

**IN THE HIGH COURT OF ZAMBIA
ECONOMIC AND FINANCIAL
CRIMES REGISTRY
HOLDEN AT LUSAKA**

2023/HPEF/12

(Civil Jurisdiction)

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

JEFFERY NNAOMA MICHEALS

1ST INTERESTED PARTY

AVALON LOGISTICS LIMITED

2ND INTERESTED PARTY

ABSOLUTE LOGISTICS LIMITED

3RD INTERESTED PARTY

**BEFORE HONOURABLE JUSTICES A. M. ONONUJU, I. M. MABBOLOBOLO
and S. V. SILOKA**

For the Applicant:

Ms Margaret Kapambwe Chitundu & Mrs Rhoda
Malibata Jackson - National Prosecution
Authority

For the Respondent:

Mrs Ireene M. Kunda, SC & Mr. Joseph Joel -
Messrs George Kunda & Co.

J U D G M E N T

Mabbolobolo I. M. J, delivered the Judgment of the Court

A. CASES REFERRED TO

1. *Simon Prophet v The National Director of Public Prosecutions CCT 55/05*
2. *Director of Public Prosecutions v Jessie Bwalya Kapyelata 2018/HP/1888*
3. *The Director of Public Prosecutions v Dhiraj Dhumputha 2020/HP/1287*
4. *Director of Public Prosecutions and In Re Property ZMK 157, 040, US\$ 23,007,14, ZMK 50,000 and ZMK 82,333.83 2019/HP/1784*

5. *Kumanarth Mohunram & Shelgate Investments CC v The National Director of Public Prosecutions, BOE Bank Limited & The Law Review Project (As Amicus Curiae) CCT 19/06 [2007] ZACC*
6. *National Director of Public Prosecutions v R.O Cook Properties (Pty) Limited BCLR 844 (SCA)*
7. *Johanes Kenneth Sigoti (T/A NAM Transport Company and Partnership) and the Director of Public Prosecution, Appeal No. 196/220*
8. *Director of Public Prosecutions v Sharon Lee Brown (1994) 72 Crime R527*
9. *The People v Austin Chisangu Liato, Appeal No. 291/2014*

B. LEGISLATION REFERRED TO

1. *High Court Rules Chapter 27 of the Laws of Zambia*
2. *Forfeiture of Proceeds of Crime Act No. 19 of 2020 of the Laws of Zambia*
3. *Penal Code Chapter 87 of the Laws of Zambia*
4. *Banking and Financial Services Act No.7 of 2017*

1. INTRODUCTION

- 1.1 This is a judgment on the Applicant's **Notice of Motion** for a **Non -Conviction based Forfeiture Order of Tainted Property** pursuant to **Order XXX Rules 15 and 17 of the High Court Rules** as read together with **sections 29 and 31 of the Forfeiture of Proceeds of Crime Act Number 19 of 2010 of the Laws of Zambia.**
- 1.2 The Application which was filed on 24th March, 2023 is supported by an Affidavit and Skeleton Arguments. It was also opposed by an Affidavit in Opposition and Skeleton Arguments.

2.0 AFFIDAVIT EVIDENCE

- 2.1 The Applicant's Affidavit was sworn by Patrick Chileshe Kafusha, an Investigations Officer in the employ of the Drug Enforcement Commission under the Anti Money Laundering Investigations Unit.
- 2.2 Mr. Kafusha deposed that the Drug Enforcement Commission did on 20th June, 2022 receive information that three bank accounts linked to two Companies namely Avalon Logistics Limited and Absolute Logistics Limited had some suspicious transactions which required to be investigated. Further that the two Companies were owned by Nigerian nationals and other shareholders who included Zambian nationals.
- 2.3 It was averred that the nature of the business for both Companies is specialized wholesale and other financial services except insurance and pension funding activities.
- 2.4 The Deponent stated that he had interviewed an Estate Administrator at Churches Health Association of Zambia (CHAZ) as to whether they had rented out office space to the two Companies and was informed that the two Companies were unknown to him despite the registered address of the Companies indicating that it was at that place.

2.5 He further stated that he had recorded a statement from the Head of Compliance at Ecobank relating to the accounts for the two companies. It was stated that the Bank had conducted due diligence by reviewing all the Companies' mandate files and bank statements from 2020 to the time of making the report which revealed that the transactions were very complicated and not easy to follow as the money came from different countries and went to different accounts in different countries.

