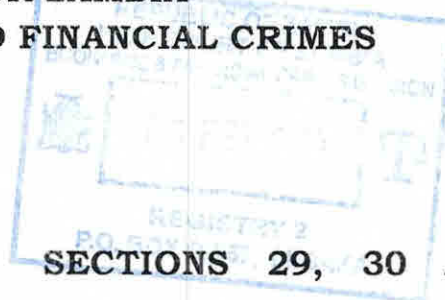


IN THE HIGH COURT FOR ZAMBIA
AT THE ECONOMIC AND FINANCIAL CRIMES
DIVISION REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

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 NUMBER 14 OF 2001 AS READ WITH
AMENDMENT ACT NUMBER 4 OF 2010 OF
THE LAWS OF ZAMBIA

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

IN RE PROPERTY-:

RESPONDENT

TOYOTA LANDCRUISER REGISTRATION NO. BAR 5455ZM, TOYOTA
LANDCRUISER REGISTRATION NO. BAR 9681ZM, TOYOTA
LANDCRUISER REGISTRATION NO. BAR 2385, TOYOTA
LANDCRUISER REGISTRATION NO. BAR 2386ZM, TOYOTA COROLLA
REGISTRATION NO. BAT 2386ZM, TOYOTA COROLLA
REGISTRATION NO. BAT711ZM, TOYOTA LANDCRUISER

REGISTRATION NO. BAR 5461ZM, TOYOTA LANDCRUISER
REGISTRATION NO. BAR 5452ZM, TOYOTA PRADO BAT 794,
TOYOTACOROLLAR 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 LAND CRUISER
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 BO. AJE 7542, NISSAN NP 300REGISTRATION NO.
AJE 7545, 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 300 REGISTRATION NO. AJE 7543, TOYOTA
LANDCRUISER REGISTRATION NO. BLA 5922, TRAILER
REGISTRATION NO. 6368, BNW7 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. ALP 8087, TOYOTA PASSO REGISTRATION NO.
ALH 3365, 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, P/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/MCHIBOMBO,
PROPERTY L/ KANAKANTAPA/429, NGABW/LN-82843/225,
CHISA/LN-56605/1070.SOLWE/LN16095/119,
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:

1ST INTERESTED PARTY

SALOID TRADERS LIMITED:

2ND INTERESTED PARTY

BEFORE THE HONOURABLE JUSTICES P. K. YANGAILO, A. MALATA-ONONUJU AND IAN MABBOLOBOLO, ON THIS.....^{8th} DAY.....^{Feb}.....2023.

For the Applicant:

Mr. M. C. Chipawa and Mrs. R. M. Jackson – National Prosecutions Authority.

For the 1st and 2nd Interested Parties:

Mr. C. Changano – D. Findlay and Associates

Mr. I. Simbeye – Malisa and Partners Legal Practitioners

For the 2nd Interested Party:

Mr. E. B. Mwansa S.C. and Ms. C. Tokowe – EBM Chambers

R U L I N G

A. MALATA-ONONUJU J. DELIVERED THE RULING OF THIS COURT

CASES REFERRED TO:

1. *Joseph Gereta Chikuta Vs Chipata Rural Council (1974) Z. R. 241;*
2. *New Plast Industries Vs Commissioner of Lands and Another (2001) Z. R. 51;*
3. *Mutantika Vs Chipungu S. C. Z. Judgment No. 13 of 2014;*

4. *Africa Banking Corporation Zambia Limited (T/A Atlas Mara) Vs Mattaniah Investments Limited (in receivership), Development Bank of Zambia, John Peter Sangwa, Leasing Finance Company Limited, Agrifoods and Allied Industries Limited S. C. Z. Judgment No.11 of 2019;*
5. *Twampane Mining Cooperation Society Limited Vs E. and M. Storti Mining Limited S. C. Z. Judgment No. 20 of 2011;*
6. *Henry Kapoko Vs The People 2016/CC/23;*
7. *Sun Country Limited Vs Charles Kearney and Roslyn Kearney S. C. Z. Appeal No. 7 of 2017;*
8. *Robert Simeza, Andrews Motel Vs Elizabeth Mzyeche (2011) 3 Z. R. 290;*
9. *Bratty Vs Attorney General of Northern Ireland (1963) A. C.*
10. *NFC Mining Vs Techpro Zambia Limited S. C. Z. Appeal No. 22 Of 2000;*
11. *Director of Public Prosecutions In Re Property Vs Beauty Chama and 2 Others 2023/HPEF/13.*

LEGISLATION REFERRED TO:

1. *High Court Rules of the High Court Act, Chapter 27 of the Laws of Zambia;*
2. *Statutory Instrument No. 58 of 2020;*
3. *Rules of the Supreme Court of England (White Book) 1999 Edition;*
4. *The Constitution of Zambia (Amendment) Act No. 2 of 2016;*
5. *The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia;*
6. *The Forfeiture of Proceeds of Crimes Act No. 19 of 2010.*

