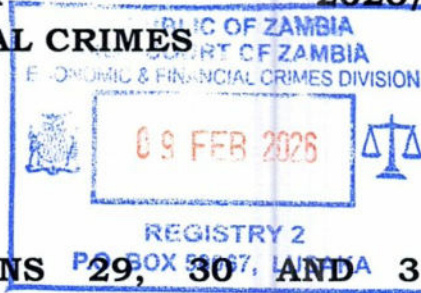


**IN THE HIGH COURT FOR ZAMBIA
AT THE ECONOMIC AND FINANCIAL CRIMES
DIVISION REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2023/HPEF/27



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

IN THE MATTER OF: SECTION 71 OF THE FORFEITURE OF PROCEEDS OF CRIMES ACT NUMBER 19 OF 2010 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: SECTION 7 OF THE PROHIBITION AND PREVENTION OF MONEY LAUNDERING ACT NO. 14 OF 2001 AS READ WITH AMNEDMENT ACT NO. 44 OF 2010

BETWEEN:

**THE DIRECTOR OF PUBLIC PROSECUTIONS
AND**

APPLICANT

IN RE PROPERTY:

RESPONDENT

TOYOTA LANDCRUISER REGISTRATION NO. BAR 5455ZM, TOYOTA LANDCRUISER REGISTRATION NO. BAR 9681ZM, TOYOTA LANDCRUISER REGISTRATION NO. BAR 5454, TOYOTA LANDCRUISER REGISTRATION NO. BAR 2385, TOYOTA LANDCRUISER REGISTRATION NO. BAR 2386ZM, TOYOTA COROLLA REGISTRATION NO. BAT 711ZM, TOYOTA LANDCRUISER REGISTRATION NO. BAR 5461ZM, TOYOTA LANDCRUISER REGISTRATION NO. BAR 5452ZM,

TOYOTA PRADO BAT 794, TOYOTA COROLLA BAT 1924ZM, TOYOTA LANDCRUSER REGISTRATION NO. BAR 23287ZM, MITSUBISHI PAJERO BAT774, TOYOTA COROLLA REGISTRATION NO. BAT 1248, TOYOTA LANDCRUISER REGISTRATION NO. BAR 1450ZM, TOYOTA LANDCRUISER REGISTRATION NO. BAR 3089, TOYOTA LANDCRUSER REGISTRATION NO. BAT 2685ZM, TOYOTA COROLLA REGISTRATION NO BAR 5251ZM, TOYOTA LANDCRUISER REGISTRATION NO BAR 5453ZM, TOYOTA LANDCRUISER REGISTRATION NO BAT 2683ZM, TOYOTA LANDCRUISER REGISTRATION NO. BAT 2684ZM, TOYOTA LANDCRUISER REGISTRATION NO. BAT 2681ZM, TOYOTA LANDCRUISER REGISTRATION NO. BAT 2682ZM, SHACMAN TRUCK REGISTRATION NO. 4591, TOYOTA COROLLA REGISTRATION NO. BAV 4906 SHACMAN TRUCK REGISTRATION NO. BAT 3415, TOYOTA COROLLA REGISTRATION NO. BAT 3330, HENRED FRUEHAUF REGISTRATION NO. BAT 8086. TOYOTA LANDCRUISER REGISTRATION NO. BAT 3703ZM, SHACMANTRUCK REGISTRATION NO. BAT 3420, SHACMAN TRUCK REGISTRATION NO. BAT 4601, SHACMAN TRUCK REGISTRATION NO. BAR 3420, SHACMAN TRUCK REGISTRATION NO. BAR 3420, MISTSUBISHI PAJERO REGISTRATION NO. BAT 553, TOYOTA HILUX REGISTRATION NO. BAR 8220, TOYOTA COROLLA REGISTRATION NO. AIC 5905, TOYOTA HILUX REGISTRATION NO. BLA 4093, BMWX5 REGISTRATION NO. AEB 3021. TOYOTA COROLLA REGISTRATION NO. A/C 5874, NISSAN NP 300 REGISTRATION NO. AJE 7542, NISSAN NP 300REGISTRATION NO. AJE 7545, NISSAN NP 300 REGISTRATION NO. AJE 7549, NISSAN NP 300 REGISTRATION NO. AJE 7547, NISSAN NP 300 REGISTRATION NO. AJE 7549, NISSAN NP 300 REGISTRATION NO. AJE 7547, FORD RANGER RAPTOR REGISTRATION NO. BBA 5033, FORD RANGER

D/CAB REGISTRATION NO. AEB 3025, NISSAN NP 300 REGISTRATION NO. AJE 7544, NISSAN NP 300 REGISTRATION NO. AJE 7543, TOYOTA LANDCRUISER REGISTRATION NO. BLA 5922, TRAILER REGISTRATION NO. 6368, BMW7 SERIES REGISTRATION NO. BAF 5123, TOYOTA COROLLA REGISTRATION NO. BAC 4345, TOYOTA ALLEX REGISTRATION NO. BAC 4110, TOYOTA ALLEX REGISTRATION NO. BAG 3400, TOYOTA ALTEZA REGISTRATION NO. AIB 7043, TOYOTA MARK II REGISTRATION NO. BAJ 8672, BMW3 SERIES REGISTRATION NO. AIB 7681, TOYOTA AURIS REGISTRATION NO. BAK 6973, TOYOTA COROLLA REGISTRATION NO. AIB 9975, MITSUBISHI PAJERO REGISTRATION NO. ACZ 4676, TOYOTA BLADE REGISTRATION NO. BAK 4155. TOYOTA HILUX REGISTRATION NO. BAK 1671, TOYOTA MARK X BAK 9895, BMW 3 SERIES REGISTRATION NO. ALP 8089, TOYOTA DUET REGISTRATION NO. ALP8087, TOYOTA PASSO REGISTRATION NO. ALH3365, BMW 310L REGISTRATION NO. BLA 2122, TOYOTA VITZ REGISTRATION NO. BAL 4568, TOYOTA VITZ REGISTRATION NO. BAL 9788, TOYOTA COROLLA REGISTRATION NO. ALL 8227, TOYOTA AURIS REGISTRATION NO. BAK 6973, PROPERTY NO L/KAMALANTAPA/17. PROPERTY NO. L/KANANKATPA/45, PROPERTY NO. L/KANAKANTAPA/495, PROPERTY NO. L/KANANKATAPA/510 PROPERTY NO. L/KANAKANTAPA/844, PROPERTY NO. L/2403/M/D, PROPERTY NO. L/22388/M CHIBOMBO, PROPERTY L/ KANAKANTAPA/429, NGABW/LN-82843/225, CHISA/LN -56605/1070. SOLWE/LN 16095/119, L/KANAKANTAPA/853, F/6282/5 KANAKANTA, L/KANAKANTA/38, L/KANAKANTAPA/1221, L/KANAKANTAPA/74, PETAU/LN- 39024/25, CHONG/LN-21188/21, CHILA/LN -71543/171, F/MASAI/4017813, F/5249 AND S/NAKON 2409649

**DALITSO LUNGU:
SALOID TRADERS LIMITED**

**1ST INTERESTED PARTY
2ND INTERESTED PARTY**

**BEFORE THE HONOURABLE JUSTICES P. K. YANGAILO, A. MALATA-
ONONUJU AND I. M. MABBOLOBOLO, ON THIS 9TH DAY OF
FEBRUARY, 2026.**

For the Applicant:

*Mrs. Margaret Kapambwe
Chitundu, Mrs. Rhoda Malibata-
Jackson, and Mr. Darlington
Mukelelabo - National Prosecutions
Authority.*

For the 1st and 2nd Interested Party:

*Mr. Charles Changanu – Messrs. D.
Findlay and Associates.
Mr. Mehluli Malisa Batakathi and
Mr. I. Simbeye – Messrs. Malisa and
Partners Legal Practitioners.*

For the 2nd Interested Party:

*Mr. E. B. Mwansa, SC and Ms. C.
Tokowe – Messrs. EBM Chambers.*

JUDGMENT

A. MALATA-ONONUJU J., DELIVERED THE JUDGMENT OF THIS COURT

CASES REFERRED TO:

- 1. Simon Prophet Vs The National Director of Public Prosecutions Case CCT 56 / 05;*
- 2. Jessie Bwalya Kapyelata Tapalu Vs The Attorney General and The Director of Public Prosecutions 2019/HP/0932;*

3. *The Director of Public Prosecution Vs Dhiraj Dhumputha* 2020/HP/1287;
4. *Director of Public Prosecution and ZMK157,040, US\$23,007.14, ZMK50,000, and ZMK82,333.83 held in different Bank Accounts* 2019/HP/1784;
5. *Kumarnath Mohunram & Shelgate Investments CC Vs The National Director of Prosecutions BOE Bank Limited & The Law Review Project (As Amicus Curiae) CCT 19/06 [2007] ZACC 4;*
6. *National Director of Public Prosecutions Vs RO Cook Properties 2004 (8) BCLR 844 (SCA);*
7. *The People Vs Austin Chisangu Liato Appeal No. 291 of 2014;*
8. *Godfrey Miyanda Vs The High Court (1984) Z.R. 62;*
9. *Owners of the Motor Vessel Lillian "S" Vs Caltex Oil (Kenya) Limited (1989) KLR 19;*
10. *Zambia National Holdings Limited and United National Independence Party (UNIP) Vs The Attorney General (1994) S.J. 22 (SC);*
11. *JCN Holdings Limited and 2 Others Vs Development Bank of Zambia (2013) 3 Z.R. 299;*
12. *Samuel Khan Macharia Vs Kenya Commercial Bank [2012] (Citation not provided);*
13. *Sydney Mwansa Vs Director of Public Prosecutions Appeal No. 276/2021;*
14. *Melrose General Services Limited Vs Economic and Financial Crimes Commission, Wasp Networks Limited and Thebe Wellness Services (SC 1519/2019);*
15. *Rosemary Chibwe Vs Austin Chibwe SCZ Judgment No. 38 of 2000;*
16. *The Attorney General Vs Roy Clarke (2008) Z.R. 38 Vol. 1 (S.C.);*
17. *Regina Chifunda Chiluba Vs The People, HPA/ 15/2009;*
18. *Stanley Mombo Amuti Vs Kenya Anti-Corruption Commission MISC 5 of 2016 (Formally Civil Suit No. 448 of 2008 (O.S.);*
19. *R Vs Ilham Anwoir, Brian Mcintosh, Zaid Meghrabi and Adnan Elmoghrabi (2008) EWCA Crim. 1354;*
20. *Assets Recovery Agency Vs Peter Oluwafemi Olaiwon Civil Suit No. E002 of 2002*
21. *Criminal Assets Bureau Vs James Gately and Charlene Lam (2001) No. 20 CAB;*
22. *The Anti-Corruption Commission Vs Pittscon Zambia Limited 2022/HPEF/12;*
23. *Zambia Revenue Authority Vs Godfrey Kasungami S.C.Z. No. 39 of 1999;*
24. *Subramanian Vs The Public Protector [1956] 1 WLR 965;*

25. *Simon Miyoba Vs The People* (1977) Z.R. 218;
26. *Zambia Revenue Authority Vs Hitech Trading Company Limited* S.C.Z. No. 40 of 2000;
27. *R Vs John Rondo* (2001) 126 A Crim. R. 562;
28. *Mutambo Vs the People* (1965) ZR 15 (CA);
29. *Kalusha Bwalya Vs Chardore Properties Limited and Ian Chamunora Haruperi* 2009/HPC/0294;
30. *The Director of Public Prosecutions In Re Property Charles Phiri as Interested Party* 2023/HPEF/24;
31. *The Director of Public Prosecutions Vs Sharon Lee Brown* (1994) 72 Crim R 527); and
32. *The Director of Public Prosecutions In Re Property & Chiyeso Lungu as Interested Party* 2023/HPEF/26.

LEGISLATION REFERRED TO:

1. *The High Court Rules of the High Court Act, Chapter 27 of the Laws of Zambia;*
2. *The Forfeiture of Proceeds of Crime Act No. 19 of 2010 of the Laws of Zambia;*
3. *The National Pensions Scheme Authority Act No. 40 of 1996 of the Laws of Zambia;*
4. *The Prohibition and Prevention of Money Laundering Act No. 14 of 2001 of the Laws of Zambia;*
5. *The Prohibition and Prevention of Money Laundering (Amendment) Act No. 44 of 2010 of the Laws of Zambia;*
6. *The Constitution of the Republic of Zambia Act No 18 of 1996 of the Laws of Zambia;*
7. *The Prevention of Organised Crime Act Number 121 of 1998 of the Laws of South Africa;*
8. *The Evidence Act, Chapter 43 of the Laws of Zambia;*
9. *The Anti-Corruption and Economic Crimes Act No. 3 of the Laws of Kenya;*
10. *The Property Transfer Tax Act 1984 Chapter 340 of the Laws of Zambia;*
11. *The Urban and Regional Planning Act No.3 of 2015 of the Laes of Zambia;*
12. *The Lands and Deeds Registry Act Chapter 187 of the Laws of Zambia; and*
13. *The Anti-Corruption Act No. 3 of 2012 of the Laws of Zambia.*

OTHER WORKS REFERRED TO:

1. *International Bank for Reconstruction and Development and The World Bank – Stolen Assets Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture 2009.*
2. *Murphy on Evidence, Peter Murphy. 5th Edition (1995), Universal Law Publishing;*
3. *Black’s Law Dictionary 11th Edition 2019. Bryan A. Garner Editor in Chief. Thomson Reuters; and*
4. *Cross & Tapper on Evidence, Sir Rupert Cross and Colin Tapper. OUP Oxford, 2010.*

1. INTRODUCTION

- 1.1 The Applicant filed Originating Notice of Motion for a Non-Conviction Based Forfeiture Order of Tainted Property pursuant to **Order XXX Rules 15 and 17** of the **High Court Rules** as read together with **Sections 29 and 31** of the **Forfeiture of Proceeds of Crime Act No. 19 of 2020** of the **Laws of Zambia**.
- 1.2 The Originating Notice of Motion, filed on 26th July 2023, was supported by an Amended Affidavit in Support dated 22nd February 2024, with List of Authorities and Skeleton Arguments filed on 26th June 2023.

2. THE APPLICANT’S AMENDED AFFIDAVIT IN SUPPORT

- 2.1 The Applicant’s Amended Affidavit in Support was sworn by **PARDON LIUMA**, a Police Officer in the employ of the Zambia Police Service holding the rank of Detective Inspector based at Zambia Police Service Headquarters under the Criminal Investigations Department, thus competent to depose to the facts therein.
- 2.2 The Deponent avowed that on an unknown date, but in the month of December 2021, he was assigned a docket to investigate a confidential report in which it was alleged that 15 motor vehicles reasonably

suspected to be proceeds of crime, were parked at Star Shell Zambia Limited situate at Plot No. 18502 Kafue Road in Lusaka.

- 2.3 The Deponent avowed that he conducted a search at Star Shell Zambia Limited on 30th December 2021 and found and seized 15 motor vehicles now parked at the Drug Enforcement Commission (DEC) Headquarters in Lusaka.
- 2.4 It was avowed that the Deponent recorded a Statement from Mr. Ephraim Simwanza, a Manager or Clerk at Star Shell Zambia Limited, who stated that on an unknown date, but in the month of August, he received a batch of motor vehicles, Landcruiser by make, and that he did not know the people that brought the vehicles there.
- 2.5 Further to the above, it was averred that the Deponent was informed by Mr. Simwanza that it was his boss Mr. Ahsan Muhammad who instructed him to receive the vehicles and that the owners wanted them to be sold. Mr. Ephraim Simwanza's Statement was exhibited and marked "**PL1**".
- 2.6 It was deposed that a search was conducted at the Road Traffic and Safety Agency (RTSA) which revealed that out of the 15 motor vehicles seized at Star Shell Zambia Limited, one Toyota Landcruiser bearing Registration Number BAT 3703ZM was registered under Saloid Traders Limited.
- 2.7 That a search at the Patents and Companies Registration Agency (PACRA) established that the Directors and Shareholders of Saloid Traders Limited are Mr. Dalitso Lungu and Ms. Matildah Likando Milinga. It was deposed that a Printout from PACRA, exhibited and marked "**PL2**", at Paragraph 11 of the Amended Affidavit in Support showed that Saloid Traders Limited was incorporated on 17th

September 2018, and its registered office is Farm No. 919/50 Lusaka South in Lusaka.

- 2.8 The Deponent averred that he interviewed and obtained a Statement, a copy of which is exhibited and marked "**PL3**", from Patrick Chilekwa who confirmed that Saloid Traders Limited was duly incorporated and that Dalitso Lungu is one of the Directors and a Shareholder.
- 2.9 It was avowed that through investigations, it was found that the Company had filed its annual returns that were due for filing on or around 16th September 2022. A copy of the Tax Returns was exhibited and marked "**PL4**".
- 2.10 The Deponent swore that he conducted another search at Star Shell Zambia Limited and 16 vehicles were impounded and seized. A copy of the Notice of Seizure was exhibited and marked "**PL5**".
- 2.11 It was deposed that the Deponent's investigations revealed that out of the 16 motor vehicles seized, 5, namely Toyota Prado Registration Number BAT 794, Nissan NP300 Registration Number AJE 7543, Mitsubishi Pajero Registration Number BAT 553, Mitsubishi Pajero Registration Number BAT 774 and Nissan NP300 Registration Number AJE 7744, were registered under Saloid Traders Limited. Exhibited and marked "**PL6 - 10**" are copies of the motor vehicle Registration Certificates.
- 2.12 The Deponent avowed that he received further information from Police Command that there was information from reliable sources to the effect that there was some suspicious motor vehicles parked at a warehouse yard of Ndozo Lodge. That the Deponent conducted a search at the said Lodge on 22nd February 2022, and four (4) Shacman Tipper Trucks and one (1) Trailer with Registration Numbers BAT

3420 and BLA 6368, BAR 5288 and BAT 4601 were discovered concealed in the warehouse.

- 2.13 It was avowed that on 1st March 2022, the Deponent submitted a request to RTSA to establish the owners of the vehicles and trailer above and it was revealed that all the Shacman Tippers and Trailer were registered in the name of Saloid Traders Limited.
- 2.14 The Deponent avowed that he recorded a Statement, a copy of which is exhibited and marked "**PL11**", from Mr. Bryson Milambo, a Police Officer at Siavonga Police Station, who informed him that on 2nd September 2021, he was assigned to carry out investigations concerning the abandoned motor vehicles in Siavonga. That Mr. Bryson Milambo informed the Deponent, that together with other Officers, he travelled to Siavonga and found Mr. Brave Mweetwa with a Toyota Landcruiser Registration Number BLA 5922. That upon interviewing Mr. Brave Mweetwa, he was informed that he was given the motor vehicle by the Patriotic Front Party (PF) Secretariat for campaigns and that he collected it from State House.
- 2.15 The Deponent averred that he interviewed and recorded a Statement, a copy of which is exhibited and marked "**PL12**", from Mr. Brave Mweetwa in connection with the said motor vehicle who stated that he was a candidate for Siavonga Constituency under the Patriotic Front Party (PF) and that he had requested for a campaign motor vehicle from the Party President and Secretariat, and that a Toyota Landcruiser white in colour was handed to him by Mr. Chisanga Chanda.
- 2.16 The Deponent avowed that he recorded a Statement, a copy of which is exhibited and marked "**PL13**", from Mr. Chisanga Chanda who confirmed to have handed over the Toyota Landcruiser Registration

Number BLA 5922 to Mr. Brave Mweetwa. That a search at RTSA revealed that the said motor vehicle belonged to Saloid Traders Limited.

- 2.17 The Deponent avowed that further investigations at RTSA revealed that Saloid Traders Limited had a total of 48 motor vehicles of different makes all valued at ZMW23,050,842.49. A copy of the Statement from RTSA was exhibited and marked "**PL14**".
- 2.18 It was deposed that through investigations the Deponent discovered that out of the 48 motor vehicles, 12 were seized while the rest were restricted with RTSA and their whereabouts are unknown. The Restriction Notice was exhibited and marked "**PL15**".
- 2.19 The Deponent avowed that he recorded an Ordinary Statement, a copy of which is exhibited and marked "**PL16**", from Mr. Dalitso Lungu concerning the motor vehicles in question and that he stated that his Company, Saloid Traders Limited, owns the vehicles. That he had bought some of the vehicles from Higer Bus Zambia Limited at Makeni in Lusaka and others from Henred Fruehauf situated at Makeni opposite Higer Bus Zambia Limited.
- 2.20 The Deponent swore that he recorded a Statement, a copy of which is exhibited and marked "**PL17**", from Mr. Wu Ming, the General Manager at Higer Bus Zambia Limited, who stated that on 9th August 2021, Mr. Dalitso Lungu bought two (2) Shacman Trucks at a cost of USD220,400.00 and paid USD50,000.00 cash as down payment.
- 2.21 That Mr. Wu Ming informed the Deponent that as for the balance, which was USD170,400.00, it was agreed that he would pay USD50,000.00 per month until he finished payments as per the Credit Sale Agreement.

- 2.22 It was deposed that Mr. Wu Ming informed the Deponent that initially, Saloid Traders Limited went to his Company on 18th January 2021, and bought Shacman Tipper Trucks and that Mr. Dalitso Lungu entered into an agreement on behalf of Saloid Traders Limited. The Deponent was informed by Mr. Wu Ming that the cost of the two (2) trucks was USD196,000.00 and Mr. Dalitso Lungu paid a down payment of USD50,000.00 and the balance was paid in full within three months.
- 2.23 The Deponent further averred that he was informed by Mr. Wu Ming that the total which was paid in cash by Mr. Dalitso Lungu towards the purchase of the trucks was USD476,000.00 and there is an outstanding balance of USD40,000.00.
- 2.24 The Deponent avowed that he interviewed and recorded a Statement, a copy of which was exhibited and marked "**PL18**", from Mr. Emmanuel Mbalaka, a Logistics Officer at Sarago General Dealers, who stated that on 23rd April, 2021, two motor vehicles were purchased from Sarago General Dealers at the cost of USD38,500.00 each and a total combined cost of USD77,000.00 which was paid in cash by Saloid Traders Limited. That the vehicles bought were Nissan Hardbody NP300 Chassis Number ADNCPUP 22 Z 0085332 and Nissan Hardbody NP300 Chassis Number ADNCPUD 22 Z 0085811, respectively.
- 2.25 That Mr. Emmanuel Mbalaka informed the Deponent that the vehicles were registered with RTSA bearing Registration Numbers AJE 7543 ZM and AJE 7544 and were handed over to Saloid Traders Limited.
- 2.26 The Deponent avowed that he conducted a search at the Ministry of Lands and Natural Resources to establish whether Saloid Traders Limited owned any real property and he found that Saloid Traders

Limited owned eight (8) properties being L/Kanakantapa/17, L/Kanakantapa/45, L/Kanakantapa/495, L/Kanakantapa/510, L/Kanakantapa/844, L/2403/M/D, L/22383/M Chibombo and, L/Kanakantapa/429. Copies of the Lands Register for Saloid Traders Limited was exhibited and marked “**PL19**” to “**PL26**”.

- 2.27 It was deposed that the Deponent was informed that the Department of Valuation and Property Management conducted a valuation on the properties and reports to that effect, copies of which are collectively exhibited and marked “**PL27-29**”, were issued.
- 2.28 The Deponent recorded a Statement from Ms. Lillian Rhoda Masuwa Mulusa who stated that she owned a bare land in Chibombo District whose property number is L/22383 which she, in 2020, sold to Mr. Dalitso Lungu at a consideration of ZMW400,000.00. A copy of the Statement is exhibited and marked “**PL30**”.
- 2.29 The Deponent averred that he conducted financial investigations on Saloid Traders Limited to establish whether it had any bank accounts and his investigations revealed that Saloid Traders Limited maintains two bank accounts, Kwacha account number 5681184500170, and a Dollar account number 5681184500271, with Zambia National Commercial Bank (ZANACO) Cairo Business Centre and that Mr. Dalitso Lungu is the sole signatory.
- 2.30 It was deposed that a Statement was recorded from Mr. Joseph Chisembele, a Banker at ZANACO, who stated that he printed the Bank Statements for Saloid Traders Limited for both the Kwacha and Dollar Accounts. That he printed the Mandate File for Saloid Traders Limited and noticed that the said File had one signatory being Mr. Dalitso Lungu. That Mr. Joseph Chisembele further informed the Deponent that the Dollar Account was not very busy as compared to

the Kwacha Account and that the closing balance as of 14th September 2022, was USD677.05. A copy of the United States Dollar Account Bank Statement was exhibited and marked "**PL31**".

- 2.31 The Deponent was further informed that the closing balance on the Kwacha Account as of 14th September 2022, was ZMW173,320.07 and the copy of the Bank Statement was exhibited and marked "**PL32**".
- 2.32 The Deponent avowed that Mr. Chisembele informed him, and he established, that the total credit transactions for the Kwacha Account during the period between December 2021, to January 2022, was ZMW32,981,966.00. The copy of the Statement by Mr. Joseph Chisembele was exhibited and marked "**PL33**".
- 2.33 The Deponent avowed that further investigations revealed that Saloid Traders Limited owns property in Jack Compound which was leased out to Total Energies Limited. A copy of the Lease was exhibited and marked "**PL34**".
- 2.34 The Deponent avowed that he recorded a Statement, a copy of which was exhibited and marked "**PL34**", from Ms. Caroline H. Benedicte, the Managing Director for Total Energies Limited, who stated that the Lease Agreement with Saloid Traders Limited was for 10 years commencing 1st September 2018.
- 2.35 That Ms. Caroline H. Benedicte informed the Deponent that it was agreed that the annual lease rental was USD96,000.00 at USD8,000.00 per month, which rentals would be paid quarterly amounting to USD26,000.00 including tax. She informed the Deponent that the said money was being paid through ZANACO Bank Kwacha Account Number 5681184500170 for Saloid Traders Limited. The Deponent was informed that from the time they entered into the Agreement, Total Energies Limited have paid USD362,399.95 to

Saloid Traders Limited. A copy of Ms. Caroline H. Benedicte's Statement was exhibited and marked "**PL35**".

- 2.36 The Deponent swore that investigations also revealed that Saloid Traders Limited hired out three (3) Shacman Trucks to Bleavins Ingram International Zambia Limited (BII) for three months. It was deposed that a Statement, a copy of which is exhibited and marked "**PL36**", was recorded from Mr. Vincent Kanyanta, the Chief Executive Officer for BII Zambia Limited, who stated that he first hired the trucks in the month of August 2021, after agreeing that he should pay ZMW8,000.00 per truck per day.
- 2.37 That in August 2021, Mr. Vincent Kanyanta paid Saloid Traders Limited ZMW232,000.00 after Tipper, bearing Registration Number BAR 5288, worked for 29 days. That in September 2021, he hired three Tippers for 56 days and paid Saloid Traders Limited ZMW448,000.00 through a bank transfer, a copy of which was exhibited and marked "**PL37**". It was deposed that in October 2021, the Tipper worked for 86.5 days, and he paid Saloid Traders Limited ZMW692,000.00 through a bank transfer, a copy of which is exhibited and marked "**PL38**".
- 2.38 It was deposed that in November 2021, Mr. Vincent Kanyanta paid Saloid Traders Limited part payment of ZMW500,000.00 for the 75 days the trucks had worked and later in December he settled the balance of ZMW100,000.00 which was paid through a bank transfer, whose form was exhibited and marked "**PL39**".
- 2.39 That Saloid Traders Limited prepared the invoices for the above transactions, and copies of the invoices are exhibited and marked "**PL40-43**".