2.6 The Deponent stated that he later on seized the bank accounts relating to the two Companies through issuance of Notice of Seizure. At the time of seizure, Absolute Logistics Limited had a balance of K31,108.72 in account No. 5615000009343 and USD 1,541,994.23 in account No. 5618000009345. Avalon Logistics Limited had a balance of K5, 504.20 in account No. 5615000009344, USD 7,132.95 in account No. 5611000009347 and GBP 546,309.56 in account No. 5615000009348. These accounts were said to have various huge transactions to and from different bank accounts which did not tally with the declared amounts on the account opening mandate files.

- 2.7 A further deposition was that despite the Companies having a lot of money in the bank accounts, a PACRA print out for both Companies seems to suggest that the two were sharing a small office space being office unit number two, first floor, Elisa House in Olympia.
- 2.8 The Deponent stated that Jeffery Nnaoma Micheals, Kamikazi Ruki and Salome Towela were arrested and charged with the offence of **giving false information to a Public Officer** contrary to **section 125 (a) of the Penal Code Cap 87** of the Laws of Zambia and **being in possession of property suspected of being proceeds of crime contrary to section 71** of the **Forfeiture of Proceeds of Crime Act No. 19 of 2010 of the Laws of Zambia.**
- 2.9 It was averred that the Deponent had travelled to Abuja, Nigeria with other officers to institute investigations on the status of the subject Companies.
- 2.10 It was established from the investigation that Avalon Logistics Limited was incorporated under Corporate Affairs Commission of Nigeria on 27th August, 2010 and that the Directors/Shareholders are Abiola Saibu Adentunji, Adebogun Ademola John and Adeyami Adebola Olatunde, all Nigerians.

It was also established that Absolute Logistics Limited was incorporated on 21st June, 2010 with the same directorship and shareholding as Avalon Logistics Limited.

2.11 The Deponent averred that Towela Salome Chirwa in her statement confirmed that she was one of the shareholders of Avalon Logistics Limited and Absolute Logistics Limited registered in Zambia and that she receives a quarterly salary of USD 450. Further that Kamikazi Ruki Chirwa in her statement indicated that she is one of the administrative signatories of Avalon Logistics Limited accounts held at Eco Bank.

2.12 The 1st Interested Party, Jeffrey Nnaoma Micheals filed an Affidavit in Opposition in his capacity as the Director and employee of the 2nd and 3rd Interested Parties.

2.13 Mr. Nnaoma deposed that it is not true that 1st, 2nd and 3rd Interested Parties have any British Pound account but admitted having USD, Euro and Zambian Kwacha accounts.

2.14 He confirmed that the Drug Enforcement Commission had effected a Seizure Notice on the various accounts since 10th

February, 2022 and that the Seizure Notice was served on the Bank which in turn wrote to the Interested Parties.

2.15 The Deponent stated that the address referred to in the Affidavit in Support of the Notice of Motion was the registered address of the law firm for Messrs Gill and Seph Advocates which had been retained to incorporate both Avalon Logistics Limited and Absolute Logistics Limited. The address was given as the registered address of the Companies at incorporation but that the companies have since relocated from the said address.

2.16 It was averred that Joseph Muleba Chitupila is neither a director nor a shareholder in any of the Companies but that he was an advocate from the law firm that had incorporated both Companies using the firm address as a temporary registered address for the purposes of incorporation and correspondence. Further that Kamikazi Ruki and Salome Towela are only local directors but not shareholders.

2.17 The Deponent stated that the monies in both the Companies' accounts are operational funds and not income. The accounts are infact not savings accounts but business accounts. Further that the stipulated amount in the mandate form

during account opening is usually an estimate income per annum and that this can be exceeded due to operational growth. The funds are traceable and the inflows and out flows reflect the Companies' daily operations in rendering other financial services. In addition, the nature of business involves the purchase and sale of funds. Accordingly, the inflows represent the Companies' purchases while the outflows represent payments made on behalf of the Companies' clients through brokerage which becomes their sales and their profits is the margin between.

2.18 It was a further averment that the accounts are daily trading accounts hence the constant inflows and outflows of traceable funds with operations which are not a complicated web but easy and traceable transactions since there are no cash elements.

2.19 It was averred that the Companies are licensed to operate the buying and selling of funds by the Central Bank of Nigeria. The Deponent believes that lots of money in a bank account does not translate into proceeds of crime when the purpose is known, being operational funds held on behalf of customers for trade invoice settlements for which the companies have

received value and due remittance to their respective trade partners.