1. INTRODUCTION

- 1.1 The 1st and 2nd Interested Parties filed Summons to set aside originating process for irregularity and to expunge paragraphs of the Respondent's Affidavit for non-compliance with mandatory Rules of the Court. The Summons was filed pursuant to **Section 44(1) (a) and (e) of the High Court Act Chapter 27 of the Laws of Zambia, Order III Rule 3 sub-rule 2, Order VI Rule 2 and Order V Rules 15 to 20 of the High Court Rules Chapter 27 of the Laws of Zambia** as amended by **Statutory Instrument No. 58 of 2020** read with **Order 2 Rule 2 of the Rules of the Supreme Court of England, 1999 Edition.**
- 1.2 The Interested Parties applied for an Order that the Proceedings in the main be set aside for irregularity on the ground that the Originating Notice of Motion filed by the Applicant herein on 26th June 2023 does not comply with the prescribed form and that the Affidavit of Pardon Liuma filed into Court on 5th July 2023 violated mandatory rules of preparing Affidavits and therefore ought to be expunged.

2 THE APPLICATION BY THE 1ST AND 2ND INTERESTED PARTIES

- 2.1 The Interested Parties filed the Summons to set aside the Originating Process with an Affidavit in Support sworn by Counsel Mr. Isaac Simbeye, List of Authorities and Skeleton Arguments on 17th August 2023.
- 2.2 In his Affidavit in Support, Mr. Simbeye deposed that the current proceedings were instituted by the Applicant by way of Originating Notice of Motion supported by an Affidavit in Support sworn by one

Pardon Liuma together with List of Authorities and Skeleton Arguments.

- 2.3 It was avowed that the aforementioned Originating Notice of Motion did not have the words "*Republic of Zambia*" nor "*Originating Notice of Motion*". Further that it did not have the following words or Notice: "*NOTE: It will not be necessary for you to enter an appearance but if you do not attend either in person or by your Advocate, at the time and the place above mentioned, such order will be made, and proceedings taken as the Court may think just and expedient*". It was deposed that the Originating Notice of Motion filed by the Applicant differs from the prescribed Originating Notice of Motion both in form and substance.
- 2.4 It was avowed that the Deponent of the Affidavit in Support of the Notice of Motion, Mr. Pardon Liuma, did not state his residential address, that a number of paragraphs in the Affidavit in Support were not written in the first person and that Paragraphs 4 and 21 did not disclose the source of information the Deponent deposes to therein.
- 2.5 It was deposed that the contents of Paragraphs 99, 110, and 112 are not facts and that the several exhibits produced in the Affidavit of Mr. Pardon Liuma were not certified to be true and correct copies of the original statements or documents exhibited. Further that the Affidavit in Support has in excess of 400 pages but is not paginated.
- 2.6 The Deponent averred that the said Affidavit of Pardon Liuma violates the mandatory rules of procedure and practice guiding the preparation of Affidavits and in the circumstances, an application can be made to this Court for an Order striking out the Originating Notice of Motion.

- 2.7 In the List of Authorities and Skeleton Arguments in Support, it was submitted that based on the background as presented in the Affidavit in Support, the Interested Parties argued that this Court should find that the entire process commenced by the Applicant be set aside for irregularity and the offending paragraphs of the Affidavit be expunged for violating the mandatory rules of Court guiding the preparation of affidavits. That should this Court find that the Originating Notice of Motion filed completely departs from the Prescribed Form, this Court should hold that it lacks jurisdiction due to wrong mode of commencement.
- 2.8 It was submitted that in the alternative, that it would be argued that should the Court find that the non-compliance with the prescribed form for the Originating Notice of Motion on the part of the Applicant is mere irregularity, then the Court should order the Originating Notice of Motion to be set aside for irregularity.
- 2.9 The Interested Parties submitted that it will be argued that the Affidavit filed in support of the Originating Notice of Motion be expunged either in its entirety or only to the extent of the cited paragraphs and exhibits which violate the mandatory rules of preparing Affidavits.
- 2.10 After establishing the jurisdiction of this Court to hear the Application, Counsel for the Interested Parties stated that the basis for prescribing forms and the use of prescribed forms in commencing actions and making applications can be traced from the **High Court Act**. It was submitted that the Rules of the Court are made to regulate and standardize the procedure as well as to prescribe the format that Court documents must adhere to.

- 2.11 Counsel referred this Court to **Order VI Rule 2** of the **High Court Rules** and argued that this provision of the law entails that it is mandatory that every originating process ought to be in a prescribed form and that parties commencing actions are not at liberty to design their own forms nor alter the prescribed forms unnecessarily, especially altering the material contents of the prescribed form.
- 2.12 Counsel referred to **Form 11** being listed as “*Originating Notice of Motion (Order 6, r.2)*” and argued that this Rule applies to the Originating Notice of Motion filed by the Applicant. Counsel argued that when **Form 11** in the **First Schedule** of the **High Court Rules** is compared to the purported Originating Notice of Motion filed by the Applicant, it is evident that the document filed is not an Originating Notice of Motion as prescribed by the Rules of Court in the **First Schedule**. It was argued that the Applicant deleted, without authority, certain words from the prescribed form and that these words are not idle or negligible words but were included in the prescribed form by the committee duly constituted and authorized under the law to prescribe the form.
- 2.13 Counsel submitted that what was filed by the Applicant was not an Originating Notice of Motion and as such, it must be held that due to the wrong mode of commencement, this Court has no jurisdiction to deal with the proceedings. In support of his submission, Counsel relied on the cases of **Joseph Gereta Chikuta Vs Chipata Rural Council** ⁽¹⁾ and **New Plast Industries Vs Commissioner of Lands and Another** ⁽²⁾.
- 2.14 It was further submitted that should this Court find that the Originating Notice of Motion herein failed to adhere to the prescribed form and that such failure is fatal and unbecoming of the prescribed

