

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

2023/HPEF/21

BETWEEN:

RICHARD MUSUKWA

JENALA LUNGU

JACQLINE MUSUKWA

KUMAPILI HOTEL LIMITED

MWANANGWA RESOURCES LIMITED

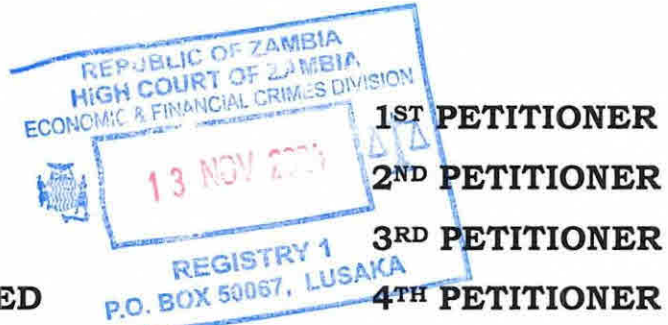
TACHIZYA COMPANY LIMITED

TWENTY-FOUR SEVEN STAND BY

SECURITY LIMITED

AND

ATTORNEY GENERAL



1ST PETITIONER

2ND PETITIONER

3RD PETITIONER

4TH PETITIONER

5TH PETITIONER

6TH PETITIONER

7TH PETITIONER

RESPONDENT

**BEFORE THE HONOURABLE JUSTICES P. K. YANGAILO, A.
MALATA-ONONUJU AND S. V. SILOKA ON THIS 13TH DAY OF
NOVEMBER, 2024.**

*For the Petitioners : Mr. Jonas Zimba – Messrs. Makebi Zulu Advocates
For the Respondent: Ms. A. Chisanga, Principal State Advocates & Ms.
N. K. Chongo, Principal State Advocate*

J U D G M E N T

Justice S. V. Siloka delivered the Judgment of the Court

CASES REFERRED TO:

1. *Subramaniam Vs Public Prosecutor (1956) WLR 965;*
2. *Major Isaac Masonga Vs The People (SCZ No. 24 of 2009);*
3. *Patel Vs The Attorney General (1968) ZR 99 (H.C);*

4. *Roy Chilumanda and Namwali Lodge and Car Hire Vs Attorney General (2006/HP0792)*;
5. *The People Vs Peter Thomas London Tembo (HP/36/1999)*;
6. *Shell & BP Zambia Limited Vs Conidaris and Others (1975) ZR 174 (SC)*;
7. *Ghani Vs Jones (1969) 3 All ER 1700*;
8. *Daniel Chizoka Mbendagoma Vs Attorney General (1979) ZR 45*;
9. *The People Vs Austin Liato (SCZ Appeal No. 291/2014)*;
10. *Edith Tshabala Vs Attorney General (1999) ZR 139*;
11. *Miyanda Vs Levy Patrick Mwanawasa, Electoral Commission of Zambia and the Attorney General (2005) ZR 138*;
12. *Kachasu Vs Attorney General (1967) ZR 145 (HC)*;
13. *Arzike Vs Gov. N. Region (1961) ALL NLR 379*;
14. *Communications Authority Vs Vodacom Zambia Limited (S.C.Z Judgment No. 21 of 2009)*;
15. *C & S Investments Limited and Others Vs The Attorney General (2004) ZR 216*;
16. *Rajan Lekhraj Mahtani and John Sangwa Vs The People (SCZ No. 21 of 2019)*;
17. *Morgan Vs Sim (1857) UKPC 33*; and
18. *J. Z. Car Hire Limited Vs Chela Scirocco & Enterprises Limited (SCZ Judgment No. 26 of 2002)*.

LEGISLATION AND OTHER MATERIAL REFERRED TO:

1. *The Constitution of Zambia Act 1991*;
2. *The Criminal Code Chapter 88 of the Laws of Zambia*;
3. *Prohibition and Prevention of Money Laundering Act No. 14 of 2001 of the Laws of Zambia*;
4. *State Proceedings Act, Chapter 71 of the Laws of Zambia*;
5. *Narcotic Drugs and Psychotropic Substances Act No. 35 of 2021 of the Laws of Zambia*;
6. *High Court Act Chapter 27 of the Laws of Zambia*; and
7. *Rules of the Supreme Court of England (White Book) 1999 Edition*.