2.20 The Deponent stated that they do not have Absolute Logistics Limited and Avalon Limited registered in Nigeria but that they have parent Companies namely South Globe Limited and Avalon Offshore Logistics Limited incorporated in Nigeria.

2.21 It was averred that the Deponent and his colleagues are former bankers who have been in business for over two decades and South Globe Limited being one of their businesses was registered in 2003 and the Director/Chairman and shareholder is the current chairman of First Trust Mortgage Bank in Nigeria. He is also the Director/Chairman of Marshland Energy Limited and Chukelad Farms Limited among others. It was therefore stated that they have verifiable income as they are still in business todate.

3.0 SKELETON ARGUMENTS

3.1 In the Applicant's Skeleton Arguments, it was submitted that the Court was being approached by way of a **Notice of Motion** for a **Non-Conviction based Forfeiture Order**. Reliance was placed on **Order XXX Rules 15 and 17 of the High Court Rules** to support this position.

- 3.2 The case of **Simon Prophet v The National Director of Public Prosecutions**¹, was cited where the Court was called upon to strike an appropriate balance between two constitutional principles, namely that no one should be arbitrarily deprived of property and that the state is under obligation to protect members from criminal predators. In this jurisdiction, the case of **DPP v Jessie Bwalya Kapyelata**² was called in aid for the constitutionality of Non- Conviction based Forfeiture.
- 3.3 Another case of **The Director of Public Prosecutions and Dhiraj Dhumputha**³, was cited for the position that criminal prosecution or conviction does not affect the case of recovery of assets reasonably believed to be proceeds of crime as a non-conviction based forfeiture can run parallel with a criminal trial. To buttress this point, **section 31 (4) of the Forfeiture of Proceeds of Crimes Act** was drawn to our attention.
- 3.4 The case of **Director of Public Prosecutions and ZMK 157,040, USD 23,007.14, ZMK 50,000 and ZMK 82,33.83**⁴ held in different banks was cited where the Court held that, 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.

3.5 It was contended that as the Affidavit in Support shows, the property in issue is tainted property. Further that the Interested parties had given false information to a Public Officer when registering the two Companies and the giving of false information is an offence as provided for under **section 125 (a) of the Criminal Procedure Code Chapter 87** of the Laws of Zambia.

3.6 The Applicant argued that there is evidence on the incorporation form indicating that the registered office of Avalon Logistics Limited and Absolute Logistics Limited is Elisa House along Chainama Road while a statement recorded from a Mr. Third Himoongu (an Estate Administrator at CHAZ) shows that the two mentioned Companies have never rented any office space at Elisa House nor any property owned by CHAZ.

3.7 It was submitted that according to the Affidavit sworn by Patrick Chileshe Kafusha, when the compliance team at Eco Bank tried to review the transactions on the two Companies, they realised that the transactions were very complicated and

not easy to follow as they went to different accounts in different countries. The two accounts were found with huge amounts of money.

3.8 The Applicant posited that it was evident that the monies which the Interested Parties possess in the accounts in issue are proceeds of crime which offend the provisions of **section 71 of the Forfeiture of Proceeds of Crime Act.**

3.9 According to the Applicant, the business declared by the subject Companies and the volume of transactions on the entities' bank accounts did not tally as the transactions were too huge compared with what was declared on the account opening mandates. In addition, the two Companies though registered in Zambia and had bank accounts opened at Eco Bank, never conducted any business in Zambia. The bank accounts just received huge cash transfers from various accounts from different accounts and later sent the money to various bank accounts outside Zambia.

3.10 The Applicant submitted that when the 1st Interested Party was asked about the source of the money, he stated that he has duly registered businesses in Nigeria which are holding Companies of the ones registered in Zambia and that all the

funds seized are from legitimate sources. The Applicant's position is that investigations revealed that Avalon Logistics Limited and Absolute Logistics Limited are inactive in Nigeria so it is not possible for the funds in question to have come from the said Companies. Further that a company print-out on the two Companies obtained from Nigeria has different Directors/Shareholders compared to the same Companies registered in Zambia.

3.11 There was additional evidence that Towela Salome Chirwa who was a signatory to the company documents in Avalon Logistics Limited and Absolute Logistics Limited was not genuinely connected to the two companies but was merely a pawn used as a front to satisfy statutory obligations. It was therefore argued that the above proves that the Interested Parties were in possession of property suspected to be proceeds of crime as they had failed to give proper and sufficient explanation of where the money in their bank account came from.