standard, then this Court should order that it has not been adequately moved and therefore, lacks jurisdiction to hear it altogether and dismiss the originating process for irregularity.

- 2.15 That however, should this Court be of the view that the lapses of the purported Originating Notice of Motion contain mere irregularities, then this Court should order that the originating process be set aside accordingly.
- 2.16 With regards to the mandatory rules for preparing affidavits, it was Counsel's submission that affidavits must be sworn in the first person as provided in the High Court Rules. It was argued that all the paragraphs of the Affidavit of Pardon Liuma filed into Court were not sworn in the first person.
- 2.17 Counsel submitted that by the use of the word "*shall*", adherence to the Rule is mandatory such that any departure from it shall be treated as fatal to the survival of the offending affidavit or paragraph thereof. Counsel cited the Supreme Court case of **Mutantika Vs Chipungu** ⁽³⁾ wherein guidance was given that the use of the "*shall*" in a Rule entailed that the Rule in question does not leave room for options as such a rule does not give the Court discretionary power. That the offending paragraphs of the Affidavit should consequently be expunged.
- 2.18 With regards to disclosing the informant of the Deponent, Counsel once again referred to the case of **Mutantika Vs Chipungu** ⁽³⁾ and submitted that it is also a mandatory requirement of the High Court Rules that when the Deponent swears an affidavit premised on information not in the Deponent's personal knowledge, the Deponent must disclose the informant and give reasonable particulars of such an informant.

- 2.19 Counsel contended that Paragraphs 4 and 12 of the Affidavit of Pardon Liuma which neither names the informants nor such informant's reasonable particulars offend the mandatory requirements and are therefore scandalous befitting expunging from the Court Record. To further buttress his submission, Counsel went on to cite **Order 41 Rule 5 paragraph 4** of the **Rules of the Supreme Court of England**.
- 2.20 Counsel submitted that the evidence found in an affidavit is equated to oral evidence given in Court such that anything a deponent cannot allude to while giving oral evidence, must not grace an affidavit. Counsel cited the case of **Africa Banking Corporation Zambia Limited (T/A Atlas Mara) Vs Mattaniah Investments Limited (in receivership), Development Bank of Zambia, John Peter Sangwa, Leasing Finance Company Limited, Agrifoods and Allied Industries Limited** ⁽⁴⁾ wherein the Supreme Court held that affidavits containing extraneous matter are expunged from the Record.
- 2.21 Counsel argued that therefore, the Affidavit filed by Pardon Liuma in support of the originating process be expunged for violating mandatory requirements for preparing affidavits particularly by not disclosing particulars of the informant.
- 2.22 With regards to the prerequisite for producing handwritten notes, Counsel contended that exhibits marked **PL1, 3, 11, 13, 16, 17, 18, 33, 35, 36, 45, 47, 50, 58, 59, 60** and **61** are typed statements of handwritten statements but none of the exhibits have been certified as true and correct copies of the original copies contrary to **Order V Rule 19** of the **High Court Rules**. Counsel submitted that in the case in *casu*, the listed exhibits fall short of the compulsory standard

and in a practical sense, their authenticity cannot be ascertained. That the Rules cited above are mandatory and non-compliance should be treated as fatal to the enlisted exhibits and therefore, ought to be expunged from the Record. In support, Counsel cited the case of **Twampane Mining Cooperative Society Limited Vs E. and M. Storti Mining Limited** ⁽⁵⁾ where the Court stated that it could not over-emphasise the importance of parties adhering to rules of Court at their own peril.

2.23 In conclusion, Counsel for the Interested Parties referred us to the empowering **Order 2, Rules 1 and 2** of the **Rules of the Supreme Court of England** and submitted that it has been demonstrated that the Applicant who moved this Court has failed and/or neglected to adhere to the aforecited mandatory prescribed Rules of Court and we must therefore, set aside the proceedings herein for irregularity and that the paragraphs offending the mandatory rules of Court be expunged.

2.24 It was prayed that this Court sets aside the proceedings therein for irregularity and costs be for the Interested Parties.

3 THE RESPONSE BY THE APPLICANT

3.1 The Applicant, on 10th October 2023, filed an Affidavit in Opposition to the Summons to set aside Originating Notice of Motion for irregularity and to expunge paragraphs of the Affidavit for non-compliance with mandatory rules accompanied with List of Authorities and Skeleton Arguments in Opposition.