1.0 INTRODUCTION

- 1.1 The First Petitioner, Richard Musukwa, on behalf of six (6) other Petitioners filed this Petition on 26th of May, 2023, seeking various declaratory reliefs; and damages against the Respondent.
- 1.2 The Petitioner also prayed for a Conservatory Order against the Respondent by its servants or against or whomsoever to maintain the Petitioners' status.
- 1.3 The Petition was filed pursuant to **Articles 1 (2), 1 (3), 11, 16, 17 and 18 of the Constitution of Zambia, Section 118 of the Criminal Procedure Code and Section 23 of the Prohibition and Prevention of Money Laundering Act No. 14 of 2001** of the **Laws of Zambia**.
- 1.4 The Respondent opposed the Petition by filing an Answer, Affidavit in Opposition and Skeleton Arguments.
- 1.5 The Matter then proceeded to trial and witnesses gave *viva voce* testimonies.
- 1.6 The First Petitioner is a Zambian citizen who resides at House No. 11 Mopani Avenue, Chililabombwe, on the Copperbelt Province of the Republic of Zambia and at Property No. Lusaka/LNS52062/109 Leopards Hill Lusaka in the Lusaka Province of the Republic of Zambia.
- 1.7 The Second Petitioner is a Zambian citizen who resides at House No. 11 Mopani Avenue, Chililabombwe, on the Copperbelt Province of the Republic of Zambia.
- 1.8 The Third Petitioner is a Zambian who resides at Plot No. 3170 and 3174 Congo Road, Kamenza Chililabombwe, on the Copperbelt Province of the Republic of Zambia.

- 1.9 The Fourth Petitioner is a duly registered company incorporated in accordance with the Laws of Zambia and operating as a Hotel at Plot No. 4006426 Hillside, off Park Road, Kamenza in Chililabombwe on the Copperbelt Province of the Republic of Zambia.
- 1.10 The Fifth Petitioner is a duly registered company incorporated in accordance with the Laws of Zambia and operating its business from Plot No. 26 Church Road Kamenza, Mwanangwa House, Chililabombwe on the Copperbelt Province of the Republic of Zambia.
- 1.11 The Sixth Petitioner is a duly registered company incorporated in accordance with the Laws of Zambia and operating its business in Chililabombwe on the Copperbelt Province of the Republic of Zambia.
- 1.12 The Seventh Petitioner is a duly registered company incorporated in accordance with the Laws of Zambia and operating its business in Chililabombwe at Plot No. 26, Church Road Kamenza, Mwanangwa House on the Copperbelt Province of the Republic of Zambia.
- 1.13 Whilst the Respondent is the Government Chief Legal Adviser and representative of the Government in all legal matters with authority to represent the Zambia Intelligence Service, the Drug Enforcement Commission and the Zambia Police who are agents of the State and has been sued in that regard pursuant to **Section 12** of the **State Proceedings Act**.

2.0 FACTS IN SUPPORT OF THE PETITION

- 2.1 On the 16th day of May, 2023, a combined team of Officers from the Zambia Police Service, the Office of the President and the Drug Enforcement Commission (herein after referred to as ‘the

- Officers') entered and raided House No. 11 Mopani Avenue and the, Petitioners' Farm located in Fitobaula, Chililabombwe, on the Copperbelt Province of the Republic of Zambia.
- 2.2 The Officers equally entered and raided properties of the 3rd Petitioners herein situate at Plots No. 3170 and 374 Congo Road Kamenza Chililabombwe on the Copperbelt Province of the Republic of Zambia.
- 2.3 On the said 16th day of May, 2023, while the 1st and 2nd Petitioners were not at the above-mentioned properties, the Officers without any right or authority entered the premises and once on the premises, started issuing/filling out Search Warrants and Notices of Seizure that were purportedly pre-signed by the Director General of the Drug Enforcement Commission.
- 2.4 Whilst at House No. 11 Mopani, the Officers prepared a Search Warrant, conducted a search, and seized, in the absence of the registered owners, the said property, and thereafter issued a Notice of Seizure where they purported to seize the following properties:
- i. Motor vehicle Registration No. JEN 11 belonging to the 2nd Petitioner;***
 - ii. Motor vehicle Registration No. BAG 7000 belonging to the 1st Petitioner;***
 - iii. Motor vehicle Registration No. AIZ 4994 belonging to the 1st Petitioner;***
 - iv. Motor vehicle Registration No. ALH 2340 belonging to the 6th Petitioner;***
 - v. Motor vehicle Registration No. BAE 9000 belonging to the 1st Petitioner;***