3.12 It was contended that the property in issue is the subject of this Non- Conviction based Forfeiture application as it is tainted property and proceeds of crime. Further that the 1st Interested Party registered the two Companies in Zambia for

the sole purpose of opening bank accounts at Ecobank which were later used as conduit bank accounts to fraudulently receive and transfer huge cash transfers to and from various bank accounts.

3.13 The Applicant urged this Court to adopt the reasoning of Van Heerdeem, AJ in the persuasive South African Constitutional Court case of **Kumannath Mohunram & Shelgate Investments CC v The National Director of Public Prosecutions, BOE Bank Limited & The Law Review Project (As Amicus Curiae)**⁵ where the holding of the Supreme Court in the case of **National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd**⁶ was cited with approval.

3.14 In the Skeleton Argument filed on behalf of the Interested Parties, it was submitted that it was clear from the Affidavit in Opposition sworn by Jeffrey Nnaoma Micheals that the 2nd and 3rd Interested Parties were incorporated by lawyers namely Messrs Gill and Seph Advocates who had used their premises as the address for purposes of incorporation as confirmed by the exhibits marked **“JNM3”** and **“JNM4”**. This fact is also confirmed in the Affidavit sworn by Patrick Chileshe Kafusha and exhibited as **“PKC3”**. The submission is that there was

no false statement given at incorporation of the two Companies and as such there was nothing irregular in the way the two Companies were incorporated.

3.15 It was contended that with regard to the accounts in issue, there is no dispute that the procedures for account opening were followed and even the nature of business was indicated as Trade and Logistics. Further that in the incorporation documents, the nature of business is shown as non specialised wholesale and other financial service activities.

3.16 The Interested Parties argued that as can be deduced from the Affidavit in Opposition, there was no offence which had been committed by simply holding of money in the accounts whose source has been explained with sufficient documents exhibited. Further that from the definition of tainted property under **section 2**, it is clear that this case can not qualify under (b). Under (c), proceeds of the offence, the Deponent had testified that the funds have a legitimate source and no one has complained or recalled them.

3.17 It was further submitted that the business by the Interested Parties has not been prohibited under any law in Zambia. The case of **Johanes Kenneth Sigoti (T/A NAM Transport**

Company and Partnership) and the **Director of Public Prosecutions**⁷ citing the case of **National Director of Public Prosecutions v RO Cook Properties (Pty) Limited and Boule Saad Nomanie's (Pty) Limited**⁶ was called in aid for the position that property will be an instrumentality of an offence if it plays a reasonably direct role in the commission of an offence and in a real and substantial sense, the property must facilitate or make possible the commission of the offence.

3.18 The Interested Parties contended that from the evidence in support of the Application by the Applicant, there is no evidence which shows that the funds in the affected accounts were used in the commission of an offence or that they were proceeds of crime. That infact the Affidavit in Support at paragraph 19 shows that the officers were unable to understand the nature of transactions.

3.19 The Interested Parties have shown bank statements in exhibits marked "**JNM1(a)**" to "**JNM1(e)**" and exhibits invoices "**JNM6**" to the effect that the Interested Parties are engaged in the business of providing invoice discounting, foreign currency facilitation and payment services for trade based organizations involved in cross border trade transactions.

- 3.20 A further submission was that it was not competent for the Applicant to combine **section 125 of the Penal Code** which creates the offence of giving false information to a public officer and sets out the sentence for that offence on one hand and **section 71 of the Forfeiture of Proceeds of Crimes Act** which creates the offence of being in possession of property suspected of being proceeds of crime and sets out the punishment of the offence, on the other.
- 3.21 It was submitted that whatever the case, the Interested Parties' contention is that **section 71 of the Forfeiture of Proceeds of Crime Act** which deals with property or money that may reasonably be suspected of being proceeds of crime is not applicable to this case since the Interested Parties have established the source of funds, where the funds were being transferred to and which companies are traceable.
- 3.22 Further that, the possession of the monies in the accounts belonging to the 2nd and 3rd Interested Parties cannot therefore be said to offend the provisions of **section 71**. To buttress this position, we were referred to the case of **Director of Public Prosecutions v Sharon Lee Brown**⁸ which was cited in the case of **Austin Chisangu Liato**⁹ where the Court stated that

“the test deals with and interrogates the Accused Person’s state of mind as to whether or not he had suspicion that the money could have been proceeds of crime which question is only resolved by interrogating the source or manner it came into the Accused Person’s possession”.