- 2.40 The Deponent avowed that he made enquiries at the National Pensions Scheme Authority (NAPSA) to establish whether Saloid Traders Limited was registered under the Authority. That the total traceable earnings for Saloid Traders Limited from the incorporation date of 17th September 2018, were USD362,399.95 earned from the Total Energies Limited Lease and ZMW1,972,000.00 earned from BII Zambia Limited.
- 2.41 It was deposed that on 22nd March 2023, the Deponent received information through a letter from NAPSA to the effect that Saloid Traders Limited was registered on 25th March 2021, as a contributing employer with the Authority under the provision of the **National Pensions Scheme Authority Act No. 40 of 1996** and was allocated with Employer Account Number 5276293. The copy of the letter is exhibited and marked "**PL44**".
- 2.42 The Deponent avowed that he recorded a Statement, a copy of which is exhibited and marked "**PL45**", from Mr. Evans Mpundu, a Contributions Officer at NAPSA, who stated that Saloid Traders Limited has been contributing to NAPSA since March, 2021, to December, 2022, ZMW500.00 for a single employee, Chilufya Lwipa Chabula of National Registration Card number 174695/11/1. That in January 2023, Saloid Traders Limited started contributing for Mr. Dalitso Lungu, ZMW500.00. That Saloid Traders Limited has two registered employees with NAPSA.
- 2.43 The Deponent averred that investigations at NAPSA revealed that Ms. Matildah Likando Milinga, who is a Director and Shareholder at Saloid Traders Limited, was not registered at NAPSA as an employee.
- 2.44 That following an extension of his investigations into the Directors and Shareholders at Saloid Traders Limited, it was revealed that Ms. Matildah Likando Milinga works for the Zambia Electricity Supply

Corporation (ZESCO) and that a Statement recorded from Mr. Isaac Chisanga, a Senior Manager Industrial Relations at ZESCO, confirmed that Ms. Matildah Likando Milinga joined the Corporation on 2nd August, 2016, and that on 1st September, 2018, she was promoted to the position of Accountant Assistant.

- 2.45 It was averred that at the time of the first appointment, her salary was ZMW8,336.41 and upon being promoted, it rose to ZMW10,393.35. That in 2021, she got a compassionate loan of ZMW30,000.00 which she paid through deductions from her salary for 12 months after which she started getting paid ZMW8,872.60. Copies of her pay slips from 2016 to 2021 are exhibited and marked "**PL46**". That, in 2022, her salary was increased to ZMW11,040.60 and that she is still working for ZESCO as an Accountant Assistant. A copy of Mr. Isaac Chisanga's Statement is exhibited and marked "**PL47**".
- 2.46 The Deponent avowed that a search with all the banks revealed that Ms. Matildah Likando Milinga owns four motor vehicles that are registered in her name.
- 2.47 That a search at various banks revealed that Mr. Dalitso Lungu maintains account numbers 1810232100297, 1810232200432 and 1810132100196 with ZANACO Cairo Business Centre and one account with ABSA Bank Head Office.
- 2.48 The Deponent recorded a Statement from Ms. Inonge Muyunda Mwaba, a Banker at ZANACO, who stated that Account Number 1810232100196 was opened on 10th October 2012, and is still active. That the transfer transactions on the Account include 14 Internet Bank Transfers it received, cash deposits of ZMW220,000.00 made by Mr. Dalitso Lungu and ZMW100,000.00 from Saloid Traders Limited to Mr. Dalitso Lungu.

- 2.49 That Account Number 1810232200432 was opened on 16th March 2020 and is still active although it has never had big deposits. A copy of the Bank Statements of Account Number 1810232200432 is exhibited and marked "**PL48**".
- 2.50 It was deposed that Account Number 1810232100297 was opened on 10th October 2012 and is active. That there were three transactions on the Account amounting to ZMW3,000,000.00 on 15th to 16th April 2021. One transaction was a closure of a fixed term deposit that came through the Account, and two fund transfers of ZMW1,000,000.00 each, which were transferred on the Account on 15th and 16th April 2021. A copy of the Bank Statement for Account Number 1810232100297 is exhibited and marked "**PL49**".
- 2.51 It was deposed that on 16th April, 2021, Mr. Dalitso Lungu invested in a 'family' fixed term deposit of ZMW3,000,000.00 where he was paid an interest of ZMW570,000.00. Further that there were various deposits on the said Account and notable was one for ZMW223,300.00 which was deposited by Mr. Dalitso Lungu.
- 2.52 A copy of the Statement of Ms. Inonge Muyunda Mwaba is exhibited and marked "**PL50**".
- 2.53 The Deponent avowed that an inspection of the Mandate Files, copies of which are exhibited and marked "**PL51**", for all the accounts revealed that Mr. Dalitso Lungu is the sole signatory to all of them. That the Bank Account Number 401045163 held at ABSA Bank had a total credit balance of ZMW3,831,593.00 between 2015 and 2022. The copies of the Bank Statement are exhibited and marked "**PL52A**" and "**PL52B**".
- 2.54 The Deponent averred that investigations at the Ministry of Lands revealed that Mr. Dalitso Lungu has 16 properties dotted around the

Country. That on 6th May 2023, the Commissioner of Lands wrote a letter, a copy of which is exhibited and marked “**PL53**”, which revealed that he owns Property Numbers L/Kanakantapa/74, NGABW/LN_82843/225, L/Kanakantapa/1221, F/MASAI/4017813, CHISA/LN_56605/1070, CHONG/LN_21188/21, CHILA/LN_71543/171, LUSAK/LN_52061/9, SOLWE/LN_16095/119, PETAU/LN_39024/25, S/NAKON/2409649 and LUSAK/LN_2662/13.

- 2.55 It was deposed that on 25th November 2022, the Deponent received information through a letter from the Ministry of Lands to the effect that, after a search through their system, it was discovered that Mr. Dalitso Lungu also owned Property Numbers L/Kanakantapa/38, L/Kanakantapa/853, F/5249 Masaiti and F/6282/S. A copy of the letter from the Ministry of Lands is exhibited and marked “**PL54**”.
- 2.56 It was deposed that a search at RTSA revealed that Mr. Dalitso Lungu has 21 motor vehicles registered under his name. A copy of the Mandate Files is exhibited and marked “**PL55**”.
- 2.57 The Deponent avowed that according to the Evaluation Report generated by the Valuation Department and Property Management it was established that the total value of the subject motor vehicles is ZMW1,910,331.09 and he placed a Restriction Notice on the said vehicles.
- 2.58 It was deposed that investigations on Mr. Dalitso Lungu’s personal earnings revealed that in 2012, he worked for Varun Beverages Zambia Limited and Zambia Revenue Authority (ZRA).
- 2.59 A Statement was recorded from Mr. Obby Kafuna, a Senior Payroll Accountant at Varun Beverages Zambia Limited, who confirmed that Mr. Dalitso Lungu joined the Company on 13th August 2012. That he

worked with the Company for 2 months and 3 weeks in the Human Resources Department as an Administration Assistant and his monthly salary was ZKW2,117,375.00 (ZMW2,177.38 rebased). That for the period that he worked, he was paid a total amount of ZKW5,407,254.00 (ZMW5,407.25 rebased). A copy of his pay slip is exhibited and marked "**PL56**".

2.60 That Mr. Dalitso Lungu resigned from Varun Beverages Zambia Limited after working for 2 months and 3 weeks on 5th November 2012. A copy of the Statement from Mr. Obby Kafuna is exhibited and marked "**PL57**".

2.61 The Deponent averred that he recorded a Statement, a copy of which is exhibited and marked "**PL58**", from Mr. Bernard Simbunji, an Accountant from ZRA, who confirmed that Mr. Dalitso Lungu worked for ZRA and that he joined the Authority on 2nd November 2012, and worked for 34 months and was paid ZMW132,396.00 during the period.

2.62 Further that Mr. Dalitso Lungu got a loan of ZMW121,960.00 from Standard Chartered Bank and the Bank was deducting ZMW2,032.68 from his salary.

2.63 The Deponent avowed that he seized all the subject properties in this Matter as they are reasonably suspected to be proceeds of crime. That upon his analysis of the Valuation Reports, the Deponent found that Mr. Dalitso Lungu acquired unexplained wealth of about ZMW31,332,019.00. That the said amount is the difference between the total amount of the properties and motor vehicles acquired during the period under review and the total earnings from Varun Beverages Zambia Limited, ZRA, the loan from the Bank and salaries allegedly earned from Saloid Traders Limited.

- 2.64 It was deposed that upon analysing the Valuation Report, the Deponent found that Saloid Traders Limited acquired unexplained wealth amounting to ZMW35,067,662.56 although the 2nd Interested Party earned ZMW7,075,645.00 from Total Energies Limited and ZMW780,000.00 from BII Zambia Limited.
- 2.65 The Deponent avowed that on 15th September 2022, Mr. Dalitso Lungu was warned and cautioned for the offence of being in possession of property reasonably suspected to be proceeds of crime, contrary to **Section 71** of the **Forfeiture of Proceeds of Crime Act No. 19 of 2010**. That under Warn and Caution, Mr. Dalitso Lungu stated that all the motor vehicles are owned by him and Saloid Traders Limited. That they were bought from business operations and other sources such as farming, as he is a farmer. A copy of the Warn and Caution Statement is exhibited and marked "**PL59**". That having conducted investigations, the Deponent averred that they revealed that Mr. Dalitso Lungu does not conduct any commercial farming on the farms restricted.
- 2.66 The Deponent further avowed that he recorded a Statement from Mr. James Mwansa, a Tax Inspector at ZRA, who stated that Mr. Dalitso Lungu has not submitted Returns for the period 2017 to 2023, and has not made any payments making him non-tax compliant. A copy of the Statement is exhibited and marked "**PL60**".
- 2.67 A further Statement was recorded from Ms. Susan Matafwali, a Senior Inspector of Taxes, who stated that in 2020, the tax payable as declared by Saloid Traders Limited in the Return was ZMW11,118.00 on their assessable income of ZMW31,765.70.
- 2.68 That in 2021, the Company, Saloid Traders Limited, declared a nil Return which means that there was no profit in the year on which tax

could be charged on. A copy of the said Return is exhibited and marked “**PL61**”.

2.69 It was deposed that having been advised and verily believing the same to be true and correct, that the above cited properties are tainted properties and liable for forfeiture to the State because the properties are reasonably suspected to be proceeds of crime.

2.70 It was further deposed that the offence in **Section 71** of the **Forfeiture of Proceeds of Crime Act** is a serious offence.

3. THE APPLICANT’S SKELETON ARGUMENTS IN SUPPORT

3.1 In the Skeleton Arguments filed on 26th June 2023, Counsel for the Applicant begun by quoting **Order XXX Rule 15** and **17** of the **High Court Act**, as well as **Section 29** of the **Forfeiture of Proceeds of Crime Act** (FPOCA), which form the basis of the Applicant’s Application and gives this Court the jurisdiction to hear the Matter.

3.2 Counsel submitted that Non-Conviction Based Forfeiture, also known as Civil Forfeiture, provides a unique remedy used as a measure to combat organised crime; that it rests on the legal fiction that the property and not the owner has contravened the law. It was submitted that it does not require a conviction or even a criminal charge against the owner and that this kind of forfeiture is in theory seen as remedial and not punitive.

3.3 Counsel referred us to the decision in the case of **Simon Prophet Vs The National Director of Prosecutions** ⁽¹⁾ wherein the Court was called upon to strike an appropriate balance between two constitutional principles. One of the principles is that no one should be arbitrarily deprived of property. The other is that the State is under an obligation to protect members of the public from criminal predations.

- 3.4 Counsel submitted that Non-Conviction Based Forfeiture is constitutional and cited the case of **Jessie Bwalya Kapyelata Vs The Attorney General and The Director of Public Prosecutions** ⁽²⁾ which states that Non-Conviction Based Forfeiture is constitutional.
- 3.5 Counsel further cited the holding in the case of **The DPP Vs Dhiraj Dhumputha** ⁽³⁾ as well as **Section 31(4)** of the **FPOCA** for the settled position that Non-Conviction Based Forfeiture can run parallel with criminal proceedings and that a Forfeiture Order for tainted property is not affected by the outcome of criminal proceedings or investigations.
- 3.6 Counsel further cited the case of **Director of Public Prosecution and ZMK157,040, US\$23,007.14, ZMK50,000, and ZMK82,333.83 held in different Bank Accounts** ⁽⁴⁾ wherein it was stated as follows:
- “A non-conviction based forfeiture provides an effective avenue for confiscation in situations where it is not possible to obtain a criminal conviction, whether the defendant is dead, unknown, missing or immune from prosecution, or in cases where the statute of limitations prevents prosecution.”***
- 3.7 Counsel submitted that the Notice of Motion for a Non-Conviction Based Forfeiture Order against the tainted Properties is supported by an Amended Affidavit in Support deposed to by one Pardon Luima showing that the Properties in issue are proceeds of crime as they are above the net worth of the Interested Parties.
- 3.8 It was contended that the Properties which the Interested Parties possess are proceeds of crime and that the possession of the said Properties offend the provisions of **Section 71** of the **FPOCA**.

- 3.9 Counsel defined 'proceeds of crime' as per the **Prohibition and Prevention of Money Laundering (Amendment) Act No. 44 of 2010** as read with the **Prohibition and Prevention of Money Laundering Act 2001**, as well as per **Section 2** of the **FPOCA**. It was Counsel's submission that the Affidavit in Support of the Application shows that Dalitso Lungu owns 21 vehicles registered in his name with an estimated value of ZMW1,522,549.76, and 14 properties in different parts of the Country including in North Western, Copperbelt, Muchinga, and Central Province, whose value, according to the Department of Valuation and Property Management, was ZMW12,825,100.00.
- 3.10 Counsel submitted that there is evidence to the effect that Dalitso Lungu worked for Varum Beverages Zambia Limited where he earned salaries amounting to ZMW5,407.25 and that he also worked for ZRA where he earned ZMW132,396.00; and that he got a loan from Standard Chartered Bank.
- 3.11 It was submitted that evidence from NAPSA, where Saloid Traders Limited made monthly contributions for its employees, indicate that Dalitso Lungu earned a total of ZMW125,000.00 in salaries for the 25 months from March 2021 to March 2023. That the total sum of the known earnings for Dalitso Lungu from 2012 to date is ZMW384,763.25. That there is evidence that the value of the Properties that Dalitso Lungu owns is ZMW31,332,019.75.
- 3.12 Counsel submitted that the above evidence clearly shows that Dalitso Lungu acquired the unexplained net worth of ZMW31,332,019.75 and when asked how he acquired the Properties, he indicated that he is a farmer but did not indicate what he deals with and who his customers are. That further, there is evidence from the Dealing Officer to the

effect that he has visited all the properties owned by Dalitso Lungu and has not found anywhere where he conducts his farming activities. That the only farm discovered with some farming activity is registered in his mother's name and is not his.

- 3.13 It was Counsel's submission that Dalitso Lungu failed to give a reasonable explanation on how he acquired the above Properties; that the above Properties are proceeds of crime as they are above the net wealth of the Interested Party.
- 3.14 Counsel submitted that there is evidence that Saloid Traders Limited owns 48 motor vehicles valued at ZMW23,050,842.49 and that the value of the properties according to the valuation done by the Government Valuation Department on properties owned by Saloid Traders Limited is ZMW11,843,500.00. That the properties owned by Saloid Traders Limited and leased out to Total Energies Limited and hired out to BII Zambia Limited, and monies received from entities such as Mountain Sun, Village Mall and Collins Chibwe, present total traceable earnings for Saloid Traders Limited of ZMW7,855,645.00.
- 3.15 It was submitted that evidence shown in the Affidavit reveal that Saloid Traders Limited acquired unexplained wealth amounting to ZMW35,067,662.56 and that this amount is more than ZMW7,855,645.00 being the traceable amount that Saloid Traders Limited earned.
- 3.16 Counsel submitted that when Dalitso Lungu was asked about how Saloid Traders Limited acquired the properties in question, he responded that the motor vehicles were bought from business operations and other sources such as farming as he is a farmer. It was submitted that the explanation given by Dalitso Lungu is not sufficient in that he did not give details of the business operations and how

much he was getting from the said operations. That further, he did not state what farming activities he is involved in nor the customers that buy his products.

- 3.17 Counsel submitted that the evidence proves that Dalitso Lungu and Saloid Traders Limited were in possession of property suspected to be proceeds of crime as they failed to give proper and sufficient explanation of where the money, they used to buy the motor vehicles and the Properties in issue, came from.
- 3.18 That the Affidavit furthermore chronicled investigations which resulted in the seizure of the cited Properties which are the subject of the Non-Conviction Based Forfeiture Application as they are tainted properties.
- 3.19 Counsel defined ‘tainted property’ and ‘serious crime’ as per **Section 2** of the **FPOCA** and contended that the Properties are proceeds of crime in that the Interested Parties have not given any significant explanation on how they acquired the Properties.
- 3.20 Counsel referred the Court to **Section 31(1)** of the **FPOCA** and submitted that as set out in the said provision, on a balance of probabilities and from the evidence set out, it can clearly be seen that the Properties in question are proceeds of crime. That the offence of being in possession of proceeds of crime is a serious offence because one can be sentenced to twelve months or more when found guilty.
- 3.21 We were urged to adopt, for persuasive reasons only, the reasoning of Van Heerden AJ in the South African Constitutional Court case of **Kumarnath Mohunram & Shelgate Investments CC Vs The National Director of Public Prosecutions, BOE Bank Limited & The Law Review Project (As Amicus Curiae)** ⁽⁵⁾ wherein she cited with approval the holding of the Supreme Court in the case of **National**

Director of Public Prosecution Vs RO Cook Properties (Pty) Ltd. ⁽⁶⁾

and submitted that the Applicant has established on a balance of probabilities that the Property cited above are proceeds of crime. That the Affidavit and exhibits have placed sufficient evidence to satisfy the Court that the Property stated above are proceeds of crime.

3.22 It was Counsel's prayer that the Court finds that the cited Properties are tainted properties and Orders that the same be forfeited to the State.

4. THE INTERESTED PARTIES' AFFIDAVIT IN OPPOSITION

4.1 The Interested Parties filed an Affidavit in Opposition with List of Authorities and Skeleton Arguments on 22nd July 2024. The Amended Affidavit in Opposition was sworn by **DALITSO LUNGU**, the 1st Interested Party and a Director in the 2nd Interested Party.

4.2 The Deponent averred that the Toyota Landcruiser bearing Registration Number BAT 3703M was bought by his father, Mr. Edgar Chagwa Lungu, but that the same was registered under Saloid Traders Limited.

4.3 It was avowed that whilst not disputing the information the Applicant obtained from PACRA, the five (5) motor vehicles namely, Toyota Prado Registration Number BAT 794, Nissan NP300 Registration Number AJE 7543, Mitsubishi Pajero Registration Number BAT 553, Mitsubishi Pajero Registration Number BAT 774 and Nissan NP300 Registration Number AJE 7744, referred to in the Applicant's Amended Affidavit in Support, are registered under Saloid Traders Limited and the same were bought by his father.

4.4 The Deponent avowed that the four (4) vehicles being three (3) Shacman Tipper Trucks and one (1) Trailer with Registration Numbers

BAT 3420 and BAT 6368, BAR 5288 and BAT 4601 were bought by Saloid Traders Limited on Credit Sale Agreement and at the material time the vehicles were parked at Ndozo Lodge after being used in normal business operations under a lease and the same were never concealed. A copy of the Credit Sale Agreement was exhibited and marked "**DL1**". That the terms of the Credit Sale Agreement were that USD50,000.00 would be paid upon signing the Agreement and the balance would be settled in instalments. That upon purchase, the motor vehicles were hired out to various clients under the normal course of business and constantly generated income.

- 4.5 The Deponent stated that he had no comment to the averment by the Applicant in the Amended Affidavit in Support that an interview was conducted and a Statement recorded from Mr. Bryson Milambo, a Police Officer at Siavonga Police Station, concerning abandoned motor vehicles in Siavonga.
- 4.6 It was deposed that the motor vehicle referred to in the Amended Affidavit in Support, being a Toyota Land Cruiser bearing Registration Number BLA 5922 was paid for by his father and that at the material time, his father had asked for the said vehicle after which the Deponent had no knowledge as to where it was taken, used, or to whom it was given.
- 4.7 It was averred that the 48 motor vehicles referred to in the Amended Affidavit in Support were bought at different times and prices and mainly financed by the Deponent's father, and that in any case, the total value mentioned therein has no basis or reference whatsoever as the said Statement marked "**PL14**" contains no values for the actual purchase prices or estimates to rely on; thus it does not reflect the

true purchase prices contained in the purchase documents filed with RTSA at the time of registration of the vehicles.

- 4.8 The Deponent avowed that the State seized 12 motor vehicles and the rest were restricted. That a copy of the Restriction Notice "**PL15**" is merely a Restriction Notice which does not show the details of the 12 motor vehicles alleged to have been seized.
- 4.9 The Deponent avowed that he admits to the extent that the Company bought motor vehicles from Higer Bus Zambia Limited and Henred Fruehauf, but that, he verily believes that Henred Fruehauf is a duly registered company in Zambia. That though he cannot speak to the interview conducted with Mr. Wu Ming, he can confirm buying the said trucks upon paying a deposit of USD50,000.00.
- 4.10 The Deponent avowed that he does not dispute that there was a balance of USD170,400.00 that remained and because of the intervening circumstances such as seizure of the said vehicles which has impeded the hiring operations, the Company has been unable to finish paying off the balance of the motor vehicles.
- 4.11 The Deponent avowed that he did not dispute that he entered into an agreement on behalf of Saloid Traders Limited for the Shacman Tipper Trucks nor does he dispute that the cost for the two trucks was USD196,000.00 and that he paid a down payment of USD50,000.00 and the balance was paid in full within three (3) months; He equally confirmed that he, himself, did pay cash amounting to USD476,000.00 towards the purchase of the trucks and the payment of the same was made in instalments.
- 4.12 With regards to the purchase of two (2) motor vehicles from Sarago General Dealers as contained in the Applicant's Amended Affidavit in Support, the Deponent vied that the purchase of the motor vehicles

was facilitated and financed by his father and that he, the Deponent, owns a filling station which is operated by Saloid Traders Limited on lease to Total Energies Limited at USD8,000.00 per month since 2018.

- 4.13 It was deposed that with regards to the findings at Ministry of Lands and Natural Resources that Saloid Traders Limited owns eight (8) properties in the Kanakantapa and Chibombo areas, he can confirm that this is so, and that the properties were legally acquired and that they are neither tainted nor are they proceeds of crime whatsoever.
- 4.14 It was deposed that with regards to the Evaluation Reports referred to in the Applicant's Amended Affidavit in Support and marked "**P27**" to "**P29**", the Deponent verily believes that they do not reflect the actual cost of purchase and development of the Properties that were applicable at the material times, but that the same merely consists of assumptions and opinions of the Evaluators as to the market value of the respective Properties at the date of the evaluation.
- 4.15 The Deponent avowed that he verily believes that there is a great discrepancy between the Valuation Reports alluded to in the Amended Affidavit in Support and that the actual considerations of the purchase of the Property as shown in the exhibits marked "**PL19**" to "**P26**".
- 4.16 The Deponent vied that he could confirm that Saloid Traders Limited did purchase Property No. L/22383 in Chibombo District from Ms. Lillian Rhoda Masuwa Mulusa as can be seen on the Land Register printout.
- 4.17 The Deponent avowed that Saloid Traders Limited maintained and operated bank accounts with ZANACO with the Account Numbers as stipulated in the Applicant's Amended Affidavit in Support, until the State restricted them and that he is the signatory thereto.

- 4.18 It was deposed that the Property owned by the 1st Interested Party, leased to Total Energies Limited through the 2nd Interested Party for USD8,000.00 per month, was gifted to him by his father. Copies of the Deed of Gift and the respective Occupancy Licence were exhibited and marked “**DL2a**” to “**DL2d**”.
- 4.19 It was deposed that the Director of Public Prosecutions (DPP) wrote to Total Energies Limited directing them to deposit the applicable rentals into the National Prosecutions Authority Forfeiture Account number 17020204423161 domiciled at Investrust Bank. Copies of the letter from the DPP to Total Energies Limited and the inforamatory letter to Saloid Traders Limited were exhibited and marked “**DL3a**” and “**DL3b**”, respectively. The Deponent averred that he verily believes that the DPP has no legal authority to divert the rentals as he did.
- 4.20 The Deponent avowed that he did not dispute the contents of the Statement of Ms. Caroline H. Benedicte, the Managing Director at Total Energies Limited, given to the Applicant as stated in the Amended Affidavit in Support.
- 4.21 That though the Deponent could not comment on the averments that enquiries were made at NAPSA in order to establish whether Saloid Traders Limited was registered under the Authority as deposed to in the Amended Affidavit in Support, the Deponent did avow with regards to the averments regarding the traceable earning for the Company from the incorporation date of 17th September, 2018, that he had various other sources of income as the business run by Saloid Traders Limited is a family business and the bulk of its purchases and business operations were facilitated and financed by his father.
- 4.22 The Deponent avowed that he did not dispute that Saloid Traders Limited was registered as a contributing employer with NAPSA on 25th

March 2021 and was allocated with Employer Account Number 5276293 nor did the Deponent dispute the copy of the letter exhibited in the Amended Affidavit in Support marked "**PL44**" evidencing the said registration.

- 4.23 Further that he did not dispute the contents of the Applicant's Amended Affidavit in Support with regards to his Bank Accounts at ZANACO Cairo Business Centre and the one Account at ABSA Bank Head Office and the various transactions and monies therein as well as the Bank Statements exhibited.
- 4.24 The Deponent avowed that he did own the 16 Properties dotted around the country as stated in the Amended Affidavit in Support and based on investigations conducted at the Ministry of Lands and confirmed by a letter from the Commissioner of Lands, a copy of which was exhibited and marked "**PL53**", and vied that the said Properties are not proceeds of crime as he genuinely acquired them.
- 4.25 It was deposed that the Deponent did not dispute that he has 21 motor vehicles registered under his name as shown by the copies of the RTSA Mandate Files exhibited and marked "**PL55**" in the Amended Affidavit in Support but noted that motor vehicle Registration Number ALH 3365 was recorded twice.
- 4.26 It was deposed that the Valuation Report in respect of the above motor vehicles referred to in the Amended Affidavit in Support is merely an unsubstantiated estimate which neither represents nor reveals the actual purchase price of the vehicles but merely indicates a valuator's opinion or value estimate.
- 4.27 The Deponent averred that he did not dispute his work history as stated in the Amended Affidavit in Support, but in addition, the Deponent avowed that his formal work is not his only source of income

as to a larger extent, since his childhood, before he started running Saloid Traders Limited, he has been assisted by his parents as already indicated above.