- vi. Motor vehicle Registration No. BBA 7000 belonging to the 1st Petitioner;**
- vii. Motor vehicle Registration No. BLA 7000 belonging to the 5th Petitioner;**
- viii. Motor vehicle Registration No. BAL 7000 belonging to the 4th Petitioner;**
- ix. Motor vehicle Registration No. BCD 2033 belonging to the 6th Petitioner;**
- x. Motor vehicle Registration No. BBA 1744 belonging to the 5th Petitioner;**
- xi. Motor vehicle Registration No. AJE 5752 belonging to the 5th Petitioner;**
- xii. House No. 11 Mopani;**
- xiii. 4 decorative stones; and**
- xiv. Maverick shotgun, Serial Number MV0204615 Caliber 12B belonging to the 1st Petitioner.**

- 2.5 After entering House No. 11 Mopani, without a Search Warrant, the Officers proceeded to the 1st Petitioner's Farm situated at Fitobaula Area, Chililabombwe and without any authority or warrant proceeded to enter the said property. Upon entry, a defective pre-signed Search and Seizure Warrant was prepared.
- 2.6 From the 1st Petitioner's Farm, the Officers went to the 3rd Petitioner's residence at Plots No. 3170 and 3174 Congo Road and entered the said premises without any authority or search warrant, raided the said premises and whilst at the said property prepared a Search Warrant and thereafter prepared a Notice of Seizure of the said properties.
- 2.7 The Petitioner further averred that whilst at the 3rd Petitioner's premises, the Officers, in the late hour of the 16th of May, 2023,

- prepared a Notice of Seizure bearing description of properties as Mapili Lodge property and Mwanangwa House in Chililabombwe and left the 3rd Petitioner's premises.
- 2.8 During the search, the Officers were led by Mr. Silomba Chimwemwe, who during the Search, issued Seizure Warrants and Notices of Seizure while already on the premises.
- 2.9 Throughout the exercise, the Officers did not have a Warrant signed or issued by any Court or Magistrate of competent jurisdiction. To the contrary, they prepared the Search and Seizure Warrants after entering the premises, purportedly issued and signed by the Director General of the Drug Enforcement Commission (hereinafter referred to as the DEC).
- 2.10 The 1st Petitioner further averred that on the 22nd day of May, 2023, the Officers came to his Property No. Lusaka/LN52062/109. Upon entry on the said Property, the Officer prepared a Search Warrant thereon which however, was not availed to him.
- 2.11 The Petitioners further more averred that prior to and after the 16th day of May, 2023, they were and have never been charged nor tried for any offence related to the **Prohibition and Prevention of Money Laundering Act No. 14 of 2004** or the **Narcotic Drugs and Psychotropic Substances Act No. 35 of 2021**.

3.0 BREACHES OF THE CONSTITUTION

- 3.1 The Petitioners listed the alleged constitutional breaches as follows:
- a. Where the Officers entered their premises without a duly issued Warrant from a Magistrate in blatant disregard of the provisions of Section 118 of the*

Criminal Procedure Code Act which is the law that prescribes the rules pertaining to inquiry into crimes and stipulates that a Warrant ought to be issued by a Magistrate and does not have exceptions to this requirement. Section 118 provides:

“Where it is proved on oath to a Magistrate that, in fact or according to reasonable suspicion anything upon by or in respect of which an offence has been committed or anything which is necessary to the conduct of an investigation into any offence is in any building, vessel, carriage, box, receptacle or place, the Magistrate may, by Warrant (called a Search Warrant) authorize a Police Officer or other person therein named to search the building, vessel, carriage, box, receptacle or place (which shall be named or described in the Warrant) for any such thing, and if anything searched for be found, to seize it and carry it before the Court of the Magistrate issuing the Warrant or some other Court, to be dealt with according to the law”.