3.23 The Interested Parties contended that the case of **Director of Public Prosecutions and In Re Property**⁴ sought to be relied upon by the Applicant is distinguishable because in that case, Ms. Chau did not travel to Lusaka for interrogation while in the present case, the 1st Interested Party travelled to Zambia for interviews where he gave an explanation as to the activities on the accounts in issue as per the exhibit marked “**PCK1**” in the Affidavit in Support to the Notice of Motion filed by the Applicant.

3.24 The Interested Parties concluded by praying that this Court finds that the property cited herein is not tainted property and is not proceeds of a crime and order for the release of the same.

4.0 THE HEARING

4.1 At the hearing held on 11th July, 2023, Counsel for the Applicant informed Court that she would rely entirely on the

documents filed in Court on 20th June, 2023 in support of the application.

- 4.2 Counsel for the Interested Parties also indicated that she would be placing reliance on the documents filed on 6th June, 2023. Further that she would respond to the Affidavit in Reply which she had only been served with on the date of hearing.
- 4.3 It was her submission that this Court should take Judicial Notice of the fact that it is common knowledge and practice for law firms' addresses to be used for incorporation of companies.
- 4.4 Counsel contended that there was no evidence produced by the state to show that the business accounts in issue were not operational. Our attention was drawn to exhibits **"JNM1(a)"** to **"JNM1(e)"** on the statements of accounts in the Affidavit in Opposition. Further that the exhibits marked **"JNM6"** shows examples of operational accounts in Nigeria and that the same transactions are also contained in the exhibits referred to above.
- 4.5 It was reiterated in conclusion that the funds held in the 2nd and 3rd Interested Parties' accounts cannot be said to be tainted properties since the sources of funds are well known including the accounts to which they were being transferred.

Further that the fact these operational funds were being transferred outside Zambia does not make that illegal.

5.0 CONSIDERATION AND DECISION OF THE COURT

- 5.1 We have comprehensively addressed our minds to the Originating Notice of Motion for a Non – Conviction based Forfeiture Order, the Parties’ respective Affidavits, Skeleton Arguments and Submissions. We are indebted to Counsel.
- 5.2 It is common cause that the 2nd and 3rd Interested Parties are Companies duly incorporated at the **Patents and Companies Registration Agency (PACRA)** in Zambia. It is also not in dispute that the nature of business of the 2nd and 3rd Interested Parties is non-specialized wholesale and other financial services and that the bank accounts subject of these proceedings are domiciled at Ecobank.
- 5.3 The Applicant contends that the funds in the 2nd and 3rd Respondent’s accounts are tainted property and proceeds of crime which are liable to forfeiture to the State. The Interested Parties, on the other hand, argue that the funds are not tainted property or proceeds of crime and we should order the release of the funds.

5.4 The first issue falling for our determination, as we see it, is simply whether the funds in the accounts in issue are tainted property and proceeds of crime liable for forfeiture to the state.

5.5 **Section 71 of the Forfeiture of Proceeds of Crimes Act** provides 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.

(2) It is a defence under this section, if a person satisfies the Court that the person had no reasonable grounds for suspecting that the property referred to in the charge was derived or realised directly or indirectly from any unlawful activity

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

5.6 **Section 31 (4) of the Forfeiture of Proceeds of Crimes Act** makes it clear that the validity of an Order under **sub section (1)** is not affected by the outcome of criminal proceedings, or

an investigation with a view to institute such proceedings in respect with which the property concerned is in some way associated. In dealing with this particular aspect the Court in the case of the **Director of Public Prosecutions and Dhiraj Dhumputha**³ held that;

“Whether or not there is a criminal prosecution or conviction, it does not affect the case of recovery of assets reasonably believed to be proceeds of crime. A Non – Conviction based Forfeiture can run parallel with a criminal trial”.