- 4.28 The Deponent swore that indeed his properties were seized, but averred that the same were legally acquired and are not proceeds of crime. That he personally explained to the Investigating Officer the source of his income and how his parents assisted in the acquisition of the Assets and the Properties, and that the same are not proceeds of crime.
- 4.29 The Deponent avowed that he admitted that on 15th September 2022, he was Warned and Cautioned for the offence of being in possession of property reasonably suspected of being proceeds of crime contrary to **Section 71** of the **FPOCA** and that under Warn and Caution, he did explain to the Investigating Officer, as deposed to above, that the purchase of the Assets were facilitated by his father.
- 4.30 It was deposed that the Deponent was never asked any questions related to taxes.
- 4.31 The Deponent avowed that none of the Properties cited in this Matter are proceeds of crime contrary to the Investigator's belief.

5 THE INTERESTED PARTIES' SKELETON ARGUMENTS

- 5.1 In the Skeleton Arguments filed on 22nd July, 2024, Counsel, in his introductory submissions, gave a synopsis of the Applicant's Amended Affidavit in Support and countered the same by stating that according to the 1st Interested Party's Affidavit in Opposition, it was averred that the purchase of the bulk of his personal Properties and those owned by the 2nd Interested Party were facilitated and funded by his father, Mr. Edgar Chagwa Lungu. Counsel submitted that the 1st Interested Party duly informed the Deponent of the Amended Affidavit in Support

of the Originating Notice of Motion the source of funds for the purchase of all the Properties captioned herein, but in the Application, the Deponent opted to obscure the same.

- 5.2 Counsel submitted that in the foregoing, and by the arguments, the 1st Interested Party will resolutely refute the existence of reasonable suspicion let alone mere trace or iota of suspicion that any of the Properties is a proceed of crime liable to Civil Forfeiture.
- 5.3 Counsel submitted on the novelty of the proceedings under the **FPOCA**, and the Zambian Jurisprudence as acknowledged in the case of **The People Vs Austin Chisangu Liato** ⁽⁷⁾ at J21, and the Court's justification of the reliance on foreign jurisprudence in the case of **Jessie Bwalya Kapyelata Vs The Attorney General and The Director of Public Prosecutions** ⁽²⁾. It was submitted that in this respect, the point being made is that proceedings of the kind currently before this Court are in the realm of unsettled jurisprudence and this Court was urged to approach the interpretation of the law in a way that reflects the intention of the Legislature as expressed in the **FPOCA**; that this Court, in its quest to properly interpret the provisions of the **FPOCA**, should not allow itself to be tightly constrained by the emerging jurisprudence which it finds inconsistent with the express provisions of the Statute. Counsel beseeched this Court to seek the true meaning of the provisions presented to it for interpretation.
- 5.4 Based on the DPP's Application, Counsel submitted that according to the Originating Notice of Motion, the DPP has moved this Court pursuant to **Sections 29** and **31** of the **FPOCA**. It was Counsel's contention that pursuant to **Section 31**, in order to make an application such as the one presently before this Court, the DPP

should demonstrate, on a balance of probabilities, that the assailed Property is tainted.

- 5.5 Counsel submitted on the definition of ‘tainted property’ as per **Section 2** of the **FPOCA** and stated that **subsection (2)** of **Section 31** accords an innocent Interested Party with a statutory defence.
- 5.6 It was Counsel’s contention that it will be established that by the Application before Court, it has not been demonstrated that the Interested Parties’ Property under siege is tainted within the statutory meaning of ‘tainted property’; and it will be further demonstrated that even if the DPP demonstrated that somehow the Properties are tainted, the Interested Party’s Properties fall within the parameters of **subsection (2)** of **Section 31** of the **FPOCA** and that as such, a Forfeiture Order cannot lie against any of the Properties given the manner in which the Interested Parties acquired the Properties as this would fly in the teeth of the above stated provisions of the **FPOCA**.
- 5.7 Counsel submitted on the distinction between the **FPOCA**’s **Sections 29** and **31** on one part, and **Section 71** on the other part, which the DPP has relied on. In quoting **Sections 31(2)** and **71(2)**, Counsel submitted that there is a clear distinction between **Sections 29** and **31** on one part, and the **Section 71** crime on the other, by the fact that the statutory defences provided are different.
- 5.8 Based on the above, it was Counsel’s argument that the present Application is premised on **Sections 29** and **31** and not **Section 71** of the **FPOCA**. That in any case, this Court has no jurisdiction to make a Forfeiture Order under **Section 71** whether under criminal proceedings or civil forfeiture.
- 5.9 Counsel proceeded to define ‘jurisdiction’ as per the **Godfrey Miyanda Vs The High Court** ⁽⁸⁾ case, and argued that under **Section 71** there

is no prescribed jurisdiction premised on which this Court can draw jurisdiction to make the Forfeiture Order being sought by the DPP against the Interested Party's Properties and therefore forfeiture proceedings cannot be brought under the said Section. It was contended that unless the law clothes this Court with power to make Orders, it cannot arbitrarily clothe itself with such power. Counsel submitted that **Section 71** only creates an offence, elements of the offence and possible statutory defence without giving this Court any power to forfeit property for whatever reason.

5.10 Counsel referred us to the Kenyan case of **Owners of the Motor Vessel Lillian "S" Vs Caltex Oil (Kenya) Limited** ⁽⁹⁾, wherein the Court held that:

"Jurisdiction is everything (and that) without it, a court has no power to make one more step."

5.11 That similarly, in the case of **Zambia National Holdings Limited and United National Independence Party (UNIP) Vs The Attorney General** ⁽¹⁰⁾ it was stated as follows:

"The jurisdiction of the High Court...is unlimited but not limitless since the court must exercise its jurisdiction in accordance with the law... The High Court is not exempt from adjudicating in accordance with the law including complying with procedural requirements as well as substantive limitations..."

5.12 Counsel further referred the Court to the guidance given by the Supreme Court in the case of **JCN Holdings Limited and 2 Others Vs Development Bank of Zambia** ⁽¹¹⁾ as follows:

“...if a court has no jurisdiction to hear and determine a matter, it cannot make any lawful orders or grant any remedies sought by a party to the matter.”

- 5.13 Counsel also cited the persuasive Supreme Court of Kenya case of **Samuel Khan Macharia Vs Kenya Commercial Bank** ⁽¹²⁾ (full citation not provided) and stated that it emphasised the overriding legal principle that the jurisdiction of a Court of law is created by the Constitution or statute and never by judicial craft.
- 5.14 Based on the above, Counsel submitted that there is no prescribed jurisdiction to forfeit property under **Section 71** of the **FPOCA** for whatever reason; that the prescribed jurisdiction to forfeit property to the State is found under **Sections 29** and **31** of the **FPOCA** and only in instances where the subject property has been duly established as tainted. Counsel argued that it is therefore misleading for the DPP to find solace in **Section 71** of the **FPOCA** in advancing its Application. Further that **Sections 29** and **31** read with **Section 2** outlines the elements which the DPP ought to prove on the balance of probabilities to secure a Forfeiture Order.
- 5.15 Counsel submitted on what to prove, and the burden and standard of proof, and begun by referring the Court to **Article 16(1)** of **The Constitution of the Republic of Zambia, Chapter 1 of the Laws of Zambia** as amended by **Act No. 19 of 1996** which guarantees the sanctity of property ownership. Counsel argued that the said Article guarantees the right to property which right cannot be abrogated except in circumstances expressly provided under **Article 16(2)** which stipulates various circumstances in which the right to property can be interfered with and which Counsel submitted are closely related to the present proceedings as follows:

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

a. ...;

b. by way of penalty for breach of any law, whether under civil process or after conviction of an offence; (Emphasis theirs)

- 5.16 Based on the above provision, it was Counsel’s contention that constitutionally, a person or indeed the Interested Parties cannot be deprived of their property unless by way of penalty for breach-of any law; that it follows that any law which provides for deprivation of property without compensation for any reason other than as a penalty for breach of law is unconstitutional.
- 5.17 In this regard, Counsel argued that in line with **Article 16(2)(b)**, under **Sections 29** and **31** of the **FPOCA**, the DPP should have demonstrated that the Interested Parties breached the law or indeed that the Properties have been used or intended to be used in a crime and as a result, the Forfeiture Order being sought is penalty for breach of a specified provision of the law.
- 5.18 Counsel argued that in other words, if the Court finds that **Sections 29** and **31**, or indeed **71**, or any other provision of the **FPOCA** which provides for forfeiting of property without the DPP proving that a particular offence was committed or even existed, the Court should declare such a provision *ultra virus* **Article 16(2)(b)** of the **Constitution**.

- 5.19 It was submitted that in this respect, that on careful reading of **Sections 29** and **32** of the **FPOCA** are constitutional in that they require that when making an application, a Public Prosecutor must lead evidence to show that the property they are applying to be forfeited is tainted within the statutory definition of tainted property.
- 5.20 Counsel submitted that according to **Section 31** of the **FPOCA**, the DPP must specifically prove the elements of tainted property by producing evidence and the Court should be satisfied as such on the balance of probabilities. That **Section 34** of the **FPOCA** guides as follows:
- “The applicant in any proceedings under this Act bears the onus of proving the matters necessary to establish the grounds for making the order applied for.”***
- 5.21 Counsel submitted that ‘matters necessary’ refers to qualification or alignment of property to a crime as defined by **Section 2** of the **FPOCA**.
- 5.22 Counsel submitted that it has been argued that from the wording of **Sections 31** and **34** of the **FPOCA**, the DPP cannot make an application for a Forfeiture Order without first proving and satisfying the Court that the Interested Parties’ Properties are tainted. Counsel stated that the Court of competent jurisdiction must declare that a particular property is tainted first, only thereafter can the DPP or any other law enforcement institution make a discretionary application for Forfeiture Order relating to such property. That in this respect, the DPP nor an Investigations Officer has jurisdiction to declare any property tainted pre-emptively.
- 5.23 Counsel contended that in the absence of a cited crime, which crime need not be occasioned, caused, actioned or linked to the Interested

Party in ownership of the property under siege, there cannot effectively be a qualification of taint attached to a property, thus, the burden of proof warranting Civil Forfeiture cannot be said to have been met.

5.24 Counsel stated that he was fortified in his submission above by the Court of Appeal decision in the case of **Sydney Mwansa Vs Director of Public Prosecutions** ⁽¹³⁾ in which the Court stated as follows:

“We hold the view that although non-conviction based forfeiture (civil forfeiture) is not based on a conviction, there is need to clearly identify the offence which the respondent has committed or alleged to have committed, and then a clear connection established on the balance of probabilities how the offence (serious offence) is related to the property in issue i.e. wholly or partly derived or realised from the commission of the offence; wholly or partly derived or realised from a disposal or other dealing with proceeds of crime.” (Emphasis theirs)

5.25 Counsel submitted that this position was rehashed and so emphatically recognized by the Federal Court of Nigeria in the case of **Melrose General Services Limited Vs Economic and Financial Crimes Commission, Wasp Networks Limited and Thebe Wellness Services** ⁽¹⁴⁾.

5.26 Counsel went on to submit that having argued that an application for Non-Conviction Based Forfeiture Order can only be premised on **Sections 29** and **31** of the **FPOCA** and not on **Section 71**, Counsel would demonstrate that the DPP’s Application fails to meet the statutory threshold stipulated under **Sections 29** and **31** to warrant the making of a Forfeiture Order by this Court.

- 5.27 Counsel submitted that in the first place, **Sections 29** and **31** of the **FPOCA** are couched in discretionary terms in that they operatively use ‘**may**’. That in this regard, the Prosecutor **may** apply, and even when the Court finds that the subject property is tainted, it **may** Order that such property be forfeited to the State. (Emphasis theirs)
- 5.28 Counsel submitted that it has already been highlighted that **Section 2** of the **FPOCA** defines what tainted property entails and ultimately spells out the elements which exist to deem a particular property tainted and proceeded to quote the Section. Counsel further invited the Court to address its mind to the following definition of ‘relevant offence’ as follows:

*“**“relevant offence” in relation to tainted property, means—***
(a) an offence by reason of the commission of which the property is tainted property; or
(b) any other offence that is prescribed by regulation as a serious offence for the purposes of this definition or is of a class of offences that is so prescribed;”

- 5.29 Counsel submitted that taking into consideration the definition of ‘relevant offence’, it becomes irresistibly clear that, unless one demonstrates connection between the property sought to be forfeited and an offence or crime, there ought to be a relevant offence. That it would appear that the present matter presents this Court with the first opportunity in our jurisdiction for the Court to consider the nexus between the **FPOCA’s Sections 29, 31**, together with **Section 2’s** definitions of tainted property and relevant offence, which clearly demonstrates that a property can only be declared tainted upon the relevant offence being demonstrated to the Court with evidence with the balance of probabilities being the standard for proving.

- 5.30 It was Counsel's submission that what is running through all the elements of tainted property is that there should be an offence and property should be connected to that particular offence. Counsel submitted that under **Section 2** of the **FPOCA**, it is cardinal that the grounds upon which the DPP claims that the property is tainted are stated and proved by evidence being either that the property has already been used in the commission of an offence, or in connection with the commission of the offence, or the DPP must demonstrate by way of evidence that there is intention on the part of the Interested Party to use the besieged properties in connection with the commission of an offence.
- 5.31 Counsel submitted that in the event that the DPP makes no reference to a specific offence, as is the case in present proceedings, then **Section 2** of the **FPOCA** directs this Court to deem that it means tainted property in relation to a serious offence. That in this regard, according to **Section 2** of the **FPOCA**, 'serious offence' means an offence for which the maximum penalty prescribed by law is death or imprisonment for not less than twelve months. Counsel submitted that in this regard, there is only one reason why property can be forfeited to the State under **Sections 29** and **31** of the **FPOCA** and that is if it is declared tainted and property can only be declared tainted if it is connected to a crime; that the DPP herein has the obligation to prove the connection by providing evidence directed at meeting this threshold first. Counsel argued that without such evidence, as is in the present case, the Court cannot decide based on conjecture.
- 5.32 Counsel was fortified by the position in **Rosemary Chibwe Vs Austin Chibwe** ⁽¹⁵⁾ wherein the Court held that:

“It is a cardinal principle supported by a plethora of authorities that the Court’s conclusions must be based on facts stated on record.”

- 5.33 That, similarly, in the case of **Attorney General Vs Roy Clarke** ⁽¹⁶⁾, the Supreme Court frowned upon the Trial Judge’s findings which were not based on evidence on Record.
- 5.34 Counsel submitted that therefore, it is reiterated that this Honourable Court should religiously follow the guidance of the Supreme Court and only decide or make conclusions as to whether the besieged Properties are tainted purely based on the evidence before it and that no Order or conclusion should be made which is not supported by evidence on Record.
- 5.35 That the foregoing is also the interpretation obtaining in South Africa from where the DPP cites and relies on the cases of **Simon Prophet Vs The Director of Public Prosecutions** ⁽¹⁾ and **Kumarnath Mohunram and Another Vs The National Director of Public Prosecutions** ⁽⁵⁾.
- 5.36 Counsel proceeded to quote from the South African primary legislation giving their Courts jurisdiction to make Forfeiture Orders being **Sections 38(1) and 48(1) of the Prevention of Organised Crime Act No. 121 of 1998** (POCA) and analysed the cases of **Simon Prophet** and **Kumarnath Mohunram**, *supra*, and submitted that the case in *casu* is distinguishable from the two South African cases. Counsel submitted that in the two South African cases, the Court was able to refer to properties the National Director of Public Prosecutions sought to be forfeited as instruments of crime because the said properties were specifically connected to a particular defined offence. That in the DPP’s Application before this Court, there has been no demonstration

as to how the Properties sought to be forfeited are connected to any crime.

- 5.37 Counsel argued that a careful consideration of the **FPOCA** reveals that even in Zambia, a property cannot be deemed tainted and therefore liable for forfeiture without demonstration by way of evidence that the property is connected to a crime. It was submitted that under the **FPOCA**, a forfeiture cannot be based on conjecture or suspicion no matter how high or reasonable such a suspicion and that is the intention of the legislature and expressed under **Sections 29** and **31** of the **FPOCA**. Counsel submitted that without citing any specific facts as violating any predefined law, the DPP herein has proceeded to make an application that the Properties be forfeited to the State. That in this regard, the Court is beseeched to hold that the Application presently before Court is misconceived.
- 5.38 Counsel proceeded to submit on the ambivalence and casual misuse of different terms interchangeably and stated that in its arguments filed in Support of the Application, upon citing **Section 29** of the **FPOCA**, the DPP has argued that Non-Conviction Based Forfeiture is a remedy for combating 'organised crime'. That the DPP then slides into finding fortification in the South African jurisprudence as pronounced in the **Simon Prophet** case.
- 5.39 Counsel argued that while prominently used in the **POCA**, the phrase 'organised crime' does not exist in the **FPOCA** and therefore there is [no] such a crime under the **FPOCA**. That, similarly, the facts pertaining to what amounts to organised crime as was in the **Simon Prophet** case are far from resembling the facts as outlined in the case presently before this Honourable Court as the DPP points to no crime as having been committed by the Interested Party.

5.40 Counsel submitted that at page 4 of the DPP's Skeleton Arguments, the following arguments have been proffered:

“In the case in casu, the Notice of Motion for non-conviction-based forfeiture order against the tainted property is supported by an affidavit deposed by one PARDON LIUMA filed herewith. The affidavit shows that the properties in issue are proceeds of crime as they are above the net worth of the interested parties.” (Emphasis theirs)

5.41 Counsel contended that the phrases ‘tainted property’ and ‘proceeds of crime’, while sounding enticingly similar, the statute has distinguished their meanings with an application such as the one before this Court being justified only if it can prove that property is tainted.

5.42 Further, there is no law in the country prescribing that if a person has property whose value is above the net worth of a person in so far as is known to a law enforcement officer, then such property turns into proceeds of crime or tainted property. Counsel contended that having combed the entire **FPOCA**, there is nothing therein which turns the Properties under siege into proceeds of crime just because they have a value higher than a law enforcement officer can trace or declare as ‘known to him’, none whatsoever.

5.43 Counsel once again referred the Court to the case of **Sydney Mwansa** ⁽¹³⁾ in which the Court of Appeal stated as follows:

“In casu the court below lost sight of the issue, by focusing on financial capacity. The question the trial court ought to have answered is, whether the property in question was tainted property. The evidence in this case, in support of the application, was information from intelligence sources.

This is not evidence, even when considered on the balance of probability, as this is inadmissible information.

- 5.44 Counsel submitted that further, having demonstrated that the proceedings before this Court are anchored on **Sections 29** and **31** of the **FPOCA**, it is contended that it is a misdirection or rather misleading for the DPP to resort and belabour referring to the provisions of the **Anti-Money Laundering Act** (Prohibition and Prevention of Money Laundering Act) and the Court is urged to hold as such.
- 5.45 On the statutory defence, Counsel submitted that in his Affidavit filed in opposition to the Application for Forfeiture Order, the Interested Party deposed that he had, and still has, no reasonable basis for believing that any of his and the 2nd Interested Party's Properties are tainted property within the meaning of the **Act**. That the Deponent expressly stated that his parents funded and facilitated parts of the purchases adding further that he has no reasonable grounds to believe that the money given to him by his parents was tainted.
- 5.46 Counsel submitted that in the circumstances of this case therefore, in the unlikely event that this Court finds that there was anything tainted about the Properties prior to the Interested Parties purchasing the same, then, by virtue of **subsection (2)** of **Section 31** of the **FPOCA**, this Court should hold that it cannot Order forfeiture of the Interested Parties' Properties herein.
- 5.47 Counsel referred the Court to the case of **Regina Chifunda Chiluba Vs The People** ⁽¹⁷⁾, where the Court was sitting in its criminal jurisdiction, and submitted that in that case, the Court held that once the evidence shows that the prosecution knows the origin of the thing, then there is no suspicion. Counsel contended that the Interested

Parties herein have informed the Court that information was given to the Investigations Officer herein as to the source of the money.

- 5.48 In responding to the specific authorities cited by the DPP, Counsel referred us to the case of **Jessie Bwalya Kapyelata** ⁽²⁾ wherein the Court was dealing with the question of the constitutionality of **Sections 29** and **31** of the **FPOCA** and held that the provisions were constitutional and do not contravene **Article 16(2)(b)** of the **Zambian Constitution Chapter 1** as amended by **Act No. 18 of 1996**.
- 5.49 Counsel argued that should the Court interpret **Sections 29** and **31** of the **FPOCA** as entailing that a Forfeiture Order can be issued even if it is not proven that the subject property is connected to a crime, then such interpretation would render the provisions inconsistent with **Article 16(2)(b)** which requires that the law under which property can be taken away from the owner can be ***“by way of penalty for breach of any law, whether under civil process or after conviction of an offence;”*** (Emphasis theirs)
- 5.50 In conclusion, Counsel submitted that it has been demonstrated that for a property to qualify as tainted property, any of the three elements in the definition of tainted property must be shown. That it has been demonstrated that when compared to the South African legal framework of similar legislation, an application to forfeit property under **Sections 50(1)** and **48(1)** of the **POCA** cannot succeed unless the owner of the Property has used the subject property in violation of law thereby qualifying it to be tainted property.
- 5.51 Counsel urged this Court to hold that the DPP’s Application has failed to outline what offence was committed by the Interested Parties in connection with the Properties sought to be forfeited to the State, and as such, the Court’s powers under **Section 29** and **31** of the **FPOCA**

cannot be invoked; that such an Application cannot stand premised on feelings but on the facts placed on Record.

5.52 Counsel submitted that the DPP brought no piece or trace of evidence pointing to either of the four elements of tainted property as such, the standard required by **Sections 31(1)** and **34** of the **FPOCA** have not been met. That this Court is beseeched to dismiss the Application with costs to the Interested Party.

6. THE APPLICANT'S REPLY

6.1 The Applicant filed Affidavit in Reply to the Interested Party's Affidavit in Opposition on 8th August 2024, and the same was sworn by **PARDON LIUMA**, a Police Officer in the Zambia Police Service holding the rank of Detective Inspector under the Criminal Investigations Department.

6.2 The Deponent avowed that having been advised by Counsel and verily believing the same to be true, the 1st Interested Party has not produced evidence proving that the subject Toyota Land Cruiser bearing Registration Number BAT 3703 registered under Saloid Traders Limited was bought by his father, Mr. Edgar Chagwa Lungu.

6.3 The Deponent averred that the 1st Interested Party has not produced any documentation or evidence to substantiate his assertion that the subject motor vehicles namely, Toyota Prado Registration Number BAT 794, Nissan NP300 Registration Number AJE 7543, Mitsubishi Pajero Registration Number BAT 553, Mitsubishi Pajero Registration Number BAT 774 and Nissan NP300 Registration Number AJE 7744 registered under Saloid Traders Limited, were bought by his father.

6.4 It was deposed that the 1st Interested Party's father has not entered appearance as an interested party in this Matter to categorically state that the motor vehicles were bought by him, nor has the 1st Interested

Party demonstrated to this Court that the father had the means to purchase the subject motor vehicles.

- 6.5 The Deponent averred that contrary to the assertion made by the 1st Interested Party, the Credit Sale Agreement produced as exhibit marked "**DL1**" shows that only two (2) Shacman Tipper Trucks were purchased by Saloid Traders Limited.
- 6.6 That the 1st Interested Party has not produced any evidence to demonstrate that the subject four (4) motor vehicles found concealed in a warehouse at Ndozo Lodge are the same as the two (2) motor vehicles in the Credit Sale Agreement.
- 6.7 It was deposed that the 1st Interested Party has not exhibited the Lease to show that the four (4) motor vehicles concealed in a warehouse at Ndozo Lodge were used under normal business operations. That the 1st Interested Party has not exhibited any document to show that the subject four (4) motor vehicles were hired out to various clients under the normal course of business.
- 6.8 The Deponent averred that the 1st Interested Party has not exhibited any bank transfers or receipts to show that the Toyota Land Cruiser bearing Registration Number BLA 5922 was paid for by his father. That in addition, the 1st Interested Party's father has not entered appearance and not demonstrated the source of the funds allegedly used to purchase the subject motor vehicles nor has he produced any evidence that his father mainly financed the purchase of the subject vehicles at different times and prices.
- 6.9 It was avowed that the exhibit marked "**PL14**" does not contain the value of the 48 motor vehicles but the value of ZMW23,050,842.49 was obtained from RTSA.

- 6.10 It was deposed that the exhibit marked **"PL15"** is the Restriction Notice, but that the seized motor vehicles are listed in the exhibit marked **"PL5"** of the Affidavit in Support.
- 6.11 The Deponent averred that the 1st Interested Party has not exhibited any document to show that his father facilitated and financed the purchase of the motor vehicles but admits that the 1st Interested Party owns a filling station operated by Saloid Traders Limited on lease to Total Energies Limited at USD8,000.00 per month.
- 6.12 The Deponent swore that he admits to the extent that the Properties belong to Saloid Traders Limited but avers that they were not legally acquired and that they are tainted property.
- 6.13 It was deposed that the Valuation Reports, exhibited as **"PL27"** and **"PL28"** in the Affidavit in Support, reflect the cost of development on the Properties that were applicable at the material purchase time and are not assumptions and opinions of the Evaluators. That there is no discrepancy in the Valuation Reports as they reflect the actual considerations of the purchase of the Properties as shown by exhibits **"PL19"** to **"PL26"**.
- 6.14 It was deposed that the contents of the Affidavit in Opposition at Paragraph 34, which state that the 1st Interested Party verily believes that the DPP has no authority to divert the rentals from Total Energies Limited as he did, are legal arguments.
- 6.15 It was deposed that in response to the 1st Interested Party's averments at Paragraph 38 of the Affidavit in Opposition that he had various sources of income as the business run by Saloid Traders Limited is a family business and the bulk of the purchases and business operations were facilitated and financed by his father, the Deponent wished to state that the 1st Interested Party failed to produce any

evidence of the other various sources of income that he alleges financed the running of the business of Saloid Traders Limited.

- 6.16 It was deposed that the 1st Interested Party has not exhibited any proof supporting his assertions that the bulk of the purchases and business operations were facilitated and financed by his father nor has he shown that his father transferred money from any bank account or directly paid for the Properties owned by Saloid Traders Limited which are the subject of this Application. That there is no evidence produced to show that Saloid Traders Limited is a family business as the exhibit marked "**PL2**" in the Affidavit in Support only shows that the 1st Interested Party and his wife are the Directors and Shareholders of Saloid Traders Limited.
- 6.17 The Deponent avowed that the Properties listed in the Affidavit in Support, being the Properties dotted around the Country and evidenced by the letters from the Commissioner of Lands and Ministry of Lands exhibited and marked "**PL53**" and "**PL54**", respectively, in the Affidavit in Support, belong to the 1st Interested Party, and that they are proceeds of crime as the 1st Interested Party failed to produce evidence that the same were legitimately acquired.
- 6.18 It was deposed that the 1st Interested Party failed to produce evidence to show his other alleged legitimate sources of income and anything to show how his parents assisted him with respect to his income, nor in the acquisition of the assets subject of this Application. That the 1st Interested Party has not indicated whether his parents deposited the money into his Bank Accounts or gave it to him as cash, or whether his father paid directly for the purchase of the Properties.
- 6.19 That the Properties subject of this Application was not legally acquired and are proceeds of crime as the 1st Interested Party did not exhibit

any documents to prove traceable sources of income or funds in respect of the subject Properties.