3.2 In his Affidavit in Opposition, Pardon Liuma, an Investigations Officer in the employ of the Zambia Police Service holding the rank of Detective Inspector in the Criminal Investigations Department,

deposed that the Originating Notice of Motion filed in this Court at pages 1, 2, 4 and 5 has “Zambia” and the caption “*Originating Notice of Motion*”. That the words as quoted by the Interested Parties in their Affidavit in Support are not included in the Originating Notice of Motion, but that such omission only goes to form and not the substance of the document. That with the Originating Notice of Motion filed into Court differing from the prescribed form, the Deponent submitted that no prejudice has been and will be occasioned to the Interested Parties by the slight deviation from the Prescribed Form.

- 3.3 The Deponent averred that his address is clearly stated as Zambia Police Headquarters Lusaka Zambia and that this is in similar fashion to the Deponent for the Interested Parties who gave the address of his former employers, being Muyatwa Legal Practitioners, whose address is Plot No. 8B Kawama Road Woodlands. The Deponent averred that no prejudice has been occasioned to the Interested Parties as the defects only go to the form and not the substance of the Affidavit.
- 3.4 It was deposed that the attempts by the Interested Parties to impugn Paragraphs 99, 110 and 112 of the Affidavit in Support of the main Application are disputed as the same contain the Deponent’s findings from his investigations into the matter in the main.
- 3.5 That with regards to the Deponents exhibits marked **PL1, 3, 11, 13, 16, 17, 18, 33, 35, 36, 45, 47, 50, 58, 59, 60** and **61** in his Affidavit in Support, it was averred that no prejudice has been or will be occasioned on the Interested Parties as the defects or omissions merely go to the form and not substance of the Affidavit.

- 3.6 The Deponent avowed that contrary to the Interested Parties' assertions, the Affidavit in Support filed before this Court is paginated with the exhibits marked with consecutive numbering and that this is the proper manner in which an affidavit should be numbered and exhibits marked with consecutive numbers.
- 3.7 Pardon Liuma deposed that the purported violations do not go to the substance of the Affidavit in Support of the originating process but merely to form only, therefore no prejudice has been occasioned or will be occasioned on the Interested Parties. That under the circumstances, this Court can still proceed with the Affidavit as the defects only go to form and not substance thereby occasioning no prejudice on the Interested Parties.
- 3.8 In the accompanying List of Authorities and Skeleton Arguments the Applicant begun by establishing the jurisdiction of this Court to hear this Application which we have taken note of.
- 3.9 With regards to the use of prescribed forms, the Applicant submitted that it is desirable that prescribed forms such as **Form 11** in the **High Court Rules** ought to have been used but that a slight deviation is not fatal. It was the Applicant's contention that a departure, as in this case, which does not go to the substance but merely to the form does not preclude this Court being moved to hear this Application on the same document. It was the Applicant's argument that insistence to strictly adhere to the specific format prescribed in the High Court forms when the law envisages situations where there may be deviation from the format simply serves as an obstruction to delay and attempt to defeat the ends of justice by shifting attention and efforts away from the main Application on the merits.

- 3.10 The Applicant referred us to **Article 118 (2)** of the **Constitution of Zambia** and the case of **Henry Kapoko Vs The People** ⁽⁶⁾ and submitted that the supreme law of the land clothes this Court with the authority to exercise adjudicatory power without being fettered with strict adherence and undue regard to procedural technicalities. Further authorities to buttress their submission were **Section 47** of the **Interpretations and General Provisions Act Chapter 2 of the Laws of Zambia** and the Supreme Court case of **Sun Country Limited Vs Kearney and Another** ⁽⁷⁾.
- 3.11 Based on the above authorities, Counsel for the Applicant submitted that they are fortified that the mere failure to organize the words “*Republic of Zambia*”, “*Originating Notice of Motion*” and “*In the High Court for Zambia*” in the manner submitted by the Interested Parties in the Application to set aside for all intents and purposes does not go to the substance but merely to form.
- 3.12 That in the same vein, the omission of the Notice cannot be said to go to the substance of the Application or in any way have been deliberately omitted in a calculated attempt to mislead the Court or the Interested Party thereby prejudicing the Interested Party from deciding to present and defend their interests in the cited properties before this Court. That the State would not achieve any undue advantage or gain by deliberately omitting the stated words.
- 3.13 Counsel for the Applicant argued further that **Section 30** of the **Forfeiture of Proceeds of Crimes Act** operates in a similar manner as the Notice which the Interested Parties are insisting should have been placed in the Originating Notice of Motion. That the Section requires that the Applicant, either on its own volition or at the instance of the Court notifies any Interested Party in writing of the

application which is before Court. That the Interested Party, as is in this case, then decides their next step. It was argued that a decision not to defend their interests and the consequences that follow, especially for one who is represented by Counsel are a matter of common sense and not requiring extensive submissions.