3.2 The Petitioners’ rights to privacy as protected under **Article 17** of the **Constitution** were violated without lawful justification.

b. Where the Officers entered the premises without a duly issued Warrant from a Court of competent jurisdiction in blatant disregard of the provisions of Section 23 of the Prohibition and Prevention of Money Laundering Act No. 14 of 2001 which is the law pursuant to which the purported Notice of Seizure were issued. Section 23 provides:

“Whenever an authorized officer has reason to believe that there is reasonable cause to suspect that in or on any premises there is concealed or deposited any property liable to seizure or forfeiture under this Act, or to which an offence under this Act is reasonably suspected to have been committed, or any book or document directly or indirectly relating to, or connected with, any dealing or intended dealing, whether within or outside Zambia, in respect of any property liable to seizure or forfeiture under this Act, or which would, if carried out be an offence under this Act, the authorized Officer may with a Warrant issued by a Court of competent jurisdiction –

- i. Enter the premises and search for, seize and detain any such property, book or document;***
- ii. Search any person who is suspected or connected with the offence, in or on the premises and take that person into custody to facilitate the investigations;***
- iii. Arrest any person who is in or on the premises in whose possession any property liable to seizure or forfeiture under this Act is found, or whom the officer reasonably believes to have concealed or deposited the property;***
- iv. Break, open, examine and search any premises, article, container or receptacle suspected or connected with the offence; or***
- v. Stop, search and detain any conveyance.***

3.3 The Petitioners' rights to privacy as protected under **Article 17** of the **Constitution** were violated without lawful justification.

- c. *Where the Officers seized the Petitioners' Properties without a duly issued Warrant from a Magistrate/a Court of competent jurisdiction as per the law quoted above, their rights to protection from deprivation of property as protected under Article 16 of the Constitution of Zambia were violated.*
- d. *The Petitioner's right to a fair trial as protected under Article 18 of the Constitution are likely to be violated as the investigations are being done in blatant disregard of the provisions of the law relating to the investigations of crime more specifically the provision of Section 118 of the Criminal Procedure Code Act and Section 23 of the Prohibition and Prevention of Money Laundering Act No. 14 of 2001 which stipulates that a Warrant ought to be issued by a Court of competent jurisdiction, which may affect their ability to formulate a defence with their properties under seizure, further it takes away the equality of arms between the prosecution and the defence and lastly it jeopardizes their presumption of innocence.*
- e. *Where the Petitioners' properties are being seized without ever being charged nor tried for any offence related to the Prohibition and Prevention of Money Laundering Act No. 14 of 2001 or the Narcotic Drugs and Psychotropic Substances Act No. 35 of 2021 both pre and post the seizures, their rights to a fair trial*

are being jeopardized as it impugns their right to be presumed innocent.

4.0 INTERIM RELIEF

4.1 The Petitioners prayed to be granted a Conservatory Order against the Respondent by its servants or agents or whomsoever to maintain the Petitioners' status quo.

5.0 SUBSTANTIVE RELIEFS

5.1 The Petitioners prayed for the reliefs couched as follows:

- i. A declaration that the Officers from Drug Enforcement Commission have no authority to issue a Search or Seizure Warrant in the manner they did and against the provisions of the Criminal Procedure Code Chapter 88 of the Laws of Zambia and the Prohibition and Prevention of Money Laundering Act No. 14 of 2001 of the Laws of Zambia;*
- ii. A declaration that the Search and Seizure of the Petitioners' Properties by the Drug Enforcement Commission Officers was ultra vires, void ab initio and illegal;*
- iii. An Order that the Seizure of the Petitioners' Properties without Petitioners ever being charged nor tried for any offence related to the Prohibition and Prevention of Money Laundering Act No. 14 of 2001 or the Narcotic Drugs and Psychotropic Substances Act No. 35 of 2021 both pre and post seizures violates the Petitioners' rights to a fair trial, jeopardizes and impugns their right to be presumed innocent;*

- iv. An Order of Certiorari quashing the Warrants purportedly issued by the Director General of the Drug Enforcement Commission;*
- v. An Order of Mandamus compelling the Drug Enforcement Commission to return all the properties that were seized;*
- vi. Damages for anguish and loss of use of the properties seized;*
- vii. Damages for trespass to property;*
- viii. Any other relief the Court may deem fit; and*
- ix. Costs.*

6.0 AFFIDAVIT VERIFYING THE PETITION

- 6.1 The Affidavit verifying the facts in the Petition was sworn by the 1st Petitioner.
- 6.2 The Deponent deposed that when the Drug Enforcement Commission Officers (hereinafter referred to as the Officers) entered the Petitioners' premises, to conduct searches thereon, they only had what they purported to be a Warrant signed by the Director General of the DEC but that the Search Warrant and Seizure Notice were prepared while the Officers were on the premises of the Petitioners as per exhibit "**RM1**".
- 6.3 That notwithstanding that the Officers had no Warrant from any Court of competent jurisdiction, they seized the Petitioners' properties as per exhibit "**RM2**", "**RM3**" and "**RM4**".
- 6.4 That whilst at House No. 11 Mopani, the Officers prepared a Search Warrant thereon, conducted a search, seized the said property and other properties and thereafter issued a Notice of Seizure as per exhibit "**RM3**" and "**RM4**".