5.7 The Applicant contends that the money in the accounts in question is tainted property as it is proceeds of crime. According to the Applicant, the 1st Interested Party registered the two Companies in Zambia with the sole purpose of opening bank accounts which were later on used as conduits to fraudulently receive and transfer back huge cash amounts to and from various bank accounts. The Applicant has placed reliance on **sections 29 and 31 of the Forfeiture of Proceeds of Crimes Act** which provide as follows:

“29 A public prosecutor may apply to a court for an Order forfeiting to the state all or any property that is tainted property”

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

5.8 According to **section 2 of the Forfeiture of Proceeds of Crime Act**, tainted property is defined as follows:

“tainted property in relation to a serious offence or foreign serious offence means;

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

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

(d) proceeds of the offence and when used without reference to a particular offence means tainted property in relation to a serious offence.

5.9 A serious offence under the same section is defined as **“an offence for which the maximum penalty prescribed by law is death or imprisonment for not less than twelve months”**.

5.10 The second limb of the Applicant’s contention is that the funds in the Interested Parties’ accounts are proceeds of crime. By **section 2 of the Forfeiture of Proceeds of Crime Act**, ‘proceeds of crime’ have been stated as:

“Proceeds of crime in relation to an offence or a foreign serious offence means property or benefits 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 disposal or other dealing with proceeds of a serious offence or foreign serious offence***
- (c) wholly or partly acquired proceeds of a serious offence or a foreign serious offence; and includes, on a proportional basis, property into which any property derived or realised directly from the serious offence or foreign serious offence is later converted, transformed or intermingled, and any income, capital or other economic gains derived or realised from the property at any time after the offence or***
- (d) any property that is derived or realised, directly or indirectly, by any person from any act or omission that occurred outside Zambia and would, if the act or omission had occurred in Zambia, have constituted a serious offence.***

5.11 The Interested Parties’ position is that the procedures for opening the accounts in issue were followed and even the nature of business was indicated as Trade and Logistics. It is argued that in the incorporation documents, the nature of business is indicated as non specialised wholesale and other financial service activities. Further that there is no offence

which has been committed by simply holding monies in the accounts. It is also submitted that the funds have a legitimate source and that no one has complained about the funds in the accounts.

- 5.12 The Law is clear that for property to be deemed to be tainted property and liable for forfeiture, the Court must be satisfied on a balance of probability that the property is tainted property.

In this case, the Applicant has alleged that the money in the 2nd and 3rd Interested Parties' account is property reasonably suspected to be proceeds of crime **contrary to Section 71 of the Forfeiture of Proceeds of Crimes Act**, which is a serious offence within the definition of 'Serious Offence' in the said law as it provides for imprisonment for a period not exceeding five years.

- 5.13 From our analysis of the Applicant's affidavit evidence, we find that the basis of the Applicant's suspicion that the money in the 2nd and 3rd Interested Parties' accounts is property reasonably suspected to be proceeds of crime is that the Applicant's investigations revealed that there was a huge variance in the K1,000.00 income declared by both companies

(2nd and 3rd Interested Parties) in the mandate files compared to the monetary value of the transactions on their bank statements.

5.14 Additionally, both Avalon Logistics Limited and Absolute Logistics Limited in their application for incorporation indicated that the nature of business was non- specialized wholesale and other financial service activities except insurance and pension funding activities but that they had not conducted any such business in Zambia.

5.15 Further, when Eco Bank Limited's Compliance team tried to review the transactions on the 2nd and 3rd Interested Parties' bank statements, it was determined that the transactions were very complicated and could not easily be followed due to the fact that the money in the accounts came from different countries and went to different accounts in different countries.

5.16 The foregoing, in our view formed a sufficient basis for the Applicant to reasonably suspect that the funds in the 2nd and 3rd Interested Parties' accounts were proceeds of crime. Therefore, the property reasonably suspected to be proceeds of crime, amounts to tainted property that would be liable for

forfeiture in the event that the Interested parties fail to adequately demonstrate a legitimate interest in the property.

5.17 The second issue that we should interrogate is whether the Interested Parties herein have adequately demonstrated that they have a legitimate interest in the subject property.

Section 31 (2) of the Forfeiture of Proceeds of Crime Act, provides for issues that the interested person must adequately address to satisfy the Court that they have a legitimate interest in the tainted property. These are as follows:-

1. That the interested party did not acquire the interest in the property as a result of any serious offence carried out by the person;
2. *That the interest party had the interest before any serious offence occurred;*
3. *That the interested party acquired the interest for fair value after the serious offence occurred and did not know or could not reasonably have known at the time of the acquisition that the property was tainted property.*

In this case it is clear that the evidentiary burden of proving the interest in the property on a balance of probabilities shifts to the Interested Parties.