- 3.14 In citing the case of **Robert Simeza, Andrews Motel Vs Elizabeth Mzyeche** ⁽⁸⁾, Counsel submitted that there is no procedural injustice that has been clearly set out in the Preliminary Issue raised which has demonstrated in any way potential or existing prejudice the Interested Parties may suffer or are suffering. It was argued that the Interested Parties were notified and were aware of the proceedings and they have so far turned up through their Counsels and they ought to defend their interests on the merits.
- 3.15 With regards to the need to follow **Form 11**'s format by signing on the side of the Originating Notice of Motion, it was reiterated that the Originating Notice of Motion filed into Court also has provision for signing as can be seen at page 3 of the same document which for all intents and purposes serves the same purpose.
- 3.16 With regards to the mandatory rules for preparing affidavits, it was Counsel for the Applicant's submission that the inadvertent errors in the Affidavit do not in any way render the entire Affidavit invalid or require dismissal of the entire action without hearing it on the merits merely on breach of procedural rules.
- 3.17 Counsel submitted that the errors can be amended pursuant to **Order XVIII** of the **High Court Rules**. It was submitted that the errors in an affidavit as in this matter can be rectified pursuant to **Order V Rule 14** of the **High Court Act** and that in the spirit of the **Constitution of Zambia** this Court has discretion to allow a

defective affidavit by virtue of **Order V Rule 13** of the **High Court Rules** and the findings of the Courts in the cases cited at 3.12 above.

3.18 It was the Applicant's prayer that this Court dismisses the Application to set aside proceedings for irregularity and proceed to hear the substantive matter on its merits.

4 **HEARING**

4.1 The Hearing of the Summons was held on 25th October 2023 and present before Court was Counsel for the Applicant and the 1st and 2nd Interested Parties.

4.2 Mr. Isaac Simbeye, Counsel for the Interested Parties begun his oral submissions by stating the documents filed into Court which were to be relied on and requested for Mr. Changano to proceed with augmenting their arguments.

4.3 Mr. Changano submitted that the information to be expunged is information that the Deponent deposed to without having first-hand interaction with the information and which information he obtained during investigations but which does not preclude him from deposing to that evidence in line with the law as prescribed in **Order V** of the **High Court Rules** and **Order 41** of the **Rules of the Supreme Court, England**.

4.4 Counsel submitted that the Deponent cannot contend that such an omission is a technicality so minor that it does not affect the rights of the Interested Parties. That the technicality is so grave that it goes to the evidence which would affect the rights of the Interested Parties to own property. It was his contention that rules of evidence exist to ensure that the Interested Parties have a fair trial.

- 4.5 Counsel referred the Court to the case of **Bratty Vs Attorney General for Northern Ireland** ⁽⁹⁾ at page 63 which exposes more on the essence of the burden of proof and how evidence goes to offset such burden of proof. He contended that if evidence goes to prove or offset the burden of proof, it cannot be ruled as a technicality.
- 4.6 Counsel referred to **Article 118 (2) (e)** of the **Constitution of Zambia** as interpreted by the case of **Henry Kapoko Vs The People** ⁽⁶⁾ where the Constitutional Court *inter alia* held on technicalities and argued in contrast that the technicality which the Applicant wants to rely on is so grave such that it could affect the course of justice against the Interested Parties if allowed to stand and therefore, it should be set aside.
- 4.7 In response, Counsel for the Applicant, Mr. Chipawa begun by stating that he would rely on the documents filed in Court. In augmenting his submissions, he stated that the issues that have been raised by the Interested Parties as grounds to set aside process for irregularity merely go to form and not to the merits of the case before us. He submitted that Counsel for the Interested Parties stated that the defects are so fundamental as to affect the rights of the Interested Parties, but the same are blanket in nature and have not zeroed in on the injustice that will be occasioned on the Interested Parties.
- 4.8 Counsel submitted that the paragraphs, 4, 5 and 8 of the Affidavit that have been stated as not to have been couched in the first person only go to form as they need only be replaced with "I" and he therefore does not see the injustice. Counsel admitted that it was regrettable that the said paragraphs are not in the first person, however, no prejudice will be occasioned or has been occasioned on the Interested

Parties for the purpose of registering their interest in the property in issue and in defending their interest if they so wish to in accordance with the provisions of **Section 31(2)** of the **Forfeiture of Proceeds of Crime Act**. That the Interested Parties have not stated the particular paragraphs from which they are unable to defend or set out a defence of their interest in the properties in issue.

- 4.9 Counsel contended that when the Affidavit in Support is read holistically and not in piecemeal, the paragraphs read together actually represent in the first person as they either have preceding paragraphs which are a continuation of statements made by the Deponent in the first person.
- 4.10 Counsel submitted that the Skeleton Arguments submitted provide sufficient authorities which cloth this Court with the authority to determine matters even on defective affidavits. That the key things that the Court is expected to give regard to is whether the defects that are in issue go to the merits of the case and whether allowing the matter to be heard on its merits would be doing justice to the Parties.
- 4.11 It was contended that the issues raised by Counsel for the Interested Parties regarding evidence is what is to be determined in the main matter and the Preliminary Issues raised here are mainly about the form and the format of the documents that are before us. It was Counsel's submission that there are plenty authorities that state that matters must not die merely on technicalities such as these ones. He contended that the setting aside of a matter such as this one on technicalities does not mean the end of the case, it merely serves to delay prosecuting the matter and will not serve the interests of the Parties as they would still come before this Court with

documents conforming to the strict standards that Counsel for the Interested Parties is praying for.