7. THE APPLICANT'S SKELETON ARGUMENTS IN REPLY

- 7.1 The Applicant filed Skeleton Arguments in Reply to the Affidavit in Opposition to the Notice of Motion and the Skeleton Arguments in Support of the Affidavit in Opposition filed by the 1st Interested Party. Counsel submitted that the Skeleton Arguments in Reply were filed in Support of the Affidavit deposed to by one **PARDON LIUMA** and show that the Properties in issue are tainted property.
- 7.2 Counsel for the Applicant submitted that the Application is anchored on **Sections 29** and **31** of the **FPOCA** and proceeded to quote the said Sections as well as **Section 71** of the **FPOCA**.
- 7.3 It was Counsel's submission that **Section 29** gives jurisdiction to a Public Prosecutor to make an application to Court demonstrating that the subject property is tainted, thereafter, it is for the Court to declare that the property is tainted and grant a Forfeiture Order as per **Section 31** of the **FPOCA**.
- 7.4 Counsel contended that the Director of Public Prosecutions (DPP) in this Application has demonstrated that the subject Properties are tainted property as the Interested Parties have not exhibited any documents to prove traceable sources of income or funds in respect of the Properties.
- 7.5 Counsel submitted on the distinctions between **Sections 29, 31** and **71** of the **FPOCA** and stated that **Section 29** gives jurisdiction to a Public Prosecutor to make an application for the Forfeiture Order for any tainted property; **Section 31(1)** gives jurisdiction to the Court to grant a Forfeiture Order once the Court is satisfied on a balance of probabilities that the property is tainted; **Section 31(2)** gives an

opportunity to any person who has interest in the property to satisfy the Court of his interest and that he acquired his interest before any serious offence occurred or that he did not know or could not reasonably have known at the time of acquisition that the property was tainted property. That if a person satisfies the Court as per **Section 31(2)**, the Court will not grant the Forfeiture Order.

- 7.6 Counsel submitted that **Section 71** of the **FPOCA** on the other hand is a Section that creates an offence under the **Act**. That this offence is no different from any other offences found in the **Penal Code** or under the **Prohibition and Prevention of Money Laundering Act No. 14 of 2001** as read with **Amendment Act No. 4 of 2010**.
- 7.7 Counsel submitted that it does not follow that when a Prosecutor applies for a Non-Conviction Based Forfeiture Order under **Section 29**, that they will cite **Section 71**. That **Section 71** will only be cited if the offence alleged is being in possession of property reasonably suspected to be proceeds of crime. That if the offence alleged is, for instance, Money Laundering, Tax Evasion or Theft, **Section 71** may not feature anywhere in the application.
- 7.8 Counsel submitted that the provision under **Section 71** creates an offence that the property subject of the application has contravened; that this offence has elements that a Public Prosecutor has to prove for the property to be declared proceeds of crime. Counsel submitted that to satisfy the Court and for the Forfeiture Order to be given to the State, a Prosecutor has to prove to the Court that the interested party received, possessed, concealed, disposed of or brought to Zambia, any money, or other property, that may reasonably be suspected of being proceeds of crime.

- 7.9 Counsel submitted that the offence under **Section 71** is a serious offence as defined in **Section 2** of the **FPOCA**. It was submitted that in view of the said provisions of the law and the evidence deposed in the Affidavit, that the possession of the aforementioned Properties by the 1st Interested Party, which are beyond his known income, is a serious offence in that the 1st Interested Party is in possession of Property reasonably suspected to be proceeds of crime. It was further submitted that the fact that one can be imprisoned for a period of more than a year brings it within the definition of a 'serious offence'.
- 7.10 Counsel submitted that the DPP moved the Court for the Forfeiture Order under **Section 29** and not **Section 71** of the **FPOCA** as this Section is the offence for which the DPP moved the Court under **Section 29**. It was contended that there is a very fine distinction.
- 7.11 Counsel submitted that **Section 71** of the **FPOCA** and **Section 7** of the **Prohibition and Prevention of Money Laundering Act No. 14 of 2001** (AMLA) as read with the **Amended Act No. 4 of 2010** creates the offences that the property may contravene. **Section 71** or any other alleged offence that may be cited in the Non-Conviction Based Forfeiture is what taints the property to enable the State to allege that on a balance of probabilities, the alleged offence was committed thereby tainting the property.
- 7.12 It was Counsel's submission that the Forfeiture Order is granted based on the Prosecutor showing the Court that the property is tainted and that the offence that the interested party or the property has contravened is a serious offence.
- 7.13 It was Counsel's contention that this Application has been brought to Court pursuant to **Section 29** of the **FPOCA** and this Court has

jurisdiction to grant the Forfeiture Order as per **Section 31(1)** of the **FPOCA**.

7.14 Counsel submitted that the 1st Interested Party has failed to demonstrate his assertion that the source of the funds used to acquire and develop the subject Properties was his father's, and as such, Counsel's contention was that the 1st Interested Party is in possession of Property suspected to be proceeds of crime which is a serious offence.

7.15 Counsel stated that what the State ought to, and has done in this case, is demonstrate that the Interested Party has no rational explanation as to a legitimate source of his income. That in law, anyone in exclusive possession of property is making a claim of right of ownership to the exclusion of all other persons unless with their consent. Counsel submitted that with this formulation, the law on forfeiture makes an evidential presumption that whoever has possession has special knowledge of the source of the income. That that person therefore has a duty to prove that the source is legal because he is in possession of better facts against the whole world as to the source of his wealth as was stated in the Kenyan case of **Stanley Mombo Amuti Vs Kenya Anti-Corruption Commission** (18).

7.16 It was Counsel's submission that effectively, there is a shift of evidential burden to the person in possession; that the failure to present credible evidence that demonstrates a legal source attracts an evidential presumption that the source is illegal. It was submitted that in this setting, evidence that one is reasonably suspected to have been engaged in a crime from which they could draw financial

benefits compliments the evidence of lack of legitimate means to acquire the Property.

17.17 Counsel referred the Court to the case of **R Vs Ilham Anwoir and three Others** ⁽¹⁹⁾, where the Supreme Court in the United Kingdom were faced with resolving the following two questions which had arisen in two cases. The first question being:

“To establish guilt under section 327 or 328, must the crown prove what particular criminal conduct, or at least what type of criminal conduct, has generated the benefit which the alleged criminal property represents? Or is it enough if they can show, no doubt by reference to the large sums involved and the defendant’s want of any means of substance (as well as any other relevant evidence), that the money in question can have had no lawful origin even if they have no lawful evidence of the crime or class of crime involved?”

17.18 Counsel submitted that the second question was:

“We did not understand the respondents to submit that there could never be a case in which the Crown might properly invite the jury to infer from the available facts that criminal activity was the only reasonable and non-fanciful explanation for the presence of the relevant property in the hands of the defendants, even though there was nothing to show what class of crime was involved. We would in any event reject so general and unqualified a position. Everything, of course, depends on the particular facts. The protection for the defendants is that such an inference can only properly be drawn if it meets the

criminal standard of proof, and the jury must of course be so directed.”

17.19 Counsel submitted that the difficulty comes from the next paragraph in which he said as follows:

“Accordingly, there may be cases (whether or not this is one) in which guilt under the POCA section 327 or 328 could be inferred, applying the criminal standard, without proof of the class of crime in question. Whether a prosecution in such a case is lawful and properly brought depends in our judgment on the correctness or otherwise of the respondent’s second argument, namely that on the correct construction of POCA section 340, the Crown are required to prove at least the type or class of crime in question to which we will come in due course.”

17.20 Counsel submitted that in resolving, the Court stated as follows:

“There is clear tension between the two paragraphs. Law L.J. stated that the issue was a pure matter of law. But it is perhaps important to note that NW was a case in which the prosecution’s evidence was essentially based upon the fact that NW has no visible means of support. That is quite a different case from the scenarios envisaged by Sullivan J in paragraphs 33 and 34 of his judgment. We consider that in the present case the Crown are correct in their submission that there are two ways in which the Crown can prove the property derives from crime, a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or those kinds is unlawful, or b) by evidence of the circumstances in which the property is

handled which are such as to give rise to the irresistible inference that it can only be derived from crime.”

- 17.21 Counsel stated that owing to the foregoing analysis in the preceding case, and from the circumstances of the case, the Interested Party had no lawful means to acquire the Property he has. That, consequently, he offended the provisions of **Section 71** of the **FPOCA** making the Property tainted and should therefore be forfeited to the State.
- 17.22 Counsel submitted on the burden of proof and contended that in as much as the **Constitution** gives individuals the right to property, the same does not extend to tainted property. Counsel submitted that Non-Conviction Based Forfeiture has been brandished as unconstitutional but that however, it has been decided in a plethora of cases that Non-Conviction Based Forfeiture is constitutional.
- 17.23 Counsel submitted that this legal stance has been discussed in the South African case of **Simon Prophet Vs The National Director of Prosecutions** ⁽¹⁾, where the Constitutional Court was called upon to strike a delicate balance between two fundamental constitutional principles; one principle emphasizes that no individual should face arbitrary deprivation of property, while the other underscores the State’s duty to safeguard the public from criminal activities. Counsel submitted that on page 32 of the Judgment, the Constitutional Court stated as follows:

“Civil forfeiture provides a unique remedy used as a measure to combat organised crime. It rests on the legal fiction that the property and not the owner has contravened the law. It does not require a conviction or even a criminal charge against the owner. This kind of forfeiture is in theory seen as remedial and not punitive.

The general approach to forfeiture once the threshold of establishing that the property is an instrumentality of an offence has been met is to embark upon a proportionality enquiry – weighing the severity of the interference with individual rights to property against the extent to which the property was used for the purposes of the commission of the offence, bearing in mind the nature of the offence.”

- 17.24 Counsel submitted that in the case of **Jessie Bwalya Kapyelata** ⁽²⁾, the High Court categorically stated that Non-Conviction Based Forfeiture is constitutional.
- 17.25 That, furthermore, the DPP has successfully proven that the subject Properties were acquired in contravention of the specified offences under **Section 71** of the **FPOCA** and **Section 7** of the **Prohibition and Prevention of Money Laundering Act, 2001**. It was submitted that **Sections 29** and **31** are provisions that enable the Forfeiture Order to be granted upon the DPP proving a serious offence, and **Section 71** of the **FPOCA** creates the offence. That, hence, the Court should not declare the provisions *ultra virus* **Article 16(2)(b)** of the **Constitution**. It was submitted that the assertion that the Court has no jurisdiction to grant Forfeiture Orders is not supported by any law.
- 17.26 It was Counsel’s contention that there is no law under the **FPOCA** which states that the Court must first declare the property as tainted before the DPP can make the forfeiture application. Counsel submitted that a crime under **Section 71** of the **FPOCA** and **Section 7** of the **Prohibition and Prevention of Money Laundering Act, 2001** have been cited and it is the said provisions of the law that the Interested Party and the Property has contravened warranting the Forfeiture Order.

17.27 Counsel submitted that Non-Conviction Based Forfeiture proceedings are conducted in *rem* and not in *personam*. That this means that even in the absence of criminal charges or convictions against the owner, the property can be subject to forfeiture. That these proceedings are not unconstitutional, contrary to the assertions made by the 1st Interested Party.

17.28 Counsel submitted that **Section 34** of the **FPOCA** establishes a clear guideline regarding who holds the responsibility of proving their case in proceedings under this **Act**. This Section specifically states that the applicant, referring to the party initiating the legal action, is required to demonstrate and provide evidence for all the elements necessary to support the Orders being sought in the proceedings. That this means that the burden of proof lies with the party bringing the case forward, emphasizing their obligation to substantiate their claims and provide convincing arguments and evidence to support the legal actions they are pursuing under the **FPOCA**. Counsel submitted that the provision provides that:

“The applicant in any proceedings under this Act bears the onus of proving the matters necessary to establish the grounds for making the order applied for.”

17.29 Counsel submitted that this legal framework thus, inevitably and eventually, places the onus on the Applicant to adduce evidence of reasonable suspicion that the property is tainted. That the interested party is then given an opportunity to adduce evidence to show that the property is not tainted by providing compelling evidence to support their claims; the party seeking to retain ownership or possession of the property must demonstrate its legitimacy and refute any allegations of illegality or connection to any criminal activity.

- 17.30 It was Counsel's submission that by emphasizing the role of the interested party in meeting the burden of proof, the law ensures a fair and transparent adjudication process. It compels the interested party to present a strong case based on credible evidence, thus, upholding the principles of justice and due process in Non-Conviction Based Forfeiture cases.
- 17.31 Counsel referred the Court to the case of **Assets Recovery Agency Vs Peter Oluwafemi Olaiwon** ⁽²⁰⁾, and the Zambian Court of Appeal case of **Sydney Mwansa Vs Director of Public Prosecutions** ⁽¹³⁾ and submitted that the above cases clearly show that the Interested Party has an obligation to show that the Property in question is not proceeds of crime; the Interested Party has to show that he has sufficient resources to acquire the Properties, and it was Counsel's submission that the Interested Party has not negated reasonable suspicion.
- 17.32 Counsel contended that a mere statement that his father purchased the motor vehicles and facilitated the purchase of the assets owned by Saloid Traders Limited is not sufficient. That additionally, the 1st Interested Party has not disclosed the source of resources for the real Properties he owns and how he developed the said Properties. It was Counsel's contention that the 1st Interested Party has to offer satisfactory explanation and evidence that is solid, honest and beyond peradventure.
- 17.33 Counsel submitted that the explanation offered by the Interested Party in his opposition to the Amended Affidavit in Support of the Notice of Motion creates more doubts and leaves more questions than answers and is unhelpful. It was contended that the 1st Interested Party has failed to discharge the evidentiary burden borne by him in this Application.

- 17.34 Counsel submitted that the evidence the 1st Interested Party adduced is unconvincing hence, it cannot persuade the Court to believe him. Additionally, that he has not shown any proof in the form of bank statements, money transfer records, business records or any official records to show that his father helped him purchase and develop the Properties in question.
- 17.35 It was Counsel's submission that the 1st Interested Party's father has not entered appearance as per **Section 30(b)** of the **FPOCA** to show that he has interest in the motor vehicles and the assets owned by Saloid Traders Limited. That as it stands, the 1st Interested Party has distanced himself from the motor vehicles in that he did not purchase the said vehicles alleging that his father did and has not exhibited any proof supporting his assertion. That on the other hand, his father has not entered appearance for him to adduce evidence that he purchased the vehicles and his sources of income.
- 17.36 Counsel referred the Court to the case of **Criminal Assets Bureau Vs James Gately and Charlene Lam** ⁽²¹⁾, wherein the Court frowned upon the two Respondents who could not account and explain the sources of their wherewithal and ordered forfeiture of the subject property.
- 17.37 Counsel submitted that in *casu*, it is the responsibility of the Interested Party to demonstrate that the Properties are **not tainted** or **proceeds of crime** (emphasis theirs). That he must provide concrete evidence showing the legitimate source of funds used for the purchase and construction of the Properties as was stated in the Kenyan case of **Stanley Mombo Amuti Vs Kenya Anti-Corruption Commission** ⁽¹⁸⁾ where it was stated that:

“Section 55 (2) of the Act makes provision for evidentiary burden which is cast upon the person under investigation to provide satisfactory explanation to establish the legitimate origin of his/her assets. This evidentiary burden is a dynamic burden of proof requiring one who is better able to prove a fact to be the one to prove it. In civil proceedings when any fact is especially within the knowledge of any party to those proceedings the burden of proving or disproving that fact is upon him.”

17.38 Counsel contended that the 1st Interested Party has not presented sufficient evidence in his Affidavit regarding his assertion that his father bought the motor vehicles subject of this Application. That it is incumbent upon the 1st Interested Party to show, with concrete proof, his father’s financial capacity to purchase the motor vehicles. That it is not sufficient to merely say “my father bought the assets I own”. Counsel stated that the 1st Interested Party must show the Court whether the money was deposited into his bank account or given to him cash, or did the benefactor pay directly for the purchase of the Property.

17.39 Counsel contended that there should be proof as to the source of the funds of the benefactor for the Court to determine whether the source was legitimate. Counsel asked was it from salary, gratuity, business or gift to him? Were those sources declared for Tax?

17.40 Counsel submitted that **Section 31(2)** of the **FPOCA** places an obligation on the Interested Party to satisfy the Court that the Property is not tainted, thus, once an application has been made, it is up to the Interested Party to rebut the allegation by showing proof. That,

otherwise, in this case, there is no proof shown save an unsubstantiated statement.

- 17.41 Counsel submitted that it is the State's firm submission that from the investigations conducted, the origin and source of the funds used for the purchase of the motor vehicles and the development of the subject Properties is tainted property. Consequently, it was submitted that unless the Interested Party provides a clear and verifiable account of the sources of the funds utilized in the purchase and development of the Properties, the State respectfully urges this Court to find, on a balance of probability, that the Properties were developed with funds obtained through questionable means and therefore tainted and proceeds of crime.
- 17.42 Regarding statutory defences, Counsel for the Applicant submitted that the statutory defence under **Section 71(2)** of the **FPOCA** is not applicable to the Interested Parties. It was submitted that the 1st Interested Party in his Affidavit in Opposition has not deposed to the fact that he has and still has no reasonable basis for believing that the Properties subject of this Application is tainted property. That the 1st Interested Party did not raise the statutory defence but only indicated that the motor vehicles were bought by his father and registered under Saloid Traders Limited. That additionally, his father facilitated the purchase of assets owned by Saloid Traders Limited.
- 17.43 Counsel contended that the 1st Interested Party did not depose to the fact that he had no reasonable grounds to believe that the money given to him by his father was tainted. The fact that the 1st Interested Party did not depose to his statutory defence, it was Counsel's contention that Counsel for the Interested Parties is giving evidence from the bar and that the same should be expunged from the submissions.

- 17.44 Regarding standard of proof, Counsel submitted that in Non-Conviction Based Forfeiture proceedings it is on a **'balance of probability'** (emphasis theirs). Counsel submitted that this entails that both the Applicant and Interested Party are evenly balanced and that if one side has the weight of a feather added to it, causing it to go down and the other side to go up, that side with the weight of a feather has won or succeeded.
- 17.45 Counsel submitted that the 1st Interested Party has, in his Affidavit in Opposition and filed submission, failed to demonstrate that the Properties in question are not tainted or proceeds of crime. Counsel stated that the Applicant has shown that there are indeed reasonable grounds to support reasonable suspicion that the Properties might be direct or indirect proceeds of crime. Further that the Applicant has sufficiently demonstrated that the Interested Party is in possession of Property suspected to be proceeds of crime and that there is evidence that the subject Properties are connected to the commission of a serious offence.
- 17.46 Counsel prayed that this Honourable Court finds that the cited Properties are proceeds of crime and therefore tainted properties and are subject of Forfeiture Orders to the State.

8. HEARING

- 8.1 At the Hearing of the Originating Notice of Motion, Ms. Margaret Kapambwe Chitundu, Counsel for the Applicant, submitted that she would rely heavily on the filed documents in Support of their Application. Counsel nonetheless, proceeded to augment her filed submissions by submitting that as can be seen from the Amended Affidavit in Support of the Application, Dalitso Lungu, the 1st Interested Party, only worked for two companies in his lifetime. That

he worked for BII Zambia Limited for two months and earned a total of ZMW5,407.25 and he also worked for Zambia Revenue Authority (ZRA) for 34 months and earned a total of ZMW132,396.00. That the 1st Interested Party obtained a loan of ZMW121,960.00. It was submitted that this is the known income from Mr. Dalitso Lungu.

- 8.2 Counsel submitted that for Saloid Traders Limited, the Affidavit has shown that there is no business which the Company engaged in to enable it or its directors have such huge sums of money and Properties. It was submitted that the Affidavit shows that Dalitso Lungu made transactions such as the purchase of trucks worth USD476,000.00 and other transactions involving huge amounts of money. Counsel contended that he did not have the capacity, nor did his Company, to give him such colossal amounts of money in cash for him to go about buying the Properties which are the subject of this Application.
- 8.3 It was Counsel's belief that the unknown sources of income were being used to launder money by buying these many Properties. Counsel submitted that the Property in issue is tainted and proceeds of crime because they offend **Section 7** of the **Prohibition and Prevention of Money Laundering Act 2001**, as there was money laundering being conducted, and the offence of being in possession of money suspected to be proceeds of crime contrary to **Section 71** of the **FPOCA**. Counsel argued that this is what taints the Properties and they should therefore be subject to forfeiture.
- 8.4 Counsel submitted that the Affidavit in Support further shows that the second Director in Saloid Traders Limited, based on the known sources of income, did not in any way have the capacity to contribute

to the purchase of all these Properties that are before the Court, and which the State is asking to be forfeited as tainted property.

- 8.5 Counsel submitted they are alive to the reference Mr. Dalitso Lungu made that his father was the sponsor of all these Properties in the Affidavit in Opposition, and that other than this mere statement, he has not demonstrated to this Court how his father gave him the money. Where? When? Was it in cash? All this has not been shown.
- 8.6 Counsel submitted that the father himself, has nowhere on this Court's Record shown that he is an interested party as he is the one that gave all this Property to his son. It was Counsel's submission that if he indeed gave this Property to his son, he should have come to Court, whether in person or by affidavit, to assist this Court by telling it his source of income, his capacity to enable him, in addition to other properties he has, bequeath his son such huge Properties.
- 8.7 Counsel argued that as it is, the Court cannot in arriving at justice, depend on that mere assertion which has not been substantiated by anything, or indeed for the Court to determine if the source of the father's income is legitimate to enable him legitimately give his son these Properties before Court.
- 8.8 Counsel referred us to the case of **Assets Recovery Agency Vs Peter Oluwafemi Olaiwon** ⁽²⁰⁾ which explains what a defence in these applications should look like as follows:

“It should be a satisfactory explanation and evidence that is solid as to the source of the money.”

- 8.9 Counsel submitted that this cannot be said to have been done in this case.
- 8.10 It was Counsel's submission that in the absence of an explanation as required by **Section 71** of the **FPOCA** and in line with the above

cited case, the 1st Interested Party has failed to demonstrate to this Honourable Court a legitimate source of this money with which he was constantly buying assets by way of laundering and that it should be forfeited to the State.

- 8.11 Counsel in her submission referred the Court to the cases of **R Vs Ilham Anwoir and Three Others** ⁽¹⁹⁾ and **The Anti-Corruption Commission Vs Pittscon Zambia Limited** ⁽²²⁾ and prayed in conclusion that this Honourable Court finds that from the evidence demonstrated, the Property was tainted property and should be forfeited to the State so that not only the few benefits from illegal activities, but that 20 million citizens of this Country should benefit.
- 8.12 In response, Counsel for the 1st and 2nd Interested Parties, Mr. Mehluli Malisa Batakathi, submitted that he would rely on the Affidavit in Opposition to the Notice of Motion and the Skeleton Arguments which were both filed on 22nd July 2024. Counsel submitted that he wished to augment what is already before the Court and respond to his learned colleague's submissions.
- 8.13 Counsel begun by referring to the Applicant's Amended Affidavit in Support of the Notice of Motion filed on 22nd February, 2024, and submitted that despite this Court having guided the Applicant to amend the Affidavit so as not to include hearsay, extraneous matter and legal arguments, a number of Paragraphs therein still offend the Ruling of the Court and also the settled Rules on evidence. Counsel went on to point out the offending Paragraphs which relate to statements made by people who have not presented evidence before this Court as witnesses. As an illustration, Counsel referred the Court to Paragraph 4 of the Affidavit in Support which talks about a confidential investigative report as the source of evidence

and referred us to the case of **Sydney Mwansa Vs Director of Public Prosecutions** ⁽¹³⁾ at page J25, Paragraph 7.15, where the Court of Appeal stated that:

“The evidence in this case, in support of the application, was information from intelligence sources. This is not evidence, even when considered on the balance of probability, as this is inadmissible information.”

8.14 It was Counsel’s submission that any information in the Amended Affidavit which comes from intelligence sources, or confidential investigations or sources, is inadmissible on the strength of the **Sydney Mwansa** case and should therefore be expunged from the Court’s Record.

8.15 Counsel stated that he was further fortified in his submission by the Supreme Court in the case of **Zambia Revenue Authority Vs Godfrey Kasungami** ⁽²³⁾, where the English case of **Subramanian Vs The Public Protector** ⁽²⁴⁾ was cited with approval as follows:

“Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and admissible when it is proposed to establish by the evidence not the truth of the statement but the fact that it was made.”

8.16 It was Counsel’s submission that all the Paragraphs highlighted that contain statements from other people who are not themselves witnesses before this Court should be treated as hearsay in as far as they purport to establish the truth of what was said by those people who are not witnesses before Court. That the Court should

not give weight to the truthfulness of the statements and their contents as they are hearsay but should consider the evidence as proof of something said.

- 8.17 Counsel submitted that Counsel for the Applicant spiritedly submitted that the 1st Interested Party, Mr. Dalitso Lungu, has not disclosed what she termed as 'known source of income'. It was argued that there is no mention nor definition of that term in the **FPOCA** and consequently it is difficult to ascertain who that income is supposed to be known to.
- 8.18 Counsel, in reference to the submissions that the 1st Interested Party has no financial capacity to purchase the Property in question and their reference to money laundering, submitted that the Application before Court is for a Non-Conviction Based Forfeiture and not a trial under **Section 71** of the **FPOCA** or **Section 7** of the **Prohibition and Prevention of Money Laundering Act 2001**; that this is not what this Application is about.
- 8.19 Counsel submitted that Counsel for the Applicant submitted and are suggesting to this Court that the Interested Parties are supposed to explain to this Court in a manner that is akin to them defending themselves in a criminal prosecution under **Sections 71** and **7** of the above **Acts** and hence, they are using civil procedure to affect a criminal prosecution.
- 8.20 Counsel submitted that the Court should resist the temptation or the invitation that is being presented to it by the State for the simple reason that **Section 29** of the **FPOCA**, which is supposed to be the backbone or anchor of this Application, relates to Non-Conviction Based Forfeiture of tainted property.