5.18 To demonstrate that the 1st, 2nd, and 3rd Interested Parties have a legitimate interest in the sums of money in the accounts held at ECO Bank Limited, the 1st Interested Party, by his Affidavit in Opposition to the Affidavit in Support of the Notice of Motion stated that the monies in both the 2nd and 3rd Interested Parties' accounts were operational funds and not income.

5.19 Further, to justify the disparity between the amount declared in the mandate file at account opening and the sums of money in both accounts, the 1st Interested party stated that the declared amount was merely an estimate which could be exceeded due to operational growth. He stated that the transactions in both accounts were traceable and that the inflows and outflows reflected the companies' daily operations in the course of rendering financial services.

5.20 On the business model of both the 2nd and 3rd Interested Parties, the 1st Interested Party stated that the business involved the purchase and sale of funds. He stated that the inflows on the accounts represent the Companies' purchases while the outflows represent the payments made on behalf of their customers through brokerage with their clients, which

becomes their sales and that their profits are the margin in between. Sample copies of purchases and sale remittances were produced.

5.21 Having analysed the foregoing explanation of the 2nd and 3rd Interested Party's business model, it is our view that it does not offer an adequate explanation of how the 2nd and 3rd Interested Parties purchase and sale funds and how they make their profits.

5.22 On our further analysis of the sample copies of purchases and sale transactions remittances referred to by the 1st Interested Party and collectively marked **JNM6**, we find that Bank statements exhibited relate to accounts held by New Arbat Concerns at Access Bank, Nigeria and Zenith Bank, Nigeria. The Bank statements also relate to an account held by Hunters Row at Fidelity Bank, Nigeria and Southglobe Limited at Keystone Bank, Nigeria, which accounts make no reference to the 2nd and 3rd Interested Parties herein.

5.23 Furthermore, we note that the documents under **JNM6** referred to by the 1st Interested Party contain four invoices that relate to the 3rd Interested Party, being Absolute Logistics Limited. The first invoice was issued by Arik Air Limited,

Nigeria, dated 12th November, 2021 and is a bill to Absolute Logistics Limited, Zambia for the sum of USD 1,800.00 for Aircraft maintenance.

The second is a proforma invoice for the sum of USD37,251.98. dated 18th October, 2021, issued by CFAO Motors, Nigeria for items to be replaced on a Guest Lift and indicates Absolute Logistics as its customer. The third is an invoice dated 2nd June, 2021, issued by Coscharis Motors Plc for the sum of USD 1,579,680.00 for 120 Ford Ranger vehicles issued to Absolute Logistics, Zambia to be supplied to Nigeria. A copy of the 1st Interested Party's instruction to Eco Bank Zambia Limited to transfer the sum of USD 999,980.00 to Coscharis Motors Limited was exhibited. The fourth invoice for the sum of USD 8,000.000.00, dated 22nd December, 2021, was issued by Ibom Airline Limited to Absolute Logistics Limited, Zambia for payment for rental of an aircraft.

- 5.24 The foregoing documents in our view, do not support the 1st Interested Party's assertion that the 2nd and 3rd Interested Parties are engaged in the purchase and sale of funds nor does it demonstrate how the transactions on their accounts translate to profit margins for them. Further, the invoices

issued to the 3rd Interested Party do not offer any indication that the 2nd and 3rd Interested Parties were engaged in the purchase and sale of funds or in the facilitation of trade between companies.

5.25 We note further that by the 1st Interested Party's warn and caution statement, he indicated that he intended to expand the business of invoice settlement and trade facilitation to Zambia when he incorporated the 2nd and 3rd Interested Parties. However, he did not offer an explanation as to the purpose of opening the 2nd and 3rd Interested Parties' bank accounts with Eco Bank Zambia Limited and transacting on the said accounts, when both companies had not engaged any clients in Zambia.

5.26 By his Affidavit in Opposition, the 1st Interested Party referred to the fact that he was licenced to operate the buying and selling of funds by the Central Bank of Nigeria and produced what he purported to be licenses from the Central Bank of Nigeria. On our analysis of the said documents collectively produced as **JNM7**, we find that they contain Certificates of Incorporation for Marshland Energy Limited and Chukelad Farms Limited. Further, **JNM8** and **JNM9** contain a

Certificate of Incorporation for Avalon Offshore Logistics Limited and Southglobe Limited, respectively.