- 4.12 With regards to costs, Counsel for the Applicant argued that we are dealing with novel law that has its own challenges and errors will happen which are not deliberate nor meant to mislead this Court or prejudice the Interested Parties and he therefore, prayed that costs be in the cause.
- 4.13 In the alternative, Counsel prayed that if this Court deems it fit, an Order could be made to allow the Applicants to amend process and cure the defects in order to achieve justice and this matter be heard on its merits.
- 4.14 In Reply, Mr. Simbeye, Counsel for the Interested Parties, argued that the offending paragraphs of the Affidavit in Support of the Originating Notice of Motion have been outlined clearly in the Application before this Court and therefore, the argument that there is a blanket submission without pinpointing the real issues should not be allowed to stand.
- 4.15 Counsel argued that the defects that have been pointed out are not in form and that it has been contended that a deponent who swears an affidavit and does not disclose where his information is coming from is an issue that goes to the substance and not the form. It was submitted that following mandatory rules of evidence should not be sacrificed at the altar of expedience.
- 4.16 Counsel submitted that the alternative prayer rendered by the Applicant has come too early as there is no application before this Court with exhibits of the intended amendments and therefore, that submission should not be allowed to stand. That having admitted that the paragraphs cited were not in the first person, the Applicant's

citing of **Article 118 (2) (e)** of the **Constitution of Zambia** is misplaced.

- 4.17 Counsel argued that whilst the substantive Application raises novel issues, the form for Originating Notice of Motion has been sitting in the High Court for a long time, since the enactment of that Act and the same applies to **Order V** which deals with the preparation of affidavits.
- 4.18 Counsel reiterated that in setting aside the Application, this Court should exercise its discretion judiciously by awarding costs to the Interested Parties.
- 4.19 Mr. Changano took over and submitted that the State is admitting it made mistakes in the Application which goes to show they have clearly offended the mandatory rules of the Court. He contended that with mandatory rules one cannot plead technicality or amendments as the same will prejudice the Interested Parties. He argued that the paragraphs which his learned colleague has cited goes to substance and not to mere technicality that can require amendment. He urged this Court to set aside the matter for irregularities and in conclusion stated that the mandatory rules are very important for the profession to follow.
- 4.20 Mr. E. B. Mwansa S. C., Counsel for the 2nd Interested Party, further augmented that once this Court decides to set aside process, it cannot order costs in the cause as it will be the end of the case and there will be no other proceedings before this Court. He submitted that the costs which have been incurred so far are because of not paying attention to the High Court Act which has been in existence from before he was born. He contended that had the State paid

attention, they would have done the correct thing and because of that, they should incur the costs.

5 ANALYSIS AND DECISION OF THE COURT

- 5.1 We have considered the application and are grateful to Counsel for the Parties for their written and oral submissions.
- 5.2 The issue for this Court to decide is whether the alleged defects and omissions in the Applicant's Originating Notice of Motion and the Affidavit in Support filed go to form or substance resulting in the setting aside of the originating process for irregularity and in expunging paragraphs of the Applicant's Affidavit for non-compliance with mandatory Rules of the Court, and whether such defects and omissions can be excused under the law.
- 5.3 Before we begin to analyse and consider the issue above, we state from the onset that Rules of the Court must be adhered to and the importance of these Rules and adherence to the same was laid down in the case of **NFC Mining Vs Techpro Zambia Limited** ⁽¹⁰⁾. In that case the Supreme Court guided that:

“Rules of court are intended to assist in the proper and orderly administration of justice and as such must be strictly adhered to.”

- 5.4 The Interested Parties are arguing for strict adherence whilst the Applicant contend that there are permissible exceptions.
- 5.5 The Interested Parties have argued that the Originating Notice of Motion filed into Court by the Applicant does not comply with the prescribed form and therefore, is irregularly before this Court. The Applicant on the other hand, whilst admitting that the Originating Notice of Motion does not comply on all fours with the prescribed

format, the slight deviations from the prescribed form went to the form and not substance of the document and does not prejudice the Interested Parties in anyway.

- 5.6 **Section 44 (1) (e)** of the **High Court Act** provides the basis for the use of prescribed forms in connection with any cause or matter before Court. **Order VI Rule 2** of the **High Court Act** states as follows:

“Every writ of summons shall be in the appropriate form as set out in the First Schedule with such variations as circumstances may require”.

The use of the appropriate form is mandatory. Perusal of the **First Schedule** reveals **Form 11** which is the prescribed form for Originating Notice of Motion and as rightly noted by the Interested Parties, the Originating Notice of Motion filled by the Applicant does not have the exact phrases in the exact places as on the form and is missing the Notice found at the bottom of the prescribed form.