- 8.21 Counsel submitted that the Applicant is supposed to show by evidence, on a balance of probability, that the Property is tainted in connection with a serious offence. That it is not the subject of **Section 29** proceedings to require an interested party to come before this Court and start proving their source of income; that is not what **Section 29** is about.
- 8.22 Counsel submitted that there is a statutory defence to **Section 29** under **Section 31** of the **FPOCA**, and that defence does not say anywhere that the Interested Party under **Section 29** proceedings should account for their wealth or show their financial capacity to acquire those Properties.
- 8.23 It was submitted that under **Section 31(2)**, the Interested Party are only supposed to show three things to the satisfaction of the Court as follows: that they have interest in the Property, and that the Interested Party did not acquire the interest in the Property as a result of any serious offence carried out by the person. Counsel did not provide the third thing.
- 8.24 Counsel submitted that his argument is that once an Interested Party comes before Court and demonstrates those two things, then according to the **Act**, the Court shall Order that the interest in the Property shall not be affected by the forfeiture.
- 8.25 Counsel contended that the key here is that the Property must be connected to the commission of a serious offence as defined by the **Act**; that the Property must be connected by evidence presented in this Court to the commission of a serious offence. Counsel submitted that Non-Conviction Based Forfeiture is anchored on there being a crime and what is important is that a crime should be distinguished from an allegation of a crime. Counsel argued that

something does not become a crime just because someone thinks it is a crime or criminal conduct. That for something to constitute a crime is a matter of both fact and law, therefore it is not enough for the State to say that just because someone cannot give an explanation that they (State) are not happy with, then a crime has been committed.

- 8.26 Counsel submitted that if conduct is deemed to be criminal or is deemed to be a crime, or, in the words of the **FPOCA** that there has been a commission of a serious offence, it is cardinal to show that a crime has actually been committed and the Property that is the subject of the Application, directly or indirectly, flows from that crime that has been committed.
- 8.27 Counsel was fortified in his submissions by a publication by the **International Bank for Reconstruction and Development and The World Bank – Stolen Assets Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture 2009** at page 29 on Key Concepts 1 that Non-Conviction Based Asset Forfeiture should never be a substitute for criminal prosecution.
- 8.28 It was Counsel's submission that in these proceedings, the Applicant is attempting to use Non-Conviction Based Forfeiture proceedings as a substitute to criminal proceedings which the Applicant is at liberty to commence under **Section 71** of the **FPOCA** and **Section 7** of the **Prohibition and Prevention of Money Laundering Act 2001**. Counsel submitted that as a matter of principle, and as a matter of law, **Section 71** of the **FPOCA** should not be invoked in these proceedings. Counsel referred the Court to the case of **The People Vs Austin Chisangu Liato** ⁽⁷⁾, and submitted that the Supreme Court thoroughly interrogated the

provisions of **Section 71** of the **FPOCA** and stated that it was enough to secure a conviction under **Section 71** if the Prosecution could show that there was a reasonable suspicion that the property was a proceed of crime. That the Supreme Court went on to say that it was not just a mere suspicion, but reasonable suspicion. Counsel submitted that based on the above, and to support his contention that the Applicant is attempting to turn this Court into a trial Court for an offence under **Section 71** of the **FPOCA**, it was Counsel's contention that a reasonable suspicion is a basis to indict a person under **Section 71** of the **Act** and that suspicion only becomes an offence after judicial interrogation and pronouncement.

- 8.29 To clarify the above, Counsel submitted that the property in the **Austin Chisangu Liato** ⁽⁷⁾ case was deemed to be property suspected to be proceeds of crime not because the DPP on behalf of the People suspected it to be so, but because the Court, after conducting a trial, found it to be so, which is what **Section 71** of the **FPOCA** is all about.
- 8.30 Counsel submitted that therefore if there is a suspicion that property is proceeds of crime, anyone can have that suspicion about any property in this country or anywhere in the world, but the catch is, a suspicion only becomes an offence when the Court says so.
- 8.31 Counsel contended that it would be a travesty of justice and a mockery of our criminal justice system if suspected criminals, with emphasis on suspected as everyone is presumed innocent until proven guilty, possessing property becomes an offence for purposes of forfeiture of property without subjecting it to judicial enquiry.

That in his view, this is tantamount to turning the DPP's Office into both a prosecution and a Court especially in the face of **Section 71** of the **FPOCA** which allows the State to prosecute someone based on that suspicion; and it is under that prosecution as part of that statutory defence that a person is supposed to bring evidence to rebut that suspicion. Counsel reiterated that it is not in these **Section 29** proceedings that a rebuttal of that suspicion is supposed to be addressed.

8.32 At the close of his submission, Counsel submitted that he is guided by the case of **Sydney Mwansa Vs Director of Public Prosecutions** ⁽¹³⁾, which he added is the only case in this jurisdiction where the provisions of the law that are subject of these proceedings, being **Sections 29, 30 and 31** of the **FPOCA**, have been interrogated and pronounced upon by the Court of Appeal, at page J23 wherein it was stated that it does not matter whether a person has sufficient resources to enable him acquire such properties. That the Court guided that the issue under **Section 29** is to connect the property to a serious offence and the Court gave an example that there can be an instance where someone has sufficient resources to acquire the property, but the property will still be tainted because of its connection to a criminal activity whose proceeds are used to acquire the property. Further that in Paragraph 7.15 of the said Judgment, the Court of Appeal said that:

“In casu, the court below lost sight of the issue, by focusing on financial capacity. The question the trial court ought to have answered is, whether the property in question was tainted property.”

- 8.33 Counsel submitted that in the preceding Paragraph 7.14, the Court of Appeal stated that the **Austin Chisangu Liato** ⁽⁷⁾ case was not applicable to the facts of the **Sydney Mwansa**⁽¹³⁾ case. Counsel adopted the holding of the Court of Appeal and submitted that by adopting this position, the Interested Parties are saying that the principle and the holding in the **Austin Chisangu Liato** cannot apply in *casu*. Counsel stated that the facts in the case in *casu* are on all fours with the **Sydney Mwansa** case, so therefore it was Counsel's prayer that this Court dismisses the Application before it with costs.
- 8.34 Co-Counsel for the 1st and 2nd Interested Party, Mr. I. Simbeye, begun by submitting on the offending paragraphs of the Amended Affidavit in Support filed by the Applicant as above, which we have taken note of. Counsel referred the Court to **Section 3** of the **Evidence Act, Chapter 43** of the **Laws of Zambia**, which spells out the conditions under which evidence can be admitted in civil proceedings. That the said requirement is that the authors of those statements should have been called to testify and were the only ones competent to produce that evidence before Court. Therefore, Counsel submitted that this Court should not place any reliance on those statements, particularly the truthfulness thereof.
- 8.35 Counsel referred the Court to the case of **Simon Miyoba Vs The People** ⁽²⁵⁾ (no citation provided) and submitted that the Supreme Court of Zambia stated that the general rule is that the contents of a statement made by a witness at another time whether on oath or otherwise, are not evidence as to the truth thereof.
- 8.36 Counsel proceeded to submit that looking at the Amended Affidavit in Support, the Applicant's Application is anchored on what they

call ‘unexplained wealth’; that the Interested Parties have unexplained wealth. That, therefore, and according to the Applicant, that is a crime or a serious crime warranting the forfeiture of the subject Properties.

8.37 It was Counsel’s submission that there is no such crime in this Country. That all the Interested Parties had to do once such an Application is made is to appear before this Court and state their proximity to the serious crime cited in the Application as is required by **subsection (2) of Section 31** of the **FPOCA**.

8.38 It was Counsel’s Submission that **Section 31(2)** overrides **Section 31(1)** of the **FPOCA** as the first three words of **Section 31(1)** state:
“Subject to subsection (2)”

8.39 Counsel submitted that therefore the Application before Court leaves the Interested Parties in an embarrassing situation when the only issue being raised is unexplained wealth, and the Interested Parties do not even comprehend what that means as it is not in the law; not in the **FPOCA** or the **Prohibition and Prevention of Money Laundering Act 2001**.

8.40 Counsel addressed the reference made by the State to the case of **Assets Recovery Agency Vs Peter Oluwafemi Olaiwon** ⁽²⁰⁾ and submitted that this case does not apply to this Country in setting the standard of explanation. That in fact, the Kenyan Court was enforcing **Section 55** of the **Anti-Corruption and Economic Crimes Act No. 3** of the **Laws of Kenya** and that **subsection (5)** of **Section 55** of that **Act** reads:

“(5) If after the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far

adduced, that the person concerned does have unexplained assets, it may require the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.”

8.41 Counsel submitted that the same **Kenyan Act** has defined unexplained wealth under **Section 2** as follows:

***““unexplained assets” means assets of a person—
(a) acquired at or around the time the person was reasonably suspected of corruption or economic crime; and
(b) whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation.”***

8.42 Counsel contended that there is a clear distinction in the Kenyan law and the Zambian law in terms of statutory defence and that the distinction in the Kenya law is that someone is called upon to explain how he/she acquired the wealth subject of the proceedings; whilst in Zambia, the person is just called upon to show that the property is his and secondly that it was not acquired as a result of a serious offence.

8.43 It was Counsel’s submission that in this regard, firstly, there is no serious crime to which the Property sought to be forfeited is connected, and secondly, presuming that there was such a connection, the Interested Party has discharged their responsibility/s under the law of this Country.

8.44 Counsel referred to the learned authors of **Murphy on Evidence** wherein it was stated that he who asserts something affirmatively, bears the burden of adducing evidence. He contended that in this

regard, the Interested Parties do not have any legal obligation to assert anything affirmatively, but to first distance themselves that the Property in question was never acquired as a result of a serious offence and once they do that, it is for the State to come forth with evidence to tighten their case and show that in fact, there is a connection between the Property and how the Property is involved in the commission of the serious offence. Counsel contended that this is in line with **Section 34** of the **FPOCA** which places the burden of proving on the Applicant.

8.45 Counsel further submitted that in the celebrated case of **Austin Chisangu Liato** ⁽⁷⁾ there is nowhere in that case where the Supreme Court of Zambia, or any lower Court, stated that the offence for which Mr. Austin Liato was convicted was a serious offence. That in fact, reliance was placed on **Section 71(3)** of the **FPOCA** which states that:

“(3) The offence under subsection (1) is not predicated on proof of the commission of a serious offence or foreign serious offence.”

8.46 Counsel submitted that it then becomes clear that whilst in the proceedings under **Sections 29** and **31** of the **FPOCA** there is need to connect property to a serious crime, securing a conviction under **Section 71** of the **FPOCA** does not require proof of commission of a serious offence. Counsel referred us to the definition of a serious offence under **Section 2** of the **FPOCA** and submitted that even the offence under **Section 71** is not a serious offence.

8.47 Counsel justified his submission above by stating that the offence under **Section 71** has no minimum mandatory sentence and that due to the absence of a minimum mandatory sentence, by virtue of

Section 26 of the **Penal Code**, a person can be sentenced to any sentence even one that is less than one year. Counsel submitted that his argument is that the offence under **Section 71**, or the commission of the offence under **Section 71** cannot lead to forfeiture of the subject Property.

8.48 Counsel cited the case of **Zambia Revenue Authority Vs Hitech Trading Company Limited** ⁽²⁶⁾ wherein it was held that:

“Arguments and submissions at the bar, spirited as they may be cannot be a substitute for sworn evidence.”

8.49 It was Counsel’s submission that from the Amended Affidavit in Support and all its 122 paragraphs, no where did the Deponent talk about money laundering. Further, that the Originating Notice of Motion clearly states in the operative part of it that the Application is made pursuant to **Sections 29** and **31** of the **FPOCA** and nowhere in the body of the submission in support of this Application has the issue of money laundering been mentioned and so the aspect on money laundering should be considered as something that is beyond the proceedings as crafted before this Court; that it is beyond the scope of the original Application.

8.50 Co-Counsel for the 1st and 2nd Interested Party, Mr. Changanu, begun by referring to the Applicant’s prayer to this Court that the Property should be forfeited because it is tainted property, and submitted that there must be facts in the Applicant’s Amended Affidavit in Support showing that a serious crime was committed by the Interested Parties. It was his contention that there is no such evidence of such facts in the Application.

8.51 Counsel referred the Court to the case of **R Vs John Rondo** ⁽²⁷⁾ quoted by the Supreme Court in the **Austin Chisangu Liato** ⁽⁷⁾ case

and submitted that at page J23, the Supreme Court expanded on what amounts to reasonable suspicion. It was Counsel's contention that the Amended Affidavit in Support does not show that the Property are proceeds of a crime. That an application under the **FPOCA** requires reasonable suspicion which this Amended Affidavit has not shown; that this suspicion must be reasonable under the **FPOCA** and based on a crime, whereas the **Prohibition and Prevention of Money Laundering Act No. 14 of 2001** requires a predicated offence so the two are conflicting Acts in this Application, and the Interested Parties will not know what the Applicant is looking for.

- 8.52 Counsel submitted that at Paragraph 80 in the Amended Affidavit in Support the Court will note that it was deposed that a scrutiny of one of the Director's Account does not reveal any suspicious transactions for the period under review, so therefore there is no suspicious transactions to warrant a forfeiture.
- 8.53 Counsel submitted that it was stated that part of the Property was given to him by his father and the 1st Interested Party speaking to or producing evidence in relation to his father's income would amount to hearsay evidence. That it is not for the Interested Party to investigate the legitimacy of his father's income, but rather it is the Applicant who had the duty under **Section 34** of the **FPOCA** to go to the father of the 1st Interested Party so that they could prove their case on a balance of probabilities that a crime was committed that yielded the Property in question. Counsel submitted that in the Amended Affidavit in Support, at Paragraphs 4 to 69, the Arresting Officer confirms that the Interested Party has a business

to show that the proceeds was coming out of hard work and no crime was committed.

- 8.54 In conclusion, Counsel submitted that not having sufficient funds is not the issue, but rather the issue is, has there been a serious crime as stated in the **Sydney Mwansa** case.
- 8.55 Counsel for the 2nd Interested Party, Mr. E. B. Mwansa SC, begun by submitting that the 1st Interested Party, though not under any duty to prove how he acquired the Property, helped the State as shown in the Affidavit in Opposition at Paragraph 9, by stating that some of the Property was bought or given to him by his father, Mr. Edgar Chagwa Lungu. That the State should have pursued the father who is still alive and lives in Lusaka. Counsel contended that it is not correct to say that the father must swear an Affidavit or appear in person before this Court because that is the duty of the Interested Party who has brought a reasonable explanation that the Properties were bought by the father, who is also a source of income to the Company.
- 8.56 Counsel submitted that the State has not shown the value of the Properties at the time or day they were acquired by the Interested Parties but rather when the valuation was done and therefore this Court should not look at the colossal amount of monies mentioned by the State. That the Court should be interested in knowing whether a crime was committed or not.
- 8.57 In Reply, Counsel for the Applicant, Ms. Margaret Kapambwe Chitundu begun by addressing the issue raised regarding the expunging of Paragraphs in the Applicant's Amended Affidavit in Support. Counsel submitted that this Court had already Ruled and guided the State to amend the Affidavit and specific Paragraphs

and the State complied with the Orders of the Court and filed the Amended Affidavit which followed what was Ruled and guided by the Court. It was Counsel's contention that their response is that there should be nothing that should be struck off by the Court as those issues were already settled by the Court.

- 8.58 Counsel further placed reliance on **Article 118** of the **Constitution of Zambia** which, she submitted, provides that in arriving at justice, the Court must not place undue reliance on technicalities. Counsel urged this Court that in arriving at justice, it must look at the substance of the case.
- 8.59 In coming to the substance of the case, Counsel submitted that in their response and oral arguments to augment their written responses, the Defence has not raised any tangible explanation to show, as per **Section 31** of the **FPOCA**, that their client did not acquire the interest in the Property because of any serious offence. That instead they had gone at large in explaining definitions and the many provisions of the law and neglecting the real issue being how their clients acquired the Property.
- 8.60 Counsel submitted that it is indeed true that the State bears the burden to prove that the Property is tainted, but, as the Court is well aware, once the State makes the allegation on a balance of probability that the Property is either a proceed of crime or tainted property, the evidential burden shifts, according to **Sections 30(b)** and **31(2)** of the **FPOCA** and according to the Kenyan case of **Stanley Mombo Amuti Vs Kenya Anti-Corruption Commission** ⁽¹⁸⁾, to that person who has an interest in that property to demonstrate that they did not acquire the interest in the property

as a result of a serious offence and that the property is not tainted property or a proceed of crime.

- 8.61 Counsel submitted that the question is how one can demonstrate this if not by showing or demonstrating to the Court how they acquired the Property. It was Counsel's submission that it is only when the Interested Parties bring evidence before the Court to demonstrate that they acquired the Property legitimately and that it is within their means that they can satisfy the provisions of **Sections 31** and **30(b)** of the **FPOCA**.
- 8.62 Counsel submitted that there is a clear misapprehension of the definition of 'proceed of crime' and 'tainted property'. Counsel stated that the definition of tainted property has three definitions and one of them, **(a)**, is what they have belaboured and what was belaboured in the **Sydney Mwansa** ⁽¹³⁾ case which they have heavily relied on. It was submitted that there is the definition provided by **(b)** and **(c)**. That the definition of tainted property under **(c)** provides for proceeds of crime, therefore the **Sydney Mwansa** ⁽¹³⁾ case and the Interested Parties' submissions that the State must show the connection to the commission of an offence is **(a)**. Counsel submitted that **(c)** refers to proceeds of crime in relation to a serious offence; that it means property or a benefit that is wholly or partly derived or realised directly or indirectly by any person from money laundering or being in possession of proceeds of crime as per **Section 71**.
- 8.63 Counsel stated that the Interested Parties submitted that **Section 71** must not be invoked in these proceedings, and rightly so. It was her submission that when the State makes a Non-Conviction Based Forfeiture Application under **Section 29**, and they refer to **Section**

71, they are not asking the Court to proceed by way of **Section 71**, they are merely referring to the offence created by the said Section, the same way they would refer to Theft and refer the Court to **Section 272** of the **Penal Code**. That it is not that the State wants the Court to proceed by way of **Section 272**. Counsel argued that in the same vein, they have referred to **Section 7** of the **Prevention and Prohibition of Money Laundering Act 2001** by way of referring to the offence and not that they are calling upon the Court to carry the proceedings under the procedure in **Section 7**.

8.64 Counsel, in summation, submitted that the Application before Court is based on **Sections 29, 30** and **31** of the **FPOCA** and that the requirement is that they need to show that the Property is either tainted property or proceeds of crime by tying it to an offence. That therein comes their reference to an offence under **Section 71** of the **FPOCA** and **Section 7** of the **Prevention and Prohibition of Money Laundering Act 2001** which are two different offences.

8.65 Counsel submitted that the DPP is not trying to come through the back door as was said, to try and prosecute this case criminally under **Section 71** as the State makes the Non-Conviction Based Forfeiture Application. That should the DPP deem it fit, they will prosecute the matter under **Section 71**.

8.66 Co-Counsel for the State, Ms. Rhoda Malibata Jackson, submitted in response to the Paragraphs which are said to contain extraneous matters, that the said Paragraphs are properly before Court and they do contain facts and not extraneous matters by way of legal argument or opinions, as they are facts that the Deponent gathered from the information he got as he was conducting his investigations.

- 8.67 Counsel submitted that the said Paragraphs do not contain hearsay as there is evidence before this Court of the source of the information and Statements recorded from the different witnesses of the information that is contained in the said Paragraphs. It was Counsel's submission therefore that the Court accepts those Paragraphs as they are in accordance with the provisions of **Order 5** of the **High Court Act**. That with respect to Paragraph 4, Counsel submitted that this is a Report that was conveyed to the Police and it is confidential information as it states that it is a confidential report. It was submitted that the Deponent investigated this Report and there is evidence in the Affidavit of his findings and therefore it cannot be said to be just an informer's evidence.
- 8.68 Regarding the case of **Assets Recovery Agency Vs Peter Oluwafemi Olaiwon** ⁽²⁰⁾, it was Counsel's submission that the said case is applicable in *casu* as it allows an interested party to adduce evidence and is therefore not a complete departure from our law.
- 8.69 Counsel submitted that the case of **Simon Miyoba Vs The People** ⁽²⁵⁾ referred to by Counsel for the interested Parties is a criminal case and it contains criminal principles and the said principles are not applicable in this Matter. To buttress her submission, Counsel referred the Court to **Section 33(b)** of the **FPOCA**.
- 8.70 Counsel submitted that reference was made to the **Austin Chisangu Liato** ⁽⁷⁾ case and how the Supreme Court did not delve into the issues of serious offence. It was submitted that the said case was a criminal case and the burden of proof was beyond all reasonable doubt and there was no requirement of connecting it to a serious offence.

- 8.71 Further that in the **Sydney Mwansa** ⁽¹³⁾ case, the Court indicated that for the cases under the offence of **Section 71** of the **FPOCA**, the Applicant must show reasonable suspicion and once they have shown reasonable suspicion, the interested party has to negate the same. Counsel submitted that in *casu*, the Applicant has shown reasonable suspicion that the property is tainted and therefore it is upon the Interested Parties to negate this reasonable suspicion that has been brought before Court and that this can be done as it was held in the case of **Assets Recovery Agency Vs Peter Oluwafemi Olaiwon** ⁽²⁰⁾ by showing evidence and not merely making statements without anything to support the said statements.
- 8.72 Counsel submitted that Counsel for the 2nd Interested Party, Mr. E.B. Mwansa SC submitted that it is the obligation of the Applicant to investigate the fact that the Properties were bought by Dalitso Lungu's father. It was Counsel's submission in response and relying on the **Assets Recovery Agency Vs Peter Oluwafemi Olaiwon** ⁽²⁰⁾ case, that the Interested Party made a statement that the motor vehicles were bought by his father and therefore he has the obligation to adduce the evidence that his father bought the vehicles in the form of bank transfers, or if it was paid by cash, a statement from the people who received the cash whom his father paid.
- 8.73 It was Counsel's submission that a mere statement that the motor vehicles were bought by his father is not sufficient as nothing has been adduced to support that evidence.
- 8.74 Counsel submitted that Mr. Changano referred to Paragraphs 80 of the Amended Affidavit in Support and stated that there was nothing suspicious in this Application as there were no suspicious

transaction on the Bank Accounts. In response, Counsel submitted that this Paragraph in the Amended Affidavit in Support was referred to in isolation and is speaking to the Bank Accounts of the Directors for Saloid Traders Limited which starts from Paragraph 71.

8.75 Regarding the issue of hearsay, Counsel submitted that if the Court finds that the same is hearsay, there are exceptions to the rules when it comes to hearsay. Counsel referred the Court to the Court of Appeal case of **Mutambo Vs the People** ⁽²⁸⁾ wherein it was stated that a statement is not hearsay if the purpose of the statement was to show that the statement was made. That in *casu*, the statement was made and because of the statement made, an investigation was conducted which led to the seizure of the cited Properties which are proceeds of crime.

8.76 Counsel submitted that this Application before Court is in relation to tainted property and that the State has shown, on a balance of probability, that the Property is tainted. That the Amended Affidavit shows facts which bring out reasonable suspicion to suggest that the Property are proceeds of crime. It was Counsel's prayer that the Court finds that the Property is tainted property and orders the same to be forfeited to the State.

9. ANALYSIS AND DECISION OF THE COURT

9.1 We have considered the Affidavit and Skeleton Arguments filed by the Parties in Support, in Opposition and in Reply as well as those submitted *viva voce* during the Hearing of the Application. We are grateful for the spirited arguments and authorities therein.

9.2 The Applicant commenced this Action by way of Originating Notice of Motion for a Non-Conviction Based Forfeiture Order of tainted

property pursuant to **Sections 29, 30, 31 and 71** of the **Forfeiture of Proceeds of Crime Act No. 19 of 2020** (FPOCA) of the **Laws of Zambia**, as well as **Section 7** of the **Prohibition and Prevention of Money Laundering Act Number 14 of 2001** as read with **Amendment Act Number 4 of 2010** of the **Laws of Zambia**.

9.3 We shall begin by considering the arguments presented by Counsel for the 1st and 2nd Interested Parties, Mr. Mehluli Malisa Batakathi, with regards to the Applicant's Amended Affidavit in Support filed on 22nd February 2024, following a Ruling of this Court dated 8th February 2024.

9.3.1 Counsel contended that despite the said Ruling of this Court guiding the State to amend their Affidavit in Support of Originating Notice of Motion so as not to include hearsay, extraneous matters and legal arguments, the Applicant's Amended Affidavit in Support still offends the said Ruling and Rules on evidence as it includes hearsay statements.

9.3.2 Counsel pointed to Paragraphs 4, 7, 8, 13, 17, 21, 23, 24, 25, 26, 32, 33, 34, 35, 36, 37, 38, 39, 44, 45, 47, 48, 49, 50, 53, 54, 55, 56, 57, 58, 59, 60, 117, and 118 of the Amended Affidavit in Support. Counsel contended that the Amended Affidavit in Support and the impugned Paragraphs relate to statements made by people who are not before this Court as witnesses and are awash with hearsay statements.

9.3.3 Counsel argued that this Court should not give weight to the truthfulness of any statement that is hearsay or the contents of those statements but should only consider that evidence as proof that something was said. He cited the Court of Appeal case of

Sydney Mwansa ⁽¹³⁾, and the Supreme Court case of **Zambia Revenue Authority Vs Godfery Kasungami** ⁽²³⁾ wherein the Court cited with approval the English case of **Subramanian Vs The Public Protector** ⁽²⁴⁾ in support of his submissions.

9.3.4 Co-Counsel for the Interested Parties, Mr. I. Simbeye contended that the Amended Affidavit in Support offends the Rules of preparing affidavits and **Section 3** of the **Evidence Act** and urged this Court not to place any reliance on those statements, in particular to the truthfulness therein. He cited the case of **Simon Miyoba Vs The People** ⁽²⁵⁾ to buttress his position.

9.3.5 In response, Counsel for the Applicant, Ms. Margaret Kapambwe Chitundu submitted that the issues raised by Counsel for the Interested Parties with regards to the Amended Affidavit in Support were dealt with in this Court's Ruling dated 8th February, 2024, and as guided by the Court, the State complied accordingly.

9.3.6 Co-Counsel for the Applicant Mrs. Malibata Jackson submitted that if this Court finds that hearsay statements are contained in the Amended Affidavit in Support, that there are exceptions to the rule on hearsay and submitted that a statement is not hearsay if the purpose of the said statement is to show that the statement was made. Further that the statements made were preceded by further investigations by the Deponent which then resulted in the seizure of the cited Properties.

9.3.7 We have taken note of the submissions from Counsel for the Applicant and Interested Parties with regards to the impugned Paragraphs in the Applicant's Amended Affidavit in Support.

9.3.8 On 17th August, 2023, the Interested Parties filed Summons to set aside Originating Process for irregularity and to expunge

paragraphs of the Applicant's Affidavit in Support for non-compliance with mandatory Rules of the Court. The Applicant on 10th October, 2023, filed Affidavit in Opposition with List of Authorities and Skeleton Arguments. Following a Hearing on 25th October, 2023, this Court rendered its Ruling on 8th February, 2024, and having found the Applicant's Affidavit in Support wanting, found as follows at page R32:

“The Applicant herein is granted leave to amend and rectify its Affidavit in Support of the Originating Notice of Motion and have the same re-sworn and filed within 14 days from the date of this Ruling...”

