matter of fact, found no contention between the 1st Interested Party on the one hand and the 2nd, 3rd and 4th Interested Parties on the other that what was sold to the entity in which 1st Interested Party has an interest as Director and Shareholder ultimately was the purported Subdivision and the Remaining extent of Farm No. 132a. The issue that arose subsequently related to the payments or non payment of the balance as it were. This fact is also confirmed by the fact that the 1st Interested Party was made a signatory to both the Dollar and Kwacha Accounts for the 4th Interested Party as shown in exhibit marked **“CC11c”**. Additionally, the 1st Interested Party was given possession of the entire Simonga Farm after which the 2nd and 3rd Interested Parties relocated to Australia. The 1st Interested Party actually does confirm in his Affidavit in Opposition that sometime in 2018, the 2nd and 3rd Interested Parties approached him and offered to sell to him the Remaining

Extent of Simonga Farm as they had made their decision to relocate to Australia

5.80. It is also note worthy that the certificates of title exhibited by 2nd and 3rd Interested Parties as Subdivision No. 1 of Farm 132a and the Remaining Extent of Farm 132a were both obtained on 17th April, 2020 after the investigations by the Applicant were commenced on 26th April, 2019 and long after the 2nd and 3rd Interested Party had given vacant possession of Simonga Farm to the 1st Interested Party and had relocated to Australia sometime in August 2018. In our view, it can not for purposes of the application for forfeiture under **FPOCA**, reasonably be argued on the state of evidence that what was sold to the 1st Interested Party was merely a Subdivision of Farm No. 132a, Simonga Farm, without the Remaining Extent.

6.0 CONCLUSION

6.1. Based on our detailed analysis, we are of the well considered view that the Applicant has on the balance of probabilities, established that that Simonga Farm No. 132a, Mazabuka District, Southern Province of the Republic of Zambia is tainted Property liable to forfeiture as envisaged under **the Forfeiture of Proceeds of Crime Act No. 19 of 2010**.

6.2. Accordingly, we Order that the Simonga Farm, properly described in Paragraph 7.1 above be forfeited to the State to be dealt with by the Applicant as deemed appropriate subject to the amount of money which may be found to be due to the 2nd and 3rd Interested Parties after taking into account

requisite Taxes payable to the Collector of Taxes on the sale of Simonga Farm.

6.3. The Interested Parties are in consequence condemned in costs to be taxed in default of agreement.

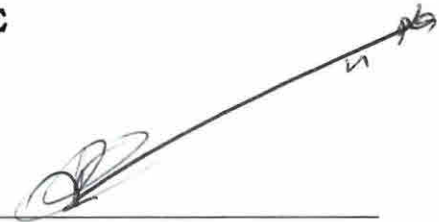
DELIVERED AT LUSAKA THIS 31ST DAY OF OCTOBER, 2024.



**S. M. WANJELANI
HIGH COURT JUDGE**



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



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