- 5.7 However, as pointed out by the Applicant, the Originating Notice of Motion filed is not wildly different from the prescribed form and in fact, is presented in a manner that has been allowed to be filed into this Court. The prescribed form requires the user to specify statute where applicable and the Applicant correctly specified **Section 30** of the **Forfeiture of Proceeds of Crimes Act** *inter alia* which indeed does give notice and direction to the Interested Party as would the omitted Notice in the prescribed form.
- 5.8 It is therefore our considered view that slight deviation from the prescribed **Form 11** in the **First Schedule** of the **High Court Act** goes to form and not substance and is not misleading to this Court

nor to the Interested Parties herein especially considering that they have made the appropriate responses to the Application in the main.

5.9 The Interested Parties have further argued that the Affidavit in Support deposed to by Pardon Liuma and filed into Court violates mandatory rules of preparing affidavits and therefore ought to be expunged. In response, the Applicant argues the purported violations above do not go to the substance of the Affidavit in Support but merely to form only and the Court can proceed with it as is and hear the substantive matter on its merits.

5.10 Before we proceed to consider the alleged breaches as submitted by the Interested Parties, we will reiterate the Courts position on properly prepared affidavits by quoting from the case of **Sun Country Limited Vs Charles Kearney and Roslyn Kearney** ⁽⁷⁾ at page J19 as follows:

“On a wider canvas, there is no doubt that the use of affidavits is often an effective method of presenting information critical to the court’s evaluation of the merits of a case or an application before it. The significance of properly compliant affiant submitted evidence and the maintenance and enforcement of the standards established for sworn statements such as affidavit, is as important as the integrity of the justice system itself. The requirements for a sworn statement or affidavit as prescribed in the Commissioner for Oaths Act do not exist merely to irritate legal practitioners and affiants with inconsequential formalities. In this jurisdiction, it has become too commonplace for legal practitioners to ignore the requirements for a properly prepared and sworn

affidavit and for some courts to avoid enforcing the requirements for fear of being perceived as too hyper-technical.

As we have stated already the requirements for sworn affidavits exist to protect the truth-seeking process and to guard the legal process from abuse. Failure of legal practitioners and courts to strictly enforce the requirements undermine the legitimacy of the justice system itself.”

5.11 We will proceed by considering the nature of each alleged breach and assess it as regards form and substance in *seriatim* as follows

Alleged failure by the Deponent to include his residential address.

Order V Rule 20 of the **High Court Act** provides Rules to be adhered to by Commissioners of Oaths with regards to the description of the witness or deponent of an affidavit and **sub-rule (b)** states as follows:

“It shall state the full name, trade or profession, residence and nationality of the witness.”

5.12 The Deponent of the Affidavit in Support Pardon Liuma admittedly gave his employer’s address and not his residential address. This is in breach of the rules but however does not go to substance but to form and will be admitted.

Several paragraphs of the Affidavit in Support are not presented in the first person.

Order V Rule 20 (c) of the **High Court Act** states as follows:

“It shall be in the first person and divided into convenient paragraphs, numbered consecutively.”

5.13 Counsel for the Applicant has admitted that paragraphs 4, 5, and 8 of the Affidavit in Support are not presented in the first person and that a simple insertion of the word "I" would cure this defect. Counsel goes on to submit that when read holistically, the paragraphs present in the first person as the preceding paragraphs are in the first person. Be that as it may, the Rules are clear that each paragraph of an affidavit shall be in the first person.

5.14 In as much as this defect goes to form and not to substance as it does not prejudice the Interested Parties in any way, the defective paragraphs in the Affidavit in Support devoid of reference in the first person must be corrected accordingly to conform with the requirements of the Rules.

Paragraphs 4 and 21 of the Affidavit do not disclose the source of information the Deponent deposes to.

5.15 The Interested Parties submitted that the queried paragraphs above neither have the name of the informant nor such informants' reasonable particulars and therefore offends the mandatory requirements and must be expunged from the Record. The Applicant contended that procedural errors in an affidavit as in this matter can be rectified.

Order V Rule 17 and 18 state as follows:

"(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.”

(Emphasis ours.)

- 5.16 Perusal of the impugned paragraphs in the Affidavit in Support are indeed devoid of reasonable particulars as described above. Such information is critical to the Interested Parties and can assist them form a defence to the allegations contained therein. The desire by the Investigating Officer and Deponent to keep the identity and whereabouts of an informant is well understood, however the Rules only require reasonable particulars intended to safe guard the said informant. The Applicant therefore, must comply with the Rules and rectify the offending paragraphs accordingly.
- 5.17 We are fortified by our decision in the case of **The Director of Public Prosecutions In Re Property Vs Beauty Chama and 2 Others** ⁽¹¹⁾ wherein we found as follows:

“However, it is our considered view that non-disclosure of informants or the basis of the sources of information, if not personal is an issue that goes to substance. And the general rule appears to be that, breach that goes to the substance of the affidavit is fatal.

Notwithstanding, the defect or default, we are fortified by Order 4/5/3 of the White Book,

which permits such Affidavits to be admitted even though they have defects. This is so because the non-disclosure goes to the weight to be attached to the averment, rather than its admissibility.”