- 9.3.9 The Applicant complied, and filed its Amended Affidavit in Support on 22nd February, 2024, to which the 1st Interested Party filed Opposition on 22nd July, 2024, and the Applicant filed its Reply on 8th August, 2024. The Hearing of the Application in the main was heard on 17th September, 2024, and it was during this Hearing that Counsel for the Interested Parties raised their Preliminary Issue stating that the Applicant's Amended Affidavit in Support still further offends this Court's Ruling and Rules on evidence as it still includes hearsay statements.
- 9.3.10 Counsel for the Interested Party claims that the above cited paragraphs of the Applicant's Amended Affidavit in Support of the Originating Notice of Motion contain hearsay statements which must be expunged by this Court.
- 9.3.11 Counsel for the Applicant argued that if this Court finds that hearsay statements are contained in the Amended Affidavit in Support, that there are exceptions to the rule on hearsay and one

such exception is that a statement is not hearsay if the purpose of the said statement is to show that the statement was made.

9.3.12 We have considered the arguments submitted *viva-voce* by Counsel for the Interested Party and the responses by Counsel for the Applicant.

9.3.13 The impugned paragraphs in the Applicant's Amended Affidavit in Support, as noted by Counsel for the Interested Parties, state as follows:

4. That on unknown date but in the month of December, I was assigned a docket to investigate a confidential report in which it was alleged that 15 motor vehicles reasonably suspected to be proceeds of crime were parked at Star Shell Zambia Limited situate at Plot No. 18502 Kafue Road in Lusaka.

7. That I recorded a statement from Mr. Ephraim Simwanza (a Manager/Clerk at Star Shell Limited) who stated that, on unknown date but in the month of August, he received a batch of motor vehicles Landcruiser by make and that he did not know the people who took the vehicles there.

*8. That further to paragraph 7 above, I was informed by Mr. Ephraim Simwanza that it was his boss Mr. Ahsan Muhammad who instructed him to receive the vehicles and that the owners wanted them to be sold. That now produced and shown to me marked "**PL1**" is a copy of the statement of Mr. Ephraim Simwanza.*

13. That I interviewed and obtained a statement from Patrick Chilekwa who confirmed that Saloid Traders Limited was duly incorporated and that Dalitso Lungu is one of the Directors and a

shareholder. That now produced and shown to me marked **"PL3"** is a copy of the statement.

17. That I received further information from the Police command that there was information from reliable sources to the effect that there were some suspicious motor vehicles parked at the warehouse yard of Ndozo Lodge.

21. That I further interviewed and recorded a statement from Mr. Bryson Milambo (a Police Officer at Siavonga Police Station) who informed me that on 2nd September 2021, he was assigned to carry out investigations concerning the abandoned motor vehicles in Siavonga.

23. That the Officer informed me that upon interviewing Mr. Brave Mweetwa, he stated to him that he was given the vehicle by the Patriotic Front Party (PF) Secretariate for campaigns and that he collected it from State House. That now produced and shown to me marked **"PL11"** is a copy of the statement of Mr. Bryson Milambo.

24. That I interviewed and recorded a statement from Mr. Brave Mweetwa in connection with the said motor vehicle who stated that he was a candidate for Siavonga Constituency under PF.

25. That I was informed by Mr. Brave Mweetwa that he requested for a campaign motor vehicle from the Party President and Secretariate, and that a Toyota Landcruiser white in colour was handed over to him by Mr. Chisanga Chanda. That now produced and shown to me marked **"PL12"** is a copy of the statement of Mr. Brave Mweetwa.

26. That I recorded a statement from Mr. Chisanga Chanda who confirmed to have handed over the Toyota Landcruiser

Registration No. BLA 5922 to Mr. Brave Mweetwa. That now produced and shown to me marked "**PL13**" is a copy of the statement of Mr. Chisanga Chanda.

32. That I recorded a statement from Mr. Wu Ming (the General Manager at Higer Bus Zambia Limited) who stated to me that on 9th August, 2021, Mr. Dalitso Lungu bought 2 Shacman Trucks at the cost of US\$220,400 and paid US\$50,000 cash as a down payment.

33. That Mr. Wu Ming informed me that as for the balance which was US\$170,400 it was agreed that he would pay US\$50,000 per month until he finished payments as per the Credit Sale Agreement.

34. That Mr Wu Ming informed me that initially, Saloid Traders Limited went to his company on 18th January 2021 and bought Shacman Tipper Trucks and that Mr. Dalitso Lungu entered into an agreement on behalf of Saloid Traders Limited.

35. That I was informed by Mr. Wu Ming that the cost for the 2 trucks was US\$196,000 and Mr. Dalitso Lungu paid a down payment of US\$50,000 and the balance was paid in full within 3 months.

36. That I was informed by Mr. Wu Ming that the total cost which was paid in cash by Mr. Dalitso Lungu towards the purchase of the Trucks was US\$476,000 and there is an outstanding balance [of] US\$40,000. That now produced and shown to me marked "**PL17**" is a copy of the statement of Mr. Wu Ming.

37. That I interviewed and recorded a statement from Mr. Emmanuel Mbalaka (Logistics Officer at Sarago General Dealers) who stated that on 23rd April 2021, 2 motor vehicles were

purchased from Sarago General Dealers at a cost of US\$38,500 each and a total combined cost of US\$77,000 which was paid in cash by Saloid Traders Limited.

38. That I was informed by Mr. Emmanuel Mbalaka that on 30th April, 2021 he prepared two letters of sale for the motor vehicles referred to in the preceding paragraph to be registered under Saloid Traders Limited.

39. That I was informed by Mr. Emmanuel Mbalaka that the details of the vehicles are Nissan Hardbody NP300 Chassis No. ADNCPUP 22 Z 0085332 and Nissan Hardbody NP300 Chassis No. ADNCPUD 22 Z 0085811 respectively.

44. That I recorded a statement from Ms. Lillian Rhoda Masuwa Mulusa, who stated that she once owned a bare land in Chibombo District whose property number is L/22383.

*45. That she informed me that in 2020, she sold the land to Mr. Dalitso Lungu at a consideration of K400,000. That now produced and shown to me marked "**PL30**" is a copy of the statement of Ms. Lillian Rhoda Mulusa.*

47. That I recorded a statement from Mr. Joseph Chisembele (a Banker at ZANACO) who stated that he printed the bank statements for Saloid Traders Limited for both the Kwacha and Dollar account.

48. That Mr. Joseph Chisembele informed me that he also printed the mandate file and noticed that the Saloid Traders Limited's mandate file had one signatory who is Mr. Dalitso Lungu.

49. That Mr. Joseph Chisembele further informed me that the Dollar account was not very busy as compared to the Kwacha account and that the closing balance as at 14th September 2022,

was US\$677.05. That now produced and shown to me marked **"PL31"** is a copy of the United States Dollar account bank statement.

50. That I was informed by Mr. Joseph Chisembele that the closing balance for the Kwacha account as at 14th September 2022 was K173,320.07. That now produced and shown to me marked **"PL32"** is a copy of the statement.

53. That I recorded a statement from Caroline H. Benedicte (Managing Director for Total Energies Zambia) who stated that the lease agreement with Saloid Traders Limited was for 10 years commencing 1st September 2018.

54. That Ms. Caroline H. Benedicte informed me that it was agreed that the annual lease rental was US\$96,000 at USD8,000 per month, which rentals would be paid quarterly amounting to US\$26,000 including tax.

55. That she informed me that the said money was being paid through ZANACO bank account No. 5681184500170 for Saloid Traders Limited.

56. That she further informed me that from the time they entered into an agreement, Total Energies have paid US\$362,399.95 to Saloid Traders Limited. That now produced and shown to me marked **"PL35"** is a copy of the statement of Ms. Caroline H. Benedicte.

57. That, investigations also revealed that Saloid Traders Limited hired out 3 Shacman Truck to Belvins Ingram International Zambia Limited (BII) for 3 months.

58. That I recorded a statement from Mr. Vincent Kanyanta (the Chief Executive Officer for Belvins Ingram International) who

stated that he first hired the trucks in the month of August 2021 after agreeing that he should pay K8,000 per truck per day.

59. That in August 2021, he paid Saloid Traders Limited K232,000 after the Tipper bearing Registration No. BAR 5288 worked for 29 days. That now produced and shown to me marked "**PL36**" is a copy of the statement of Mr. Vincent Kanyanta.

60. That in September, 2021, he hired three Tippers for 56 days and paid Saloid Traders Limited, K448,000 through a bank transfer. That now produced and shown to me marked "**PL37**" is a copy of the bank transfer form.

117. That further I recorded a statement from Mr. James Mwansa, a tax inspector at ZRA, who stated that Mr. Dalitso Lungu has not submitted returns for the period 2017 to 2023 and has not made any payments making him nontax compliant. There is now produced and shown to me marked "**PL60**" a copy of the statement of Mr. James Mwansa.

118. That I recorded a statement from Ms. Susan Mwatafwali (Senior Inspector of Taxes) who stated that in 2020 the Tax payable as declared by Saloid Traders Limited in the return was K11,118.00 on their assessable income of K31,765.70.

9.3.14 The question before us is whether the impugned Paragraphs as cited by Counsel for the Interested Parties contain hearsay statements which we have been asked to expunge.

9.3.15 According to ***Black's Law Dictionary***, 11th Edition at page 868, hearsay is defined as

"Traditionally, testimony that is given by a witness who relates not what he or she knows personally, but what

others have said, and that is therefore dependent on the credibility of someone other than the witness”

9.3.16 The learned authors of **Cross & Tapper on Evidence**, opined that hearsay is an assertion other than one made by a person while giving oral evidence in the proceedings and is inadmissible as evidence of any fact stated.

9.3.17 The authors of **Murphy on Evidence** stated as follows on the rule on hearsay:

“Evidence from any witness which consists of what another person stated (whether verbally, in writing, or by any other method of assertion such as gesture) on any prior occasion is inadmissible, if its only relevant purpose is to prove that any fact so stated by that person on that prior occasion is true. Such a statement may, however, be admitted for any relevant purpose other than proving the truth of facts stated in it.”

9.3.18 Clearly the conveyance and use of second-hand evidence is not permissible as the ideal would be to hear first-hand from the person who asserted, verbally, in writing, or by any other method of assertion, including by way of affidavit.

9.3.19 Having perused the impugned paragraphs as cited by Counsel for the Interested Parties, it is our considered view that Paragraphs 4, 7, 8, 13, 17, 21, 23, 24, 25, 26, 32, 33, 34, 35, 36, 37, 38, 39, 44, 45, 47, 48, 49, 50, 53, 54, 55, 56, 57, 58, 59, 60, 117, and 118, as guided by the above authorities, contain hearsay statements made by the Deponent of the Applicant’s Amended Affidavit in Support. They do contain second-hand information deposed to by the

Applicant's Deponent which information consists of what other people stated.

- 9.3.20 Further to the above, exhibits "**PL1**", "**PL3**", "**PL11**", "**PL12**", "**PL13**", "**PL17**", "**PL30**", "**PL32**", "**PL35**", "**PL36**", and "**PL60**" in the above impugned paragraphs are copies of typed, written and signed Statements from people whom the Deponent of the Amended Affidavit in Support of the Application interviewed in the course of his investigations.
- 9.3.21 It is our considered view that these Statements are hearsay if they are tendered to prove the truth of what the persons said in those Statements. The recorded Statements as exhibited in many of the impugned Paragraphs were made outside the Court by persons who are not testifying in these proceedings and them being offered to prove the truth of their contents would amount to hearsay.
- 9.3.22 This position is supported by **Section 3** of the **Evidence Act** which states as follows:

"(1) In any civil proceedings where direct oral evidence of a fact 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, that is to say:

(a) if the maker of the statement either—

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the

matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is outside Zambia and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.”

9.3.23 **Section 3** of the **Evidence Act** creates a limited statutory exception to the hearsay rule for documentary statements in civil proceedings: such statements may be admitted if the maker had personal knowledge (or the entry was made in the course of a duty recording information from someone with knowledge) and the maker is called as a witness, subject to narrow exceptions when the maker cannot attend. **Section 3** is a statutory carve-out to the general rule against hearsay, but it is limited in scope, and it applies only to documentary statements.

9.3.24 In *casu*, the maker of the Statements had personal knowledge of the contents of the Statements, however, they were not called as witnesses.

9.3.25 In the case of **Mutambo and Others Vs The People** ⁽²⁸⁾, the then Court of Appeal, in line with the holding in the English case of **Subramaniam Vs Public Prosecutor** ⁽²⁴⁾, stated as follows:

*“The second rejection was of evidence by the kapasu as to the orders which were given to the Boma messengers when they were despatched to the village. That evidence was rejected as hearsay. In my judgment, it was clearly not hearsay. If A delivers a chattel to B, both A and B can depose to the fact of delivery and receipt of the chattel, as can a third person who was present and witnessed the delivery and receipt. What difference is there really between such acts and the giving of a verbal order by a superior to a subordinate? Insofar as the order contains allegations of fact, the evidence as to the giving and receipt of the order and its terms is no more than hearsay as to the truth of the allegations and clearly is not admissible as to them. But I can see no reason why evidence by the recipient, or by a third party who was present and heard the order given, is not admissible as to the facts of the giving and terms of the order when those facts are relevant to a matter in issue. So far as my experience goes, such evidence is continually admitted before courts martial. The point seems to me to be clearly covered by the decisions of the Privy Council in *Subramaniam v Public Prosecutor*, 1956, 1 WLR 965 and the Court of Criminal Appeal in England in *R v Willis*, 1960, 1 All ER 331. In the former case, the accused was charged with possession of firearms without lawful excuse, and evidence was brought on his*

behalf, in support of a plea of duress, of what had been said by terrorists. The trial judge had held that the evidence was not evidence but hearsay. In giving the opinion of the Privy Council that the appeal should be allowed, Mr Da Silva said:

‘Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.’

That passage was quoted with approval and applied by Lord Parker, CJ, when giving judgment for the Court of Criminal Appeal in R v Willis supra.

Nonetheless, I am of the opinion that the rejection of the evidence was right. The ground of that opinion is that the evidence was irrelevant, as what was relevant was not the instruction which the Boma messengers received but what they told the villagers.”

9.3.26 Whilst we acknowledge that the said Statements were taken by the Deponent, given and signed for by the assertors, and certified as true copies, they remain second-hand evidence if the witness is not the one that made the Statement. In a nutshell, a written statement made outside Court, by a person who is not testifying and when it is being offered to prove the truth of its contents, is inadmissible as

hearsay. However, if the Statements are offered to prove the fact that the Statement was made, they are admissible.

9.3.27 It is our considered view that the said Statements were produced as exhibits to support the Deponent's assertions of what the makers of the Statements had told him during the course of his investigations. In our view, the Statements were produced to back the Deponent's findings during his investigations and as they were signed by their authors and certified, this proves that their contents have been authenticated by the authors and therefore, admissible in this manner.

9.3.28 It is consequently our considered view that the relevance of the Statements is not the truth of their content, but rather that they were made or disclosed to the Deponent.

9.3.29 Counsel for the Interested Parties specifically referred the Court to Paragraph 4 of the Amended Affidavit in Support which refers to a confidential investigative report received by the Deponent as a source of evidence. The assertions of the Court of Appeal at J25, paragraph 7.15 in the case of **Sydney Mwansa Vs Director of Public Prosecutions** ⁽¹³⁾ was cited, and it was submitted that based on the said case, any information in the Amended Affidavit in Support which comes from intelligence sources, or confidential investigations or sources, as the case may be, is inadmissible and should be expunged.

9.3.30 In response, Counsel for the Applicant submitted that the Paragraphs comply with the provisions of **Order V** of the **High Court Rules**. That with respect to Paragraph 4, the Report was conveyed to the Police, and it is confidential information as it states that it is a confidential report. It was submitted that the Deponent investigated

this Report and there is evidence in the Affidavit of his findings and therefore it cannot be said to be just an informer's evidence.

9.3.31 In compliance with the Order of this Court in its Ruling dated 8th February, 2024, Paragraph 4 was among the Paragraphs amended by the Applicant. For the purposes of clarity, we shall reproduce Paragraph 4 of the Amended Affidavit in Support as follows:

“4. That on unknown date but in the month of December 2021, I was assigned a docket to investigate a confidential report in which it was alleged that 15 motor vehicles reasonably suspected to be proceeds of crime were parked at Star Shell Zambia Limited situate at Plot No. 18502 Kafue Road in Lusaka.”

9.3.32 The Deponent further averred that:

***“5. That further to paragraph 4 above, on 30th December 2021, I conducted a search at Star Shell Zambia Limited.
6. That in a search conducted in paragraph 5 above, I found and seized 15 motor vehicles which are currently parked at Drug Enforcement Commission Headquarters in Lusaka.”***

9.3.33 The proceeding paragraphs of the Amended Affidavit in Support speak to further investigations the Deponent conducted in line with the confidential report referred to in Paragraph 4.

9.3.34 **Order V Rules 16, 17 and 18** of the **High Court Rules** state as follows:

“16. Every affidavit shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true.

17. When a witness deposes to his belief in any matter of fact, and his belief is derived from any source other than his own personal knowledge, he shall set forth explicitly the facts and circumstances forming the ground of his belief.

18. When the belief of a witness is derived from information received from another person, the name of his informant shall be stated, and reasonable particulars shall be given respecting the informant, and the time, place and circumstances of the information.”

9.3.35 Material in an affidavit that derives from intelligence or confidential investigations or reports is *prima facie* hearsay and, unless it fits statutory exception such as the ones provided for documentary-statement rules under **Section 3** of the **Evidence Act** and **Order V Rules 16, 17, and 18**, such material is hearsay unless the Court orders otherwise.

9.3.36 We refer to the case of **Kalusha Bwalya Vs Chardore Properties Limited and Ian Chamunora Nyalungwe Haruperi** ⁽²⁹⁾ and **Order V Rules 16, 17, and 18** of the **High Court Rules**, and whilst we apply the findings of Judge Mutuna, as he was then, to the case in *casu*, and in particular the impugned Paragraph 4 of the Applicant's Amended Affidavit in Support, it is important to note that the affidavit in the said case was sworn by a Legal Practitioner, and in *casu* by a Police Officer in the employ of Zambia Police Services.

9.3.37 Perusal of Paragraph 4 shows that the Deponent states that he received information in the form of a docket to investigate a confidential report on an unknown date but in the month of December which alleges that 15 motor vehicles reasonably suspected

to be proceeds of crime were parked at Star Shell Zambia Limited situate at No. 18502, Kafue Road Lusaka.

- 9.3.38 In Paragraph 5 the Deponent avers that based on the docket and confidential report, he proceeded to investigate and a search was conducted at Star Shell Zambia Limited. In Paragraph 6, the Deponent states that the 15 motor vehicles were found at Star Shell Zambia Limited and were seized and are currently parked at the Drug Enforcement Commission Headquarters in Lusaka.
- 9.3.39 It is our considered view that in the amended Paragraph 4 and the proceeding Paragraphs, the Deponent sufficiently states the facts and circumstances forming his grounds and belief and does state sufficient particulars representing the time, place and circumstances of the information received.
- 9.3.40 In *casu*, we cannot expect that the Deponent, a Police Officer, would go as far as to divulge the source and circumstances of the docket, much less the confidential report, likely to have been passed on to the Zambia Police Service from other Government Agencies, with the view that the Zambia Police Service acts on it.
- 9.3.41 Having already found that the statements, including the sworn Statements exhibited, in Paragraphs 4, 7, 8, 13, 17, 21, 23, 24, 25, 26, 32, 33, 34, 35, 36, 37, 38, 39, 44, 45, 47, 48, 49, 50, 53, 54, 55, 56, 57, 58, 59, 60, 117, and 118 are admissible only to the extent that they establish, not the truth of the statements and the sworn Statements, but the fact that it was made, it is our further finding that intelligence or confidential reports used by investigative wings of Government, that prompt dockets to be opened and follow-up investigations made that produce independent, testable evidence or

witness testimony, those subsequent investigative products as in *casu*, can cure hearsay defects, and are admissible.

- 9.3.42 Whilst the Interested Parties have raised Preliminary Issues, we note that the impugned Paragraphs listed at 9.3.13 above were largely not denied by the Deponent of the Interested Parties' Affidavit in Opposition to the Originating Notice of Motion and Amended Affidavit in Support, Mr. Dalitso Lungu the 1st Interested Party, filed on 22nd July 2024.
- 9.3.43 The Deponent and 1st Interested Party, Mr. Dalitso Lungu, avers at Paragraph 6 of the Affidavit in Opposition, that the contents of the Applicant's Amended Affidavit in Support at Paragraphs 1 to 8 are within the peculiar knowledge of the Deponent, and acknowledges that the Toyota Landcruiser Registration Number BAT 3703ZM was bought by his father, Mr. Edgar Chagwa Lungu, but was registered under Saloid Traders Limited, the 2nd Interested Party.
- 9.3.44 At Paragraph 8 the Deponent avers that he does not dispute Paragraphs 11 to 14 of the Amended Affidavit in Support which includes the impugned Paragraph 13 and the Statement exhibited and marked "**PL3**" recorded from Mr. Patrick Chilekwa who confirmed that Saloid Traders Limited, the 2nd Interested Party, was duly incorporated and that Mr. Dalitso Lungu is one of its Directors and Shareholders.
- 9.3.45 At Paragraph 9, the Deponent refers to the five (5) motor vehicles referred to at Paragraphs 15 and 16 of the Amended Affidavit in Support and avers that they are registered under the 2nd Interested Party and that they were bought by his father.
- 9.3.46 Whilst stating that the impugned Paragraph 17 is within the peculiar knowledge of the Deponent, Mr. Dalitso Lungu admits to a certain

extent the impugned Paragraphs 18 to 20 of the Amended Affidavit in Support and avers to actual ownership of the vehicles and states that the four (4) vehicles were indeed parked at Ndozo Lodge.

- 9.3.47 At Paragraph 14 of the Affidavit in Opposition, the Deponent states that he has no comment on the contents of the impugned Paragraph 21 of the Amended Affidavit in Support, but goes on at Paragraph 15 to clarify the position on the motor vehicles referred to in the Applicant's Amended Affidavit in Support at Paragraphs 21 to 25, stating that the Toyota Landcruiser Registration Number BLA 5922 was paid for by his father who later asked for it, and that he has no knowledge as to where it was taken, used or to whom it was given.
- 9.3.48 The Deponent goes on at Paragraph 16 to swear that he has no comment on the contents of Paragraphs 23 to 26 of the Amended Affidavit in Support which speak to the Toyota Landcruiser Registration Number BLA 5922. The impugned Paragraph 26 refers to a Statement, "**PL13**", made by Mr. Chisanga Chanda and recorded by the Applicant's Deponent, in which Mr. Chisanga confirms having handed over the said Toyota Landcruiser to a Mr. Brave Mweetwa.
- 9.3.49 At Paragraph 19 of the Affidavit in Opposition, Mr. Dalitso Lungu avers that the contents of Paragraphs 30 to 31 of the Applicant's Amended Affidavit in Support, which Paragraphs speak to Mr. Dalitso Lungu's Statement, marked "**PL16**", recorded by the Applicant's Deponent, are admitted to the extent that the 2nd Interested Party bought the vehicles from Higer Bus Zambia Limited and Henred Fruehauf.
- 9.3.50 Mr Dalitso Lungu goes on to aver at Paragraph 20 that whilst he cannot speak to the contents of the interview and Statement alluded to in the impugned Paragraph 32 of the Amended Affidavit in

Support, he confirms buying the said trucks upon paying a deposit of USD50,000.00.

- 9.3.51 Mr Dalitso Lungu, at Paragraphs 21 and 22 of his Affidavit in Opposition, does not substantially dispute the contents of the impugned Paragraphs 33, 34, and 35 of the Amended Affidavit in Support, and at Paragraph 23 confirms the contents of the Applicants Amended Affidavit in Support at Paragraph 36 stating that he bought the trucks and that payment for them was made in instalments.
- 9.3.52 At Paragraph 24 of the Affidavit in Opposition, the Deponent, Mr. Dalitso Lungu, avers that with regards to Paragraphs 37 to 40, which include the impugned Paragraphs 37, 38, and 39 of the Applicant's Amended Affidavit in Support, the purchase of the motor vehicles referred to therein were facilitated by his father. Further, that he owns the filling station which is operated by the 2nd Interested Party on lease to Total Energies at USD8,000.00 per month since 2018.
- 9.3.53 At Paragraphs 30 of the Affidavit in Opposition, the Deponent confirms the contents of the impugned Paragraphs 44 and 45 of the Amended Affidavit in Support regarding his purchase of bare land in Chibombo District from Ms. Lillian Rhoda Masuwa Mulusa as can be seen from the Land Register printout, and this includes her Statement and its contents, exhibited and marked "**PL30**".
- 9.3.54 At Paragraph 31, Mr. Dalitso Lungu, in respect to the Applicant's amended Affidavit in Support at Paragraphs 46 to 51, which includes the impugned Paragraphs 47, 48, 49, and 50, states that the 2nd Interested Party maintained and operated bank accounts with ZANACO, and that the Account Numbers are as stated by the

Applicant's Deponent, until the State restricted the Accounts to which he was a signatory.

- 9.3.55 At Paragraph 32, the 1st Interested Party deposed that with respect to the property referred to in Paragraph 52 of the Amended Affidavit in Support, being the property at Jack Compound, it was gifted to him by his father, and through the 2nd Interested Party, the same was leased to Total Energies Zambia at USD8,000.00 per month. Exhibited were "**DL2a**" to "**DL2d**" being copies of the Deeds of Gift and respective Occupancy Licenses.
- 9.3.56 The Deponent, at Paragraph 35 of the Affidavit in Opposition does not dispute Paragraphs 53 to 56 of the Amended Affidavit in Support which refer to the Lease Agreement between Total Energies Zambia and the 2nd Interested Party. The impugned Paragraph 56 of the Amended Affidavit in Support includes "**PL35**", the Statement recorded from Ms. Caroline H. Benedicte, the Managing Director of Total Energies Zambia
- 9.3.57 The Deponent further avers at Paragraph 36 of the Affidavit in Opposition that he does not dispute the contents of the Applicant's Amended Affidavit in Support at Paragraphs 57 to 63. This includes the impugned Paragraphs 57, 58, 59, and 60, and the exhibits therein marked "**PL36**" being the Statement of Mr. Vincent Kanyanta the Chief Executive Officer for Belvins Ingram International, and "**PL37**" a copy of the bank transfer for the amount of K448,000.00 to the 2nd Interested Party for the hire of its three (3) Tippers to Belvins Ingram International.
- 9.3.58 At Paragraph 49 of the 1st Interested Party's Affidavit in Opposition, he avers that Paragraphs 116 to 119 of the Amended Affidavit in Support, which includes impugned Paragraphs 117 and 118

regarding the Deponent's averments and Statements recorded from Mr. James Mwansa, a Tax Inspector from ZRA, and Ms. Susan Mwatafwali, a Senior Inspector of Taxes at ZRA, are within the peculiar knowledge of the Applicant's Deponent and that at no point during the 1st Interested Party's interaction with the Applicant's Deponent did he ever ask any questions relating to Taxes.