5.27 Quite clearly, none of the documents produced by the 1st Interested person contain a licence to buy and sell funds as alleged. In any case, the **Banking and Financial Services Act No.7 Of 2017** makes it an offence for a body corporate to offer financial services without a license. **Section 3 (1) of the Banking and Financial Services Act** provides as follows:

“(This Act applies to all financial service providers” and **Section 6 (2) and Section 6 (3) of the Banking and Financial Services Act No. 7 Of 2017** provides that:-

“(2) A body corporate shall not conduct a financial business without a financial business licence, or provide a financial service without a financial institution licence.

(3) A person that contravenes this section commits an offence and is liable, upon conviction, to a fine not exceeding five hundred thousand penalty units or to imprisonment for a term not exceeding four years, or to both.”

5.28 Given that the 1st, 2nd and 3rd Interested Parties have not produced a copy of the 2nd and 3rd Interested Parties’ licence to trade in funds or currency or conduct any financial business, they have failed to prove to the required standard

that they were authorized to trade in currency or to conduct any financial business in Zambia.

5.29 We note that the 1st Interested Party's contention that he incorporated the 2nd and 3rd Interested Parties in order to expand the Nigerian business of trading in funds to Zambia, lacks merit as he has failed to prove the existence of such a business in Nigeria or anywhere else in the world. In any case, if a Nigerian company had intended to expand its operations to Zambia, this decision would have been evidenced by the production of a company resolution or memorandum reflecting this intention, which resolution the 1st, 2nd and 3rd Interested Parties have not produced.

5.30 The 1st Interested Party contends that Southglobe Limited and Avalon Offshore Logistics Limited are the parent Companies to the 2nd and 3rd Interested Parties. To support this assertion, the 1st Interested Party produced copies of incorporation documents, collectively marked **JNM8**. **JNM8** contains a list of Directors of Avalon Offshore Logistics Limited. **JNM9** contains the certificate of incorporation for Southglobe Limited and lists Kalu Uduma as one of its directors. This, in our view, sufficiently proves on a balance

of probabilities that the 2nd and 3rd Interested Parties may be subsidiaries of Southglobe Limited and Avalon Offshore Logistics Limited. However, the said documents do not provide a satisfactory connection or explanation as to the source of the sums of money or offer an explanation of the transactions on the 2nd and 3rd Interested Parties' accounts held at Eco Bank Limited.

5.31 To further substantiate that the 2nd and 3rd Interested Parties' money in the accounts was from a legitimate source, the 1st Interested Party asserted that Mr. Kalu Uduma made an investment of 1,500,000.00N in First Trust Mortgage Bank PLC. Again, this does not support the 1st Interested person's assertion that the sums of money and transactions on the 2nd and 3rd Interested Parties' bank accounts are from a legitimate source, especially considering that the said investment was not made to either the 2nd or 3rd Interested Party companies.

5.32 In light of the foregoing, we find that the Interested persons have not satisfied us on a balance of probabilities that the monies held in the 2nd and 3rd Interested Parties' accounts are not proceeds of crime as they have failed to provide a legitimate source of the funds in their respective accounts and

failed to offer a satisfactory explanation of the various transactions on their accounts.

- 5.23 We take comfort in the persuasive case of **Kumarnath Mohunram and Shellgate Investments Co. v The National Director of Public Prosecution, BOE Bank Limited** and the **Law Review Project (as Amicus Curiae)** where the holding of the Supreme Court was cited with approval in the case of **National Director of Public Prosecutions v RO Cook Properties (Pty) Limited** as follows:

“Chapter 6, which is headed Civil Recovery of Property makes provision for orders to be made for the forfeiture of property which is tainted because it is linked to the commission of crime either because it is proved on a balance of probabilities, to be instrumentality of an offence referred to in schedule 1 of the Act or because it is proved, according to the same standard of proof, to be proceeds of unlawful activities. Such orders may be made even if no one has been convicted of having used the property or having been guilty of the unlawful activities of which the property is said to be the proceeds.”

6.0 CONCLUSION

- 6.1 Based on the foregoing, we are of the view that the Director of Public Prosecution has successfully made out its case for non conviction based forfeiture of tainted property. We therefore

order that the money held in five cited accounts subject of these proceedings be forfeited to the State to be applied as the Director of Public Prosecutions deems fit under the provisions of the law.

6.2 The Respondent is accordingly condemned in costs to be taxed in default of agreement.

6.3 Leave to appeal is granted.

Delivered at Lusaka this 15th day of November, 2023.



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



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



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