The contents of paragraph 99, 110 and 112 of the Affidavit are not based on facts.

Order V Rule 16 states:

(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.”

5.18 The Deponent submitted that the contents of the impugned paragraphs are derived from the findings of his investigations of the matter in the main. The veracity of these findings and alleged facts will be resolved in the main, however when read with **Rules 17** and **18** above there is a need to provide some clarity with regards to the findings and facts stated and the circumstances forming the ground of his belief as well as reasonable particulars of where or from whom the said findings and facts have been obtained. The Applicant must comply with the Rules and provide the “meat” to these findings and alleged facts as guided.

Exhibits listed above have not been certified to be true and correct copies of the original statements or documents exhibited.

Order V Rule 19 states as follows:

“(19) Where any document referred to in an affidavit and exhibited thereto is a handwritten document other than a statement of account, book of account or extract therefrom, there shall also be exhibited therewith a typewritten or printed copy thereof certified in such affidavit to be a true and correct copy of the original.” (Emphasis ours)

5.19 The Interested Parties submitted that they have identified the following exhibits which contain handwritten statements accompanied with typed statements devoid of certification as being true and correct copies of the original statements being **PL1, 3, 11, 13, 16, 17, 18, 33, 35, 36, 45, 47, 50, 58, 59, 60** and **61**. The Applicant has submitted that this omission does not go to the substance of the Affidavit, but merely to form as lack of certification does not prejudice the Interested Parties.

5.20 We are of the considered view that the requirements of **Order V Rule 19** are concerned with the form and not substance. When it comes to issues of form and not substance, **Section 47** of the **Interpretation and General Provisions Act** provides:

“Save as otherwise expressly provided, whenever any form is prescribed by any written law, an instrument or document which purports to be in such form, shall not be void by reason of any deviation therefrom which does not affect the substance of such instrument or document, or which is not calculated to mislead.”

- 5.21 It is our considered view that failure to have the typed statements in the case in *casu* certified is not fatal as is merely affecting the form and not the content.
- 5.22 Perusal of the Applicant's Affidavit in Support and the impugned exhibits therein show that handwritten statements and the required typed copies have been provided. The typed copies, bar one "PL13", have a Commissioner of Oaths stamp from the Ministry of Justice dated 23rd June 2023. It is our considered view that in order to fully comply with **Order V Rule 19**, not only must the typed copies of the statements have a Commissioner of Oaths stamp that is signed and dated, but it must be accompanied with the standard phrase "certified true copy of original" or similar.
- 5.23 This defect is curable and the Affidavit in Support is receivable in proceedings under **Order V Rule 13** of the **High Court Rules** as follows:

"The Court or a Judge may permit an affidavit to be used notwithstanding it is defective in form according to the Rules, if the Court or Judge is satisfied that it has been sworn before a person duly authorized."

- 5.24 We will receive the Affidavit in Support provided the impugned exhibits are cured accordingly to confirm their authenticity and to comply with the Rules. The Applicant must rectify this accordingly.
The Affidavit in Support not being paginated.
- 5.25 The Interested Parties have submitted that the entire Affidavit in Support, allegedly 400 pages strong, has not been paginated. However, the Applicant begs to differ and submitted that the Affidavit

is in fact paginated with the exhibits marked with consecutive numbers.

- 5.26 Perusal of the Affidavit in Support of the originating process and the exhibits filed therein does show that the Affidavit has been numbered very clearly and the exhibits have been marked with consecutive numbers making the document easy to follow. We find no issue with the said numbering.

6 CONCLUSION

- 6.1 In light of the foregoing, the Interested Parties' Originating Notice of Motion to set aside originating process for irregularity and to expunge paragraphs of the Respondent's Affidavit for non-compliance with mandatory Rules of the Court is declined. It is declined because we discern no prejudice that the Interested Parties will suffer by not setting aside the originating process and expunging the said paragraphs, when an Order for costs can atone for the inconvenience the Interested Parties may suffer.
- 6.2 We wish to state here that we are dismayed and shocked by the cavalier and dismissive attitude of the Applicant in both its written and oral submissions with regards to their non-compliance with mandatory Court Rules. As rightly pointed out by Counsel for the 2nd Interested Party, Mr. E. B. Mwansa S. C, this Application by the Interested Parties would not have come about had the Applicant paid attention to the High Court Act and its Rules. We wish to reiterate here that failure of legal practitioners and prosecutorial organs of Government to strictly enforce and adhere to the mandatory rules undermines the legitimacy of the justice system itself and will not be tolerated by this Court.

- 6.3 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 fourteen (14) days from the date of this Ruling failure to which the Court will make the necessary Order.
- 6.4 Costs are for the Interested Parties to be taxed in default of agreement.
- 6.5 Leave to appeal is granted.

DELIVERED AT LUSAKA THIS ^{8th}..... DAY OF ^{Feb}.....2024

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P. K. YANGAILO
HIGH COURT JUDGE

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A. MALATA-ONONUJU
HIGH COURT JUDGE

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I. M. MABBOLOBOLO
HIGH COURT JUDGE