- 9.3.59 Having perused the Interested Parties' Affidavit in Opposition vis-a-vis the impugned Paragraphs in the Applicant's Amended Affidavit as cited in the Preliminary Issues raised, it is our considered view, and indeed trite, that where admissions are made by a party opposing an application, such admissions move hearsay statements into the realm of facts which do not require to be proved.
- 9.3.60 The 1st Interested Party, having largely and expressly admitted the truth of what is contained in some of the impugned Paragraphs of the Applicant's Amended Affidavit in Support means that those facts admitted are no longer in dispute and evidence is not required to prove them. The facts admitted, not denied and confirmed by the 1st Interested Party in his Affidavit in Opposition are to be taken as truth and need not be proved further.
- 9.3.61 Based on the above, it is our considered view that the averments made and the Statements recorded by the Applicant's Deponent in the course of his investigations as contained in the Amended Affidavit in Support, and which have been admitted, not denied and confirmed by the 1st Interested Party, add context to the finding of the Applicant's Deponent. This Court considers them truth in so far as the 1st Interested Party's admissions.

9.3.62 Based on our findings above in totality, it is our considered view that the Interested Parties' Preliminary Issues raised fail with regards to Paragraph 4, 7, 8, 13, 17, 21, 23, 24, 25, 26, 32, 33, 34, 35, 36, 37, 38, 39, 44, 45, 47, 48, 49, 50, 53, 54, 55, 56, 57, 58, 59, 60, 117, and 118.

9.4 We shall now proceed to consider and determine the issues raised in the Main.

9.5 The law on forfeiture is provided for in the **FPOCA** who's preamble states, *inter alia*:

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

9.6 This is echoed in the preamble of the **Prohibition and Prevention of Money Laundering Act No. 14 of 2010** as follows:

“An Act to provide for the prohibition and prevention of money laundering; the constitution of the Anti-money Laundering Authority and the Anti-Money Laundering Investigations Unit; to provide for the forfeiture of property of persons convicted of money laundering;”

9.7 This Court's Jurisdiction stems from **Section 29** of the **FPOCA** which permits a Public Prosecutor to apply for a Non-Conviction Based Forfeiture Order as follows:

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

9.8 The standard of proof required in a Non-Conviction Based Forfeiture application is prescribed in **Section 31(1)** as follows:

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

9.9 Further **Section 78** of the **FPOCA** states 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.”

9.10 Therefore, in the case in *casu*, the preponderance of evidence, being a standard of proof in civil matters, as provided by the above Section, the Applicant should show that it is more likely than not, that the Property in question, is tainted property.

9.11 According to **Section 2** of the **FPOCA**, ‘tainted property’ in relation to a serious offence means:

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

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

(c) proceeds of the offence;

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

9.12 **Section 2** of the **FPOCA** provides a definition of ‘proceeds of crime’ as follows:

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

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

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

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

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

9.13 A ‘serious offence’ is defined under **Section 2** of the **FPOCA** as:

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

9.14 Of note is **Section 71(1)** of the **FPOCA** which provision provides for and creates the offence of being in possession of property reasonably suspected to be proceeds of crime as follows:

“(1) A person who, after the commencement of this Act, receives, possesses, conceals, disposes of or brings into Zambia any money, or other property, that may reasonably be suspected of being proceeds of crime commits an offence and is liable upon conviction to—

(a) if the offender is a natural person, imprisonment for a period not exceeding five years; or

(b) if the offender is a body corporate, a fine not exceeding seven hundred thousand penalty units.” (Emphasis ours)

9.15 Equally, **Section 7** of the **Prohibition and Prevention of Money Laundering Act No. 14 of 2010** states as follows:

“A person who, after the commencement of this Act, engages in money laundering, shall be guilty of an offence and shall be liable, upon conviction to a fine not exceeding one hundred and seventy thousand penalty units or to imprisonment for a term not exceeding ten years or to both.” Emphasis ours)

9.16 Clearly, the offences in both **Acts** carry prison sentences that exceed 12 months and are therefore considered serious offences as defined by the **FPOCA**.

9.17 We refer to our finding in the case of **The Director of Public Prosecutions In Re Property & Charles Phiri as Interested Party** ⁽³⁰⁾ where we stated that the provisions of the **FPOCA** cannot be read in isolation, in particular **Sections 29, 30** and **71**. In that case we found as follows at J74:

*“6.37. As guided in the case of **Minister of Information and Broadcasting Services and Another Vs Chembo and Others** ⁽³¹⁾, as well as the Interpretation and General Provisions of Statutes Act, the FPOCA, must be read as a whole and not piecemeal. In doing so, we find that Section 71 cannot be read in isolation from the other provisions of the Act, including Sections 29 and 31.*

6.38. We find as above for the simple and clear reason that a public prosecutor will attach and refer to Section 71 in his application for a Forfeiture Order, whether Conviction

Based or Non-Conviction Based, for the simple reason of finding that an offence of being in possession of property reasonably suspected of being proceeds of crime has been committed by the interested party which is a serious offence. Possession is the serious offence as required by the FPOCA.”

9.18 It is our considered view that **Section 71** of the **FPOCA** applies to both Conviction Based Forfeiture for the purposes of convicting an Interested Party, and to Non-Conviction Based Forfeiture proceedings for purposes of establishing an offence, a serious offence, committed by the Interested Party.

9.19 The application of **Section 71(1)** to Non-Conviction Based Forfeiture is buttressed by **Section 71(3)** of the **FPOCA** which states as follows:

“The offence under subsection (1) is not predicated on proof of the commission of a serious offence or foreign serious offence.” (Emphasis ours)

9.20 We are buttressed by Olsson J in **The Director of Public Prosecutions Vs Sharon Lee Brown** ⁽³¹⁾ where he stated that:

“Once it is shown that there has been a relevant receiving, possession, concealment or disposal of property that may reasonably be suspected of being proceeds of crime, then an offence has, prima facie, been committed.”

9.21 Further guidance regarding **Section 71(1)** of the **FPOCA** has been given in the case of **The People Vs Austin Liato** ⁽⁷⁾ wherein this was emphasised by the Supreme Court as follows:

“To prove reasonable suspicion under section 71 (1) of the Act, therefore, the prosecution does not have to show the

link between the source of the money or the accused to possible criminal conduct. It is sufficient that possession and reasonable suspicion are proved.” (Emphasis ours)

9.22 **Section 31(4)** of the **FPOCA** further emphasises that in Non-Conviction Based Forfeiture proceedings, it is sufficient that possession and reasonable suspicion are proved on a balance of probability, and that a crime need not be proved to have been committed as follows:

“The validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated.”

9.23 It is therefore abundantly clear that in an application for Non-Conviction Based Forfeiture of tainted property, the property must be tainted in relation to a serious offence, and in *casu*, the serious offences are those provided for under **Section 71(1)** of the **FPOCA** and **Section 7** of the **Prohibition and Prevention of Money Laundering Act No. 14 of 2001**.

9.24 The onus is on the Applicant to adduce evidence, on a balance of probability, that the said offences have, *prima facie*, been committed thereby rendering the impugned properties tainted properties and proceeds of crime. **Section 31(1)** of the **FPOCA** prescribes that where an application for a Non-Conviction Based Forfeiture Order has been made, the Public Prosecutor, in *casu* the Applicant, must satisfy the Court on a balance of probability, that the property is tainted property liable for forfeiture to the State.

9.25 Further, **Section 34** states as follows:

“The applicant in any proceedings under this Act bears the onus of proving the matters necessary to establish the grounds for making the order applied for.”

9.26 The Applicant, in its Originating Notice of Motion, submits that the cited Properties, which include several motor vehicles and real property, owned by and in the possession of the 1st and 2nd Interested Parties are tainted property and proceeds of crime and are subject to forfeiture to the State. The 1st Interested Party, in his own capacity and being a director in the 2nd Interested Party refutes this.

9.27 Based on the submissions made by the Parties, both in writing and orally, the issues for determination are as follows:

- a) Have the Interested Parties shown that they have interest in the subject Properties;*
- b) Has the Applicant satisfied this Court, based on the evidence tendered and on a balance of probability, that the cited Property is tainted property and therefore proceeds of a crime;*
- c) Has the 1st Interested Party shown, based on the evidence tendered and on a balance of probability, that he did not acquire the said interest in the Property as a result of any serious offence carried out by him.*

9.28 a) Have the Interested Parties shown that they have interest in the subject Properties.

9.28.1 The need to establish interest in property subject of an application for forfeiture is in **Section 30(b)** of the **FPOCA** which states that:

“(b) any person who claims an interest in the property in respect of which the application is made may appear and produce evidence at the hearing of the application;”

- 9.28.2 Further, **Section 31(2)(a)** enjoins a person claiming an interest in property to which an application relates to satisfy the Court that he or she has an interest in the property.
- 9.28.3 The Applicant in his submissions, the DPP has adduced evidence showing the Interested Parties interest in the cited Properties which we shall briefly outline.
- 9.28.4 Based on the Printout from PACRA, being “**PL2**”, the Directors and Shareholders of Saloid Traders Limited, the 2nd Interested Party, are Dalitso Lungu, the 1st Interested Party, and Ms. Matildah Likando Milinga. The Company was incorporated on 17th September, 2018.
- 9.28.5 From the evidence on Record as presented by the Applicant, the Interested Parties herein own and are in possession of the impugned Properties as cited. Ownership of the motor vehicles is evidenced by registration certificates from RTSA being “**PL6-10**” as well as a Statement from RTSA exhibited and marked “**PL14**” confirming that 48 motor vehicles were owned by the 2nd Interested Party. A letter from RTSA dated 18th April, 2023, and exhibited and marked “**PL55**” confirms that the 1st Interested Party had 21 motor vehicles registered in his name.
- 9.28.6 With regards to the real property, the Applicant conducted a search at the Ministry of Lands and Natural Resources which revealed that the 2nd Interested Party owns 8 pieces of land as evidenced by “**PL19-26**” being copies of the Land Register for Saloid Traders Limited.

9.28.7 Exhibits marked “**PL27-29**” are copies of Reports from the Department of Valuation and Property Management showing the ownership of the impugned Real Property being evaluated as well as their value.

9.28.8 “**PL30**” is a copy of a Statement made by Ms. Lillian Rhoda Masuwa Mulusa stating that she sold L/22383 in Chibombo District to the 1st Interested Party for a consideration of ZMW400,000.00 in 2020.

9.28.9 Further, through a Deed of Gift exhibited and marked “**DL2d**”, the 1st Interested Party claims ownership of land in Jack Compound, Lusaka, which he leases out through the 2nd Interested Party to Total Energies Zambia Limited as evidenced by exhibit marked “**PL34**” being a copy of the Lease Agreement, and confirmed by a Statement from Ms. Caroline H. Benedict, the Director for Total Energies Zambia Limited, exhibited and marked “**PL35**”.

9.28.10 The 1st Interested Party, in his Affidavit in Opposition, has not disputed the ownership of the said Properties as submitted and cited by the Applicant.

9.28.11 Further to the above, the Interested Parties appeared and produced evidence at the Hearing of the Applicant’s Application in line with **Section 30(b)** of the **FPOCA**.

9.28.12 It is therefore our considered view that the Interested Parties herein have shown that they have interest in the cited Properties.

9.29 b) Has the Applicant satisfied this Court, based on the evidence tendered and on a balance of probability, that the cited Property is tainted property and therefore proceeds of a crime.

9.29.1 **Section 31(1)** of the **FPOCA** places the onus of satisfying the Court that the Property subject of an Application for a Forfeiture Order on the Applicant, as follows:

“(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.”

9.29.2 This onus is also clearly spelt out in **Section 34** of the **FPOCA** and the standard of proof required under these proceedings is on a balance of probability, a civil standard much lower than that which is applicable in criminal proceedings which is beyond all reasonable doubt as specified in **Section 33** of the **FPOCA** as follows:

“(1) Any proceeding on an application for a restraining order, forfeiture order or confiscation order is not a criminal proceeding.

(2) Except in relation to an offence under this Act—

(a) the rules of construction applicable only in relation to criminal law do not apply in the interpretation of this Act; and

(b) the rules of evidence applicable in civil proceedings apply, and those applicable only in criminal proceedings do not apply, to proceedings under this Act.

9.29.3 Further **Section 78** of the **FPOCA** sets the standard of proof in proceedings as stated above. Therefore, armed with the clear understanding that the Applicant herein must prove to the satisfaction of this Court that the evidence adduced shows on a balance of probability, that the cited Property is tainted Property and that the Properties which the Interested Parties possess are proceeds

of crime and further offend the provisions of **Section 71** of the **FPOCA** as well as **Section 7** of the **Prohibition and Prevention of Money Laundering Act No. 14 of 2001** as read with **Amendment Act No. 4 of 2010**, we now proceed to examine the said evidence in order to make a determination.

- 9.29.4 It is not in dispute that the cited Properties, both the motor vehicles and the real property, belong to and are owned by the Interested Parties. This fact has been admitted to by the 1st Interested Party in his Affidavit in Opposition.
- 9.29.5 The Applicant's contention is that the cited Properties are tainted property as their investigations show that both the 1st and 2nd Interested Parties do not possess the means and ability to acquire and develop the said Properties.
- 9.29.6 The Applicant has disclosed through their investigations conducted at RTSA that the 2nd Interested Party has a total of 48 motor vehicles of different makes all valued at ZMW23,050,842.49. Exhibit marked "**PL6-10**" are Motor Vehicle Registration Certificates showing motor vehicles registered to the 2nd Interested Party. A letter from RTSA dated 18th April, 2023, exhibited and marked "**PL55**", confirms that the 1st Interested Party had 21 motor vehicles registered in his name.
- 9.29.7 In a Statement exhibited and marked "**PL16**" recorded from Dalitso Lungu, it was established that he bought some of the vehicles from Higer Bus Zambia Limited. The General Manager at Higer Bus Zambia Limited, in a Statement exhibited and marked "**PL17**" stated that Dalitso Lungu bought Shacman Tipper Trucks and Trailers at a total cost of USD476,000.00 and paid cash and that there was a balance of USD40,000.00.

- 9.29.8 Investigations further showed that Dalitso Lungu bought two motor vehicles from Sarago General Dealers on behalf of the 2nd Interested Party and a Statement from the Logistics Officer, exhibited and marked “**PL18**” established that the purchase price for the motor vehicles was USD77,000.00 which was paid in cash.
- 9.29.9 Investigations conducted at the Ministry of Lands and Natural Resources established that the 2nd Interested Party owns 8 properties in the Kanakantapa and Chibombo areas, *inter alia*, as shown in exhibits marked “**PL19-29**”.
- 9.29.10 The value of the real Property cited in the Originating Notice of Motion and listed in the Department of Valuation and Property Management Reports exhibited and marked “**PL27**”, “**PL28**” and “**PL29**” are as follows:

No.	Plot No.	Assessed Market Value (ZMW)
1.	L/KANAKANTAPA/17	1,050,000.00
2.	L/KANAKANTAPA/45	925,000.00
3.	L/KANAKANTAPA/495	981,600.00
4.	L/KANAKANTAPA/510	1,020,000.00
6.	L/KANAKANTAPA/844	940,000.00
7.	L/2403/M/D	2,400,000.00
8.	L/22383/M CHIBOMBO	587,000.00
9.	L/KANAKANTAPA/429	1,246,500.00
10.	NGABW/LN_82843/225	247,000.00
11.	CHISA/LN_56605/1070	146,000.00
12.	SOLWE/LN_16095/119	53,000.00
13.	L/KANAKANTAPA/853	2,215,500.00

14.	F/6282/5 KANAKANTAPA	486,000.00
15.	L/KANAKANTAPA/38	1,005,000.00
16.	L/KANAKANTAPA/1221	1,101,200.00
17.	L.KANAKANTAPA/74	1,240,900.00
18.	PETAU/LN_39024/25	135,000.00
19.	CHONG/LN_21188/21	1,593,500.00
20.	CHILA/LN_71543/171	72,000.00
21.	MASAI/4017813	2,600,000.00
22.	F/5249	1,700,000.00
23.	S/NAKON/2409649	Not Valued/Listed

- 9.29.11 Perusal of the Lands Register, and a letter dated 6th May 2022, from the Commissioner of Lands exhibited and marked “**PL19**” and “**PL53**” shows that several of the real property listed above were registered and issued with Certificates of Title in the name of either the 1st or 2nd Interested Party between April 2020 and June 2021.
- 9.29.12 The Deponent of the Applicant’s Amended Affidavit in Support further deposed that he received information through a letter from the Ministry of Lands and Natural Resources dated 25th November, 2022, exhibited and marked “**PL54**”, confirming ownership of a further 7 pieces of real property in the names of the 1st and 2nd Interested Parties.
- 9.29.13 Upon the confirmation of Properties owned by the 1st and 2nd Interested Parties as above, the Applicant investigated the earnings of the 1st Interested Party and his Co-Director in Saloid Traders Limited as well as the earnings of the 2nd Interested Party.
- 9.29.14 It is apparent from the Applicant’s investigations that the Co-Director in the 2nd Interested Party, Ms. Matilda Likando Milinga, works for

Zambia Electricity Supply Corporation (ZESCO) and, according to a statement recorded from the Senior Industrial Relations Manager, exhibited and marked “**PL47**”, was employed on 2nd August, 2016.

- 9.29.15 The Applicant exhibited Ms. Milinga’s pay slips from 2016 to 2021, being “**PL46**”, and deposed that her salary as of 2022 was ZMW11,040.60. That a scrutiny of her bank account held at First National Bank (FNB) did not reveal any suspicious transactions for the period under review. It was further stated that a search at RTSA revealed that Ms. Matilda Likando Milinga owns four (4) motor vehicles registered in her name.
- 9.29.16 Investigations into the 1st Interested Party’s personal financial capacity during the period of investigations revealed that he had no significant work experience. It was submitted that the 1st Interested Party began working in 2012 and worked for two organizations, being Varun Beverages Zambia Limited and Zambia Revenue Authority, and worked a total of 36 months and 3 weeks and earned a total of ZMW137,803.25.
- 9.29.17 Investigations into the 1st Interested Party’s bank accounts showed that the three accounts held at ZANACO had total credits of ZMW4,206,486.00 and ZMW1,689,765.73; and his sole account at ABSA had a total credit balance of ZMW3,831,593.00 between 2015 and 2022.
- 9.29.18 It was revealed that ZANACO Account number 181023210096, opened on 10th October, 2012, is still active and had cash deposits of ZMW220,000.00 made by the 1st Interested Party, and ZMW100,000.00 made by the 2nd Interested Party.

- 9.29.19 Regarding ZANACO Account number 1810232200432, opened on 16th March 2020, it was deposed that the Account was active but however had no big deposits.
- 9.29.20 ZANACO Account number 1810232100297, opened on 10th October, 2012, was active and had three (3) transactions amounting to ZMW3,000,000.00 on 15th to 16th April, 2021. There were the closure of a Fixed Deposit Account and two transfers of ZMW1,000,000.00 made on 15th and 16th April, 2021. That the 1st Interested Party, on 16th April 2021, invested in a fixed term deposit of ZMW3,000,000.00 where he was paid interest of ZMW570,000.00. On the said Account was also a deposit of ZMW223,300.00 made by the 1st Interested Party.
- 9.29.21 All the above transactions were evidenced by exhibits marked “**PL48**”, “**PL49**” and “**PL50**”, which are two copies of Bank Statements as well as a copy of a Statement by a Banker from ZANACO, respectively.
- 9.29.22 With regards to the 2nd Interested Party, investigations conducted by the Applicant and its Deponent revealed that the Company was incorporated on 17th September, 2018, and its registered office is at Farm No. 919/50 Lusaka South in Lusaka.
- 9.29.23 Financial investigations into the 2nd Interested Party revealed that it has two accounts at ZANACO, one being a Kwacha Account, and the other a US Dollar Account. Printouts of Statements from both Accounts show that as of 14th September, 2022, the closing balance in the US Dollar Account was USD677.05 and the closing balance in the Kwacha Account was ZMW173,320.07.
- 9.29.24 A statement from a Banker at ZANACO exhibited and marked “**PL33**” revealed that the total credit transactions for the Kwacha Account for

the period December, 2019 to January, 2022 was ZMW32,981,966.00.

- 9.29.25 The 1st Interested Party owns a property in Jack Compound which, from 1st September, 2018, the 2nd Interested Party leased to Total Energies Zambia Limited and has earned USD362,399.95, as per a statement from the Managing Director exhibited and marked "**PL35**".
- 9.29.26 Investigations further revealed that the 2nd Interested Party earned monies from hiring out the three (3) Shacman Tipper Trucks and Trailers to Belvins Ingram International (BII) and based on the invoices exhibited and marked "**PL40-43**", earned a total of ZMW1,972,000.00.
- 9.29.27 Investigations at the National Pensions Scheme Authority (NAPSA) revealed that the 2nd Interested Party is registered as a contributing employer and has been contributing to the Scheme since March, 2021 to December, 2022, ZMW500.00 for a single employee named Chilufya Lwipa Chabula. That contributions of ZMW500.00 for the 1st Interested Party begun in January, 2023. However, Ms. Matilda Likando Milinga was not registered as an employee.
- 9.29.28 The 1st Interested Party claimed to earn money as a commercial farmer, however, investigations conducted at Zambia Revenue Authority, ZRA, and a Statement exhibited and marked "**PL60**" from a Tax Inspector, revealed that the 1st Interested Party had not submitted Returns for the period 2017 to 2023, and has not made any payments making him non-tax compliant. It was deposed that investigations revealed that the 1st Interested Party does not conduct any commercial farming on any of the farms restricted.
- 9.29.29 It was submitted that a statement from the Senior Inspector of Taxes revealed that in 2020, the tax payable as declared by the 2nd

Interested Party in the Return was ZMW11,118.00 on their assessable income of ZMW31,765.70. That in 2021, the 2nd Interested Party declared a Nil Return exhibited and marked “**PL61**”.

9.29.30 It is trite that a Nil Return refers to a tax return filed by an individual or entity, in *casu* the Interested Parties, to declare that they have no taxable income or that their income falls below the taxable threshold specified by tax laws. Specifically, it is an Income Tax Return filed to inform ZRA that no taxes have been paid in the respective financial year. In general terms, a Nil Return can also mean a report showing no transactions or income by either Interested Party.

9.29.31 Based on the investigations conducted at ZRA, it is evidently clear that neither the 1st Interested Party nor the 2nd Interested Party’s income and business earnings and/or profits speak to their capacity to purchase the said Properties. The investigations conducted at ZRA with regards to taxes paid by both Interested Parties fails to substantiate a level of income and /or business profits that would enable them both acquire Properties in the manner and at the rate they did and points to the offence of tax evasion and possession of proceeds of crime. Investigations conducted into the income and business earning of the Interested Parties fails to explain the ability to pay cash in US Dollars for motor vehicles and the acquisition of real property in the manner and time the 1st Interested Party did. That they have failed to establish the legitimate source or sources of the monies used in the manner it was.

9.29.32 All in all, and based on the above, the Applicant alleges that the 1st Interested Party acquired unexplained wealth of about ZMW31,332,019.00, which is the difference between the total value of the Properties and motor vehicles acquired during the period under

review and the total earnings from Varum Beverages, ZRA and a loan from a bank as well as the salaries allegedly earned from the 2nd Interested Party.

9.29.33 The Applicant further found that the 2nd Interested Party earned ZMW7,075,645.00 from Total Energies Zambia Limited and ZMW780,000.00 from BII Zambia Limited against unexplained wealth amounting to ZMW35,067,662.56.

9.29.34 The total earnings and expenditure, mostly in cash and paid in US Dollars, against the value of the Properties established as well as revelations from the investigations on Returns at ZRA of both the Interested Parties as outlined above, led the Applicant to reasonably suspect that the above cited Properties are liable for forfeiture to the State as the Properties are tainted property reasonably suspected to be proceeds of crime.

9.29.35 It is our considered view that the Applicant has fulfilled **Section 31(1)** of the **FPOCA** and has satisfied this Court, on a balance of probability, that the Properties cited are reasonably suspected to be proceeds of crime and tainted, and therefore, liable to forfeiture to the State.

9.29.36 The onus now shifts to the Interested Parties to rebut the allegations tendered by the Applicant herein and defend that the said Properties were legitimately acquired.

9.30 c) Has the 1st Interested Party shown, based on the evidence tendered and on a balance of probability, that he did not acquire the said interest in the Property as a result of any serious offence carried out by him.

9.30.1 As per **Section 30(b)** of the **FPOCA**, the Interested Parties, primarily through the 1st Interested Party being a Director in the 2nd Interested

Party, established their interest in the cited Properties and appeared and adduced evidence in defence of the Properties and in rebuttal of the Applicant's Application.

9.30.2 **Section 31(2)** of the **FPOCA** sets out the issues that the Interested Parties must clearly address to satisfy this Court, on the legitimacy of their interest in the cited Properties. The Section states as follows:

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

(a) has an interest in the property; and

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

(i) had the interest before any serious offence occurred; or

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

9.30.3 **Section 31(2)** requires the Interested Party to rebut the allegations contained in the Applicant's submissions and defend the impugned Properties against evidence adduced pointing to the said Properties being tainted property and proceeds of crime. The onus is on the Interested Parties to satisfy this Court on the legitimacy of the Properties by adducing evidence accordingly.

9.30.4 The 1st Interested Party, in his Affidavit, does not dispute and admits that he and the 2nd Interested Party own the cited Properties, being the motor vehicles and real property. The 1st Interested Party submits that the motor vehicles cited in the Originating Notice of Motion were

all purchased or financed by his father and largely belong to the 2nd Interested Party.

- 9.30.5 He does not dispute that the 2nd Interested Party bought some of the vehicles from Higer Bus Zambia Limited and that a deposit was paid of USD50,000.00. Further that as a result of the intervening circumstances, the Company failed to pay off the balances for the motor vehicles.
- 9.30.6 The 1st Interested Party goes further to depose that the vehicles cited were bought at different times and prices and mainly financed by his father. The 1st Interested Party disputes the total value of the motor vehicles stated by the Applicant.
- 9.30.7 The 1st Interested Party does not dispute the purchase of the Shacman Tipper Trucks and Trailers as deposed to in the Applicant's Affidavit in Support and deposes that the Shacman Tipper Trucks and Trailers were hired out to clients and consistently generated income.
- 9.30.8 The 1st Interested Party deposed that he owns a filling station which is operated by the 2nd Interested Party and leased to Total Energies Zambia Limited at USD8,000.00 per month since 2018. Further that the land was gifted to him by his father. This is evidenced by a copy of a Deed of Gift and Occupancy License exhibited and marked "**DL2a**" and "**DL2b**".
- 9.30.9 The 1st Interested Party argues that the DPP's directive to Total Energies Zambia Limited to deposit the said rentals into NPA's Account held at Investrust Bank has no legal basis. Copies of the letters from the DPP to Total Energies Zambia Limited and the informatory letter from Total Energies Zambia Limited to Saloid Traders Limited advising on the implementation of the DPP's

instruction are exhibited and marked “DL3a” and “DL3b” respectively.