6.5 That prior to and post the Search and Seizure, none of the Petitioners have been charged with any offences related to the seized properties.

7.0 THE RESPONDENT'S ANSWER TO THE PETITION

7.1 The Affidavit verifying Answer to Petition was deposed to by **Emmanuel Khondowe** employed as Senior Investigations Officer of the Anti-Money Laundering Investigations Unit.

7.2 The Deponent deposed that he had perused through the Respondent's Answer to the Petition and confirms that the contents of the Respondent's Answer are true and correct to the best of his knowledge and belief.

7.3 The Deponent further deposed that the Petitioner commenced this action on the 25th of May, 2023, in which the reliefs sought are pleaded for on allegations that the DEC Officers illegally searched and seized various properties belonging to the Petitioners herein.

7.4 That the contents of Paragraphs 1 and 2 of the Petition are disputed as DEC Officers in executing their official duties, did lawfully enter the subject properties therein searched and seized the Properties with the aid and authorization of duly executed Warrants.

7.5 That the contents of Paragraph 3 of the said Petition are disputed to the extent that, the Officers did not raid the residence/properties of the 3rd Respondent herein as stated by the Petitioners.

7.6 That the contents of Paragraphs 4, 5, 6 and 7 of the said Petition are disputed as all entries, Searches and Seizures were duly executed with Warrants in the presence of Counsel representing the Petitioners namely Mr. Justice Sinkala of Messrs. Chibeluka

and Associates (herein after referred to as the Petitioners' Counsel) and Mr. Evans Muma, the property Manager (herein after referred to as "the Property Manager").

- 7.7 That the contents of Paragraph 8 are disputed to the extent that whilst in the presence of the Petitioners' Counsel and their Property Manager, the Officers, while at Mapili Lodge did seize the property as well as issue Warrants accordingly, however, the Officers did not search the Property.
- 7.8 That the contents of Paragraph 9 of the said Petition are disputed as the entire operation did not conclude in the early hours of the 17th of May, 2022.
- 7.9 That the contents of Paragraph 10 of the said Petition are disputed to the extent that the Warrant in the Officers' possession was valid and was obtained from a Court of competent jurisdiction.
- 7.10 That the contents of Paragraphs 11 and 12 of the said Petition are disputed to the extent that carbon copies of the said Warrant were served on the Property Manager.
- 7.11 That the contents of Paragraph 13 of the said Petition are disputed to the extent that an invitation was tendered to the 1st Petitioner to collect a copy of the said Warrant as a courtesy in the light of rising tension after the seizure of the properties, however, the Petitioner has neither responded nor availed himself to collect the said Warrant.
- 7.12 That the contents of Paragraph 14 of the said Petition are not disputed and the Respondent will further aver that the subject Properties are still the focus of an investigation as there is reasonable suspicion that these Properties have been acquired through proceeds of crime.

7.13 That the main intention and purpose behind the seizure of the Properties in question was to secure, preserve and protect them from any potential risks or tempering that would jeopardize the said investigations.

7.14 That depending on the outcome of the investigations, the Properties will either be released or be subjected to forfeiture.

7.15 That the contents of Paragraph 15 of the said Petition are disputed and the Respondent will aver that the rights of the Petitioners have not been violated in any way.

8.0 THE HEARING

8.1 The first Petitioners' Witness, was Mr. Richard Musukwa, herein after called **PW1**.

8.2 **PW1** informed the Court that he would rely on his Witness Statement and Bundle of Documents filed before Court.

8.3 In his evidence in chief, **PW1** informed the Court that on the 16th of May, 2023, he received a report from Mr. Ricky Kamboyi, an employee of the 5th Petitioner, that a team of Officers from the Zambia Police and the DEC were at his premises in Chililabombwe.

8.4 It was also his further testimony that he was informed by Mr. Ricky Kamboyi that upon arrival on the premises, the Officer filled in a Search Warrant exhibited on page 1 of the Petitioner's Bundle of Documents.

8.5 **PW1** further testified that after the Search that lasted three (3) hours at the house, motor vehicles and a decorative stone were all seized as per Seizure Form exhibited on page 6 of the Petitioner's Bundle of Documents.