- 9.30.10 It was submitted with regards to the Valuation Reports exhibited that the same do not reflect the actual costs of purchase and development of the Properties applicable at the material purchase price and alleges that they consist of assumptions and opinions of the evaluators.
- 9.30.11 The 1st Interested Party does not dispute the evidence presented by the Applicant regarding the 2nd Interested Party’s bank accounts held at ZANACO, and that he is the signatory thereon.
- 9.30.12 The 1st Interested Party deposed that he had other various sources of income and that Saloid Traders Limited is a family business and the bulk of its purchases and business operations were facilitated and financed by his father, Mr. Edgar Chagwa Lungu. He does not dispute the submissions by the Applicant regarding his work history and Bank Accounts but maintains that his formal work is not his only source of income as to a large extent, since his childhood, and during the running of Saloid Traders Limited, he has been assisted by his parents.
- 9.30.13 The 1st Interested Party deposed that all the Properties cited were seized by the Applicant and maintains that they were legally acquired and not proceeds of crime. He stated that he did reveal the source of income being his father, and that his parents assisted in the acquisition of the assets and the Properties and the same are not proceeds of crime.
- 9.30.14 Having perused the submissions by the 1st Interested Party and his Counsel, this Court casts its mind to the persuasive guidance given in the Kenyan case of **Assets Recovery Agency Vs Peter Oluwafemi Olaiwon** ⁽²⁰⁾ as follows:

“In civil forfeiture proceedings, the burden of proof initially lies with the Applicant, who must establish that the properties in question are likely to be proceeds of crime. Once this is established, the evidentiary burden shifts to the Respondent, who must demonstrate and justify that the properties are legitimate and not acquired through illicit means. The Respondent must provide a practical and sufficient explanation to satisfy the court regarding the source of the properties. The Applicant’s role is to raise doubt by presenting evidence suggesting that the property may have been acquired through criminal or dubious means.

Once this doubt is established, the Respondent must offer a satisfactory explanation and evidence that is solid, honest and beyond conjecture or misinformation. The evidence must be clear, logical, consistent, believable and convincing. The Respondent must demonstrate honesty and avoid being evasive, scapegoating, or misleading. Acceptable proof often includes pay slips, bank statements, money transfer records, testamentary wills etc., provided the information substantially reduces the doubt raised by the Applicant.” (Emphasis ours)

9.30.15 Our analysis of the evidence in support of the 1st Interested Party’s assertion that the Properties are legally acquired and not proceeds of crime falls short of the standard envisioned by **Section 31(2)** of the **FPOCA** and that set by the above cited case. We shall proceed to show why.

- 9.30.16 It is clear from the evidence adduced by the Applicant that the 1st and 2nd Interested Parties and the Co-Director in the 2nd Interested Party, Ms. Matildah Likando Milinga, had no financial capacity to purchase the cited Properties based on the Bank Statements produced, the income earned throughout their employment and the Tax Returns provided by ZRA.
- 9.30.17 The 1st Interested Party claims to be a commercial farmer and having other sources of income outside his employment have not been substantiated by the production of evidence showing the success of his endeavours through the production of Tax Returns, bank statements, and evidence of business transactions yielding income earned and profits made.
- 9.30.18 The 1st Interested Party's dispute of the total value of the motor vehicles bought and the actual costs of purchase and development of the Properties stated in the Valuation Reports could have been substantiated by documentary evidence such as letters and contracts of sale showing the actual purchase price of each vehicle and real property bought showing a total value less than that stated by the Applicant, as well as the legitimate source of the monies, including the US Dollars, used to purchase the said Properties.
- 9.30.19 The 1st Interested Party states that the cited Properties were bought by and largely financed by his father Mr. Edgar Chagwa Lungu. The 1st Interested Party fails to proffer sufficient evidence to support his assertion. This could have been in the form of evidence of bank transfers into any of the Interested Parties bank accounts, Dollar and Kwacha, evidencing monies used to purchase the said Properties.
- 9.30.20 Counsel for the Interested Parties referred the Court to the case of **Regina Chifunda Chiluba Vs The People** ⁽¹⁷⁾, and submitted that in

that case, the Court held that once the evidence shows that the Prosecution knows the origin of the thing, then there is no suspicion. Counsel contended that the Interested Parties herein have informed the Court that information was given to the Investigations Officer herein as to the source of the money, being the 1st Interested Party's father, Mr. Edgar Chagwa Lungu.

9.30.21 This was the same argument submitted by Counsel in the recently decided case of **The Director of Public Prosecutions In Re Property & Charles Phiri as Interested Party** ⁽³⁰⁾ where we found as follows at page J103:

“6.137. We reiterate that the Regina Chifunda Chiluba ⁽¹⁴⁾ case is distinguishable as further and solid evidence was adduced by the applicant to substantiate her claim that the former and late Republican President, Dr Chiluba, was the source of the impugned funds. Therefore, mere disclosure of the constructing party, let alone the production of the Land Use Agreement, is not sufficient evidence to defend the Property and discharge the evidentiary burden that the FPOCA casts upon persons who claim and present themselves as an Interested Party in property deemed to be tainted or proceeds of crime.”

9.30.22 It is our considered view that the 1st Interested Party has failed to proffer further and solid evidence to substantiate his claims that Mr. Edgar Chagwa Lungu, and indeed his parents, were the source of the funds used to purchase the impugned Properties.

9.30.23 Further to the above, and with regard to **Section 30(b)** and **31(2)** of the **FPOCA**, the 1st Interested Party's parents are not Interested Parties in these Proceedings and have not therefore tendered evidence

to show or register an interest in the Property, nor to substantiate the 1st Interested Party's assertions that they financed the 1st and 2nd Interested Parties and financially facilitated the purchase of the cited Properties herein.

- 9.30.24 The 1st Interested Party in his Affidavit in Opposition not only submitted that his parents are the source of funds used to purchase the cited Properties, but submitted that the properties at Jack Compound were gifted to him by his father as evidenced by copies of two Deeds of Gift dated 16th April 2019 and exhibited and marked "**DL2a**" and "**DL2c**" and leased through the 2nd Interested Party to Total Energies Zambia Limited for USD8,000.00 per month from 1st September 2018. This is evidenced by exhibit marked "**PL34**" being a copy of the Lease Agreement showing that the 2nd Interested Party is leasing No 37 and 82 of Block 603 along Jack – Howard Road. The 1st Interested Party further proffered evidence of the Occupancy Licenses for the said premises marked "**DL2b**" and "**DL2d**" for Stand No. 37/Block 603 01/01 and Stand No. BP 82/Block 603 01/01, respectively, in the Affidavit in Support.
- 9.30.25 We perused the evidence submitted by the Applicant and the 1st Interested Party regarding these impugned Properties. The Occupancy Licenses exhibited and marked "**DL2b**" and "**DL2d**" in the 1st Interested Party's Affidavit in Support are agreements between Edgar Chagwa Lungu, the 1st Interested Party's father, and Council of the City of Lusaka and are dated 29th January, 2018, and are an extension of the licences for a further 30 years from the initial date of 1st January 1979.

9.30.26 According to the Occupancy Licences, the date of the documents and their registration is 29th January, 2018, and it is for a period of thirty (30) years with an option to renew for the same length of time.

9.30.27 Clause 3(6) of the Occupancy Licences, under the Terms of Occupancy states as follows:

“Not to sub-licence or assign the benefits or part with the rights hereby granted over the premises or any part thereof except with the express approval of the Council but upon the death or mental incapacity of the Occupant during the term of this licence or any extension or renewal thereof, the person or persons entitled by law to succeed the Occupant shall be entitled to continue to occupy the said buildings during the unexpired period of such term.”

9.30.28 What is clear from the above Clause as contained in both Occupancy Licences is that the Occupant is not permitted to sub-licence or assign the premises without express approval of the Council. Should the Occupant die or become mentally incapacitated, a person entitled by law to succeed the Occupant shall be entitled to continue to occupy the premises.

9.30.29 As the date of the current Occupancy Licences is 29th January 2018, valid for 30 years, no evidence has been tendered in the form of an express approval by Lusaka City Council for the holder of the licences, Edgar Chagwa Lungu, to sub-licence or assign the benefits or part with the rights granted over the premises or any part thereof to the 1st or 2nd Interested Parties. Nor has evidence been tendered to show that the 1st Interested Party has been entitled by law to succeed the Occupant of the licences in the event of death or mental incapacity.

- 9.30.30 From the Affidavit in Support deposed to by the 1st Interested Party, through the Deeds of Gift exhibited and marked “**DL2a**” and “**DL2c**”, the 1st Interested Party claims ownership of the land in Jack Compound, Lusaka, which he leases out through the 2nd Interested Party to Total Energies Zambia Limited as evidenced by exhibit marked “**PL34**” being a copy of the Lease Agreement, and confirmed by a Statement from Ms. Caroline H. Benedict, the Director for Total Energies Zambia Limited, exhibited and marked “**PL35**”.
- 9.30.31 A scrutiny of both Deeds of Gift as exhibited in the 1st Interested Party’s Affidavit in Opposition shows that Edgar Chagwa Lungu (the Donor) gifted the said Council premises, Stand No. BP 37/Block 603 01/01 and Stand No. BP 82/Block 603 01/01 Jack Improvement Area Lusaka to the 1st Interested Party (the Donee).
- 9.30.32 Clauses 1 and 2 of the Recitals in the Deeds of Gift state as follows:
- “1. By a licence (hereinafter called ‘the licence’) dated the twenty-ninth day of January two thousand and eighteen and made between the Council of the City of Lusaka of the one part and the Donor of the other part ALL THAT property...was granted to the Donor for a period of thirty years from the first day of January in the year one thousand nine hundred seventy nine and was extended for a further period of thirty years upon the expiry of the first term SUBJECT TO the exceptions reservations restrictions restrictive covenants and conditions mentioned or contained or referred to in the Urban and Regional Planning Act (No. 3 of 2015) and any amendments thereto and regulations made thereunder and in particular SUBJECT TO the terms and conditions contained in the*”**

Fifth Schedule appended to the said regulations and to other terms and conditions as may be contained in the said licence.

2. The Donor is desirous of transferring to the Donee the property subject to the licence hereto by way of gift.”

9.30.33 The Documents go further to state that the Donor freely and voluntarily and without valuable consideration assigns to the Donee the property to hold for the residue of the term created by the licence. It is stated therein that the necessary consent in writing to the Assignment made has been duly obtained and an exemption from paying Property Transfer Tax obtained from the Zambia Revenue Authority (ZRA).

9.30.34 As we have stated above, as at 29th January, 2018, there is no evidence tendered to show that the licence holder of the Occupancy Licences and Donor in the Deeds of Gift, Edgar Chagwa Lungu, obtained express permission to sub-licence or assign the benefits or part with the rights granted by the Council of the City of Lusaka over the premises or any part thereof to the 1st or 2nd Interested Party.

9.30.35 Further to the above, a Deed of Gift, is a legal document or agreement that transfers ownership of land from the Donor, in *casu* the 1st Interested Party's father, Edgar Chagwa Lungu, to the recipient, the 1st Interested Party, as a gift. A Deed of Gift is a voluntary and gratuitous transfer of property without consideration and is exempt from the payment of Property Transfer Tax, as charged under the **Property Transfer Tax Act 1984 Chapter 340** of the Laws of **Zambia**, where the transfer is between a proven parent to his or her proven child, being immediate family.

9.30.36 A Deed of Gift, by its very nature and definition, cannot facilitate the transfer of an Occupancy Licence from one person, an Occupancy Licence holder, to another person, even when the purported transfer is between immediate family as in *casu*. A Deed of Gift facilitates the transfer of ownership of property, and no evidence has been tendered to show that Edgar Chagwa Lungu owned Stand No. BP 37/Block 603 01/01 and Stand No. BP 82/Block 603 01/01 Jack Improvement Area Lusaka by way of Certificate of Title. He merely had an Occupancy Licence which prohibited him from sub-licencing or assigning the premises to anyone without written consent from the Council.

9.30.37 We are cognizant of **Section 30** of the **Urban and Regional Planning Act No 3 of 2015**, from which the Occupancy Licences Edgar Chagwa Lungu obtained stemmed from, which states as follows:

“30. (1) A person shall not, without an occupancy licence issued under this section and except in accordance with the conditions of the occupancy licence, build, use, let, sell, create a lien or security or in any way deal with any dwelling or building erected on any piece or parcel of land.

(2) A local authority may issue to any person an occupancy licence in respect of any piece or parcel of land in such form, subject to such conditions and on payment of such fees as may be prescribed.

(3) Subject to the provisions of this Act, an occupancy licence shall be valid for a period of thirty years.

(4) An occupancy licence and any other document relating to any dealing with land shall be registered in such manner as may be prescribed.

(5) The holder of an occupancy licence shall have such rights and obligations in respect of the piece or parcel of land to which the licence relates and in respect of any dwelling or other building erected thereon as may be prescribed...

(6) A local authority may, after giving three months' notice in writing to the licensee, revoke an occupancy licence on any of the following grounds:

(a) the licensee has committed a breach of, or failed to comply with, any of the conditions of the licence; or

(b) the licensee has failed to pay the fee prescribed for the licence.

(7) Any fees payable under this Part may be recovered by a local authority as a civil debt.

(8) A holder of an occupancy licence may apply to the registrar for the issuance of the certificate of title in respect of the piece or parcel of land to which the occupancy licence relates.”

9.30.38 The exhibits marked “**DL2b**” and “**DL2d**” show that Edgar Chagwa Lungu is the holder of the Occupancy Licences in relation to Stand No. BP 37/Block 603 01/01 and Stand No. BP 82/Block 603 01/01 Jack Improvement Area Lusaka. No evidence has been tendered to show that Edgar Chagwa Lungu obtained any written consent from the Council to sub-licence or assign these premises.

9.30.39 As per **Section 30(8)** of the **Urban and Regional Planning Act** above, no evidence has been tendered to show that the holder of the Occupancy Licence applied to the Council for the issuance of a

Certificate of Title for the said premises or parcels of land to which the Occupancy Licences relate.

- 9.30.40 Without proof of such application and the approval thereof, and indeed the issuance of Certificates of Title for both Stands from the Ministry of Lands, Edgar Chagwa Lungu cannot proceed to gift the premises or parcels of land to the 1st Interested Party by way of the Deeds of Gift.
- 9.30.41 We have further taken note that the Deeds of Gift exhibited in the 1st Interested Party's Affidavit in Support and tendered for our consideration are without documentary evidence in support such as the Council's approval for the issuance of a certificate of title, the actual Certificates of Title issued in the name of Edgar Chagwa Lungu, State Consent to Assign Stand No. BP 37/Block 603 01/01 and Stand No. BP 82/Block 603 01/01 Jack Improvement Area Lusaka to the 1st Interested Party, and ZRA Certificate of Exemption from the need to pay Property Transfer Tax on the transfer of the said premises.
- 9.30.42 We have noted that there has been no evidence tendered of proof of registration of the purported Deeds of Gifts as required by **Section 4** of the **Lands and Deeds Registry Act Chapter 187** of the **Laws of Zambia**.
- 9.30.43 We consequently find the two Deeds of Gift, exhibited and marked "**DL2a**" and "**DL2c**" do not meet the legal requirements to qualify as Deed of Gift to transfer ownership of the subject Properties.
- 9.30.44 Further to the above, we have taken note of the fact that the Occupancy Licences granted to Edgar Chagwa Lungu for Stand No. BP 37/Block 603 01/01 and Stand No. BP 82/Block 603 01/01 Jack Improvement Area Lusaka are dated 29th January, 2018. Evidence

on Record shows that the premises were then leased to Total Energies Zambia Limited on 1st September 2018, when the said premises were under an Occupancy Licence held by Edgar Chagwa Lungu. However, the Lease Agreement, exhibited and marked “**PL34**” in the Applicant’s Amended Affidavit in Support, shows that the said Agreement was between Saloid Traders Limited, the 2nd Interested Party incorporated on 17th September, 2018, and Total Energies Zambia Limited, a full 16 days before the 2nd Interested Party could legally contract.

- 9.30.45 Further, the date of execution of the two Deeds of Gift, which we have found to have not been legally executed, purportedly gifting the 1st Interested Party, a director in the 2nd Interested Party, the impugned premises is 16th April, 2019. This is approximately 7 months before Mr. Dalitso Lungu, through his Company, Saloid Traders Limited, could legally contract with Total Energies Zambia Limited. The Lease was executed before the purported Deed of Gift.
- 9.30.46 All in all we find that the Interested Parties regarding Stand No. BP 37/Block 603 01/01 and Stand No. BP 82/Block 603 01/01 Jack Improvement Area Lusaka have not acted legally and above board. There are clear signs of concealment when it comes to the manner in which the said premises were handled and transferred from Council ownership to Edgar Chagwa Lungu and the 1st Interested Party, as well as in the manner in which the Lease Agreement between the 2nd Interested Party and Total Energies Zambia Limited was executed.
- 9.30.47 We refer to the persuasive guidance given in the Kenyan case of **Assets Recovery Agency Vs Peter Oluwafemi Olaiwon** ⁽²⁰⁾ as quoted above at 9.30.14 and find that the Interested Parties have failed to meet the evidentiary burden demanded therein and which we have adopted.

- 9.30.48 The lawfulness of the source of the Property gifted to the 1st Interested Party and the clear irregularities in the contract entered by the 2nd Interested Party and Total Energies Zambia Limited deem the impugned premises tainted in line with the definition of tainted property in **Section 2** of the **FPOCA**.
- 9.30.49 Based on our finding above, the 1st Interested Party cannot be deemed to be an innocent owner of the impugned premises who acquired them by way of gift as a *bona fide* transferee without knowledge through due diligence of the unlawful nature and origin of the said gifts.
- 9.30.50 It is our considered view that the Donor's ability to gift the impugned premises must itself have a lawful foundation which in *casu* it did not. It is our considered view that the production of the Deeds of Gift does not discharge the Interested Parties' evidentiary burden once the Applicant, and indeed the evidence on Record, raises credible suspicion of illicit and dubious acquisition.
- 9.30.51 Borrowing from the standard of the evidentiary burden on interested parties as guided in the case of **Assets Recovery Agency Vs Peter Oluwafemi Olaiwon** ⁽²⁰⁾, *supra*, the Interested Parties herein failed to provide a clear, honest, consistent and believable narrative of how the said premises were received and contracted upon. Mere assertions are not enough. The documentary evidence provided on Record has exposed flaws and lapses of evidence with regard to the legal title of the said premises.
- 9.30.52 It lends credence to the Applicant's assertions that the impugned premises are reasonably suspected of being proceeds of crime and conduits of money laundering as per **Section 71(1)** of the **FPOCA** and **Section 7** of the **Prohibition and Prevention of Money**

Laundering Act No. 14 of 2001 as read with **Amendment Act No. 4 of 2010** due to the lack of verifiable explanation of legitimate origin and use.

- 9.30.53 It is therefore, our considered view that based on the evidence tendered by the Applicant establishing that on a balance of probability, the Properties cited in the Originating Notice of Motion are tainted property and proceeds of crime, and the failure of the Interested Parties to adduce sufficient evidence, on a balance of probability, to discharge the evidentiary burden that the **FPOCA** casts upon persons who claim and present themselves as an interested party in property deemed to be tainted or proceeds of crime, the Applicant's Application succeeds.
- 9.30.54 Counsel argues that the **Zambian Constitution, Chapter 1 of the Laws of Zambia** as amended by **Act No. 19 of 1996**, under **Article 16**, guarantees the sanctity of property ownership. That the said Article guarantees the right to property which right cannot be abrogated except in circumstances expressly provided which Counsel highlighted being by way of penalty for breach of any law, whether under civil process or after conviction of an offence.
- 9.30.55 Counsel argued that in line with **Article 16(2)(b)** under **Sections 29 and 31** of the **FPOCA**, the DPP should have demonstrated that the Interested Parties breached the law or indeed the Properties have been used or are intended to be used in a crime and as a result, the Forfeiture Order being sought is a penalty for breach of a specified provision of the law. That failure to prove that a particular offence was committed or even existed, this Court should declare such a provision *ultra virus* **Article 16(2)(b)** of the **Constitution**, contrary to the Court's finding in the case of **Jessie Bwalya Kapyelata** ⁽²⁾

wherein it was held that the provisions of **Sections 29** and **31** of the **FPOCA** were constitutional and do not contravene the said Article.

9.30.56 We do agree with Counsel for the Interested Parties that **Article 16 (1)** of **The Republican Constitution** guarantees the right to ownership and enjoyment of property. However, the said Article is not couched in absolute terms and does allow for derogations in permitted circumstances as follows:

“b. by way of penalty for breach of any law, whether under civil process or after conviction of an offence;” (Emphasis ours)

9.30.57 In the case of **The Director of Public Prosecutions In Re Property & Chiyeso Lungu as Interested Party** ⁽³²⁾ we stated that there can be no guaranteed right to a property whose origins cannot be legally justified by the person claiming an interest in it. This was the position taken in the case of **Jessie Bwalya Kapyelata** ⁽²⁾ wherein it was held that Non-Conviction Based Forfeiture is constitutional.

9.30.58 We are buttressed by the case of **The Director of Public Prosecutions Vs Sharon Lee Brown** ⁽³¹⁾ and the Supreme Court case of **Austin Chisangu Liato Vs The People** ⁽⁷⁾ wherein it was stated that once it has been shown that there has been possession of property that may reasonably be suspected of being proceeds of crime, then an offence has, *prima facie*, been committed; and that the Prosecution does not have to show the link between the source of the money or the accused to possible criminal conduct. It is sufficient that possession and reasonable suspicion are proved.

9.30.59 We reiterate our position above with regard to Counsel for the Interested Parties' arguments submitted around the phrases 'matters necessary' contained in **Section 34**, and the phrase 'relevant offence'

contained in **Section 2** of the **FPOCA**, save to add that ‘matters necessary’ alludes to the evidentiary burden placed on the Applicant, and the evidence expected to be adduced by the Applicant and the onus placed on them in **Section 31** of the **FPOCA**.

9.30.60 It is therefore our considered view that Non-Conviction Based Forfeiture proceedings are not only constitutional, but that the Applicant need only adduce sufficient evidence showing, on a balance of probability, that the impugned Property cited is tainted property and that the Interested Parties had possession of the said Property thereby offending **Section 71(1)** of the **FPOCA** and **Section 7** of the **Prohibition and Prevention of Money Laundering Act**.

9.30.61 Consequently, Counsel for the Interested Parties’ arguments around the phrase ‘matters necessary’ contained in **Section 34**, and the phrase ‘relevant offence’ as provided for under **Section 2** of the **FPOCA** fail.

9.30.62 Counsel took exception to the use of the phrase ‘organised crime’ and argued that whilst the phrase was prominently used in the South African **Prevention of Organised Crime Act** (POCA), the same was absent and does not exist in the **FPOCA**.

9.30.63 We agree with Counsel for the Interested Parties that the said phrase is used in the **POCA** and is not alluded to in the **FPOCA**. We also take cognizance that the Applicant quoted from the case of **Simon Prophet Vs The National Director of Prosecutions** ⁽¹⁾ which used the phrase in its holding as quoted at 4.42 above. We have perused the Record and there is nowhere in the Applicant’s submissions where they use the phrase ‘organised crime’ in relation to the acts and omissions of the Interested Parties.

9.30.64 Counsel contends that there is no law in this Country, including in the **FPOCA**, prescribing that if a person has property whose value is above the net worth of a person in so far as is known to a law enforcement officer, then such property turns into proceeds of crime or tainted property. Counsel cited the **Sydney Mwansa Vs Director of Public Prosecutions** ⁽¹³⁾ case and the Court of Appeal's holding as quoted at 3.74 above to buttress his submission.

9.30.65 This argument was put forward in the case of **The Director of Public Prosecutions In Re Property & Charles Phiri as Interested Party** ⁽³⁰⁾ and we stated as follows at J77:

“6.49. Contrary to Counsel's assertions above, Section 62 of the Anti-Corruption Act No. 3 of 2012 states as follows with regards to commencement of forfeiture proceedings for unexplained property, or what is referred to as Unexplained Wealth in other jurisdictions:

“The Commission may commence proceedings for forfeiture of unexplained property under this section against a person where—

(a) after due investigation, the Commission is satisfied that the person has unexplained assets; and

(b) the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and the person's known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that disproportion has been given.

6.50. Evidently, where a person has wealth or assets, in whatever form, whose value Law Enforcement Agencies have found to be above the known legitimate sources of income of that person, and that person, having failed to proffer an adequate explanation as to their origins or the disproportion, may find that the wealth or assets are considered tainted property and proceeds of crime and forfeiture proceedings commenced against the said property.”

- 9.30.66 The provision in **the Anti-Corruption Act** as referred to above clearly shows that there is one such law that investigations by Law Enforcement Agency into the unexplained wealth of a person may lead to forfeiture proceedings being instituted.
- 9.30.67 We have noted that the investigations into the financial capacity of the Interested Parties showed a lack of compliance with Tax Returns required by ZRA and the submission of Nil Returns pointing to not only the fact that the Interested Parties had no discernible income from employment or business transactions and dealings that would be subject to tax, but also that the monies used to purchase the cited Properties could have been obtained from illicit or unlawful activities such as money laundering and tax evasion.
- 9.30.68 The lack of establishment of legitimate sources of income to enable the Interested Parties’ acquisition of the cited Properties leads to the reasonable suspicion that the Properties are tainted property and proceeds of crime.
- 9.30.69 The evidence adduced by the Applicant is not just from intelligence sources, but compiled as a result of robust investigations at, *inter alia*, ZRA, RTSA, Ministry of Lands and Natural Resources, NAPSA

and various Banks where Accounts held by the Interested Parties are domiciled, accompanied by sworn Statements and Reports, and whose findings have not been sufficiently disputed by the Interested Parties herein.

9.30.70 Counsel for the Interested Parties contends that the DPP has no legal authority to divert the rentals received from Total Energies Limited for the lease of the Property owned by the 2nd Interested Party to the NPA Forfeiture Account domiciled at Investrust Bank following the 2nd Interested Party's Account held at ZANACO Cairo Road Business Centre being frozen by the Zambia Police Service pending determination of the Matter before Court.

9.30.71 We have taken note of Counsel for the Interested Party's contention and have noted that Counsel has failed to point to provisions in the law that precludes the DPP from directing a third party such as Total Energies Limited that rentals sent to frozen accounts be diverted to the NPA Forfeiture Account pending the determination of a matter before Court. All investigations under the **Anti-Corruption Act No. 3 of 2012** are subject to the DPP's direction and Counsel for the Interested Party has failed to pinpoint any legal provision that stops the DPP from acting as he did.

10. CONCLUSION

10.1 For the avoidance of doubt, we find as follows:

10.1.1 Based on the foregoing findings, we are of the view that the Director of Public Prosecutions has successfully made out its case for Non-Conviction Based Forfeiture of tainted property.

10.1.2 The evidentiary burden that had shifted to the Interested Parties was not discharged as required by **The Forfeiture of Proceeds of Crime Act, Act Number 29 of 2010** of the **Laws of Zambia**.

10.1.3 We accordingly Order that the cited Properties herein be forfeited to the State, to be applied as the Director of Public Prosecutions deems fit within the confines of the law.

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

DELIVERED AT LUSAKA THIS 9TH DAY OF FEBRUARY, 2026



.....
P.K. YANGAILO
HIGH COURT JUDGE



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



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