8.6 **PW1** testified that the house seized, being House No. 11 Mopani Avenue, was acquired sometime in 2001 and was declared in

2011 when he became a Member of Parliament, as per the Declaration Form which is on pages 56 to 59 of the Petitioners' Bundle of Documents.

- 8.7 **PW1** further testified that all the properties subject of this seizure belonged to him and his companies which were acquired lawfully.
- 8.8 It was also **PW1**'s testimony that on the 25th of January, 2022, a joint investigations team raided his residence at Long Acres with a Search Warrant duly signed by the Magistrate and proceeded to conduct a search which said search was fruitless.
- 8.9 In cross-examination **PW1** informed the Court that he had read Paragraph 7 of the Affidavit verifying answer to petition but that the Search Warrant should not have been signed by the Director General of the DEC.
- 8.10 **PW1** further informed the Court that he recognized the document on Page 1 and that, the Search Warrant was signed by the Director General.
- 8.11 In further cross-examination, **PW1** informed the Court that following the seizure of the Assets in Paragraph E, he was sometime last year charged for possession of property suspected to be proceeds of crime.
- 8.12 In further cross-examination, **PW1** told the Court that as regards Paragraph 23 of the Petition, in particular line No. 6, he claimed for damages and anguish but that he did not file any Medical Report.
- 8.13 As regards damages for trespass to property, **PW1** informed the Court that he claimed for that relief because the State Agents came into his premises without a Search Warrant.

- 8.14 **PW1** when further cross-examined stated that he had exhibited a Seizure and Search Warrant in his Bundle of Documents.
- 8.15 The second Witness for the Petitioners was Kamboyi Ricky aged 37 years, herein after called **PW2**.
- 8.16 The gist of **PW2**'s evidence was to the effect that on the 16th of May, 2022, he witnessed a Search without a Warrant by DEC Officers at the Petitioners' premises in Chililabombwe where the main house, gun, decorative stone and cars were seized as per exhibits "**RM1**", "**RM2**", "**RM3**" and "**RM4**".
- 8.17 In cross-examination, **PW2** told the Court that the Search and Seizure Warrants were filled in his presence.
- 8.18 In further cross-examination **PW2** informed the Court that the Officers entered the premises without his consent.
- 8.19 The third Petitioners' Witness was Jacqueline Musukwa aged 43 years, herein after called **PW3**.
- 8.20 In her evidence in chief, **PW3** informed the Court that on the 16th of May, 2023, at about 23:00 hours, a team of Officers from Zambia Police and the DEC raided her premises known as Plots No. 3174 and 3170 Kamenza East without a Search Warrant.
- 8.21 It was **PW3**'s further testimony that after the property was seized, the State Agents filled in a Seizure Form which was handed to her to sign.
- 8.22 In cross-examination, **PW3**, informed the Court that she was claiming for mental anguish although she did not have any proof to show that she suffered from mental anguish.
- 8.23 The fourth Petitioners' Witness was Evans Muma, herein after called **PW4**. The gist of **PW4**'s testimony was that on the 28th of May, 2023 he witnessed the search of the properties of the

1st Petitioner and 3rd Petitioner by Officers from the DEC, which search and seizure was done without a Warrant.

8.24 According to **PW4**, after the search, the house, gun, decorative stone and motor vehicles were seized as per “**RM1**”, “**RM2**”, “**RM3**” and “**RM4**”.

9.0 THE RESPONDENT’S CASE

9.1 The Respondent called Mr. Emmanuel Khondowe as the Witness for the Respondent, herein after called **RW1**.

9.2 In his evidence in chief **RW1** informed the Court that in the month of May, 2023, he commenced investigations after the DEC received information to the effect that there were properties reasonably suspected to be proceeds of crime.

9.3 It was **RW1**’s evidence that some of the properties reasonably suspected to be proceeds of crime were on the Copperbelt.

9.4 It was **RW1**’s evidence that in light of that discovery, he requested Mr. Chimwemwe Silomba, a Senior Investigations Officer based on the Copperbelt to help locate, search and seize the properties of interest based in Chililabombwe.

9.5 It was **RW1**’s evidence that during the search on or about the 16th of May, 2023, Mr. Silomba searched and seized real property, more particularly:

- i. House No. 11 Mopani Avenue, Chililabombwe on the Copperbelt Province of the Republic of Zambia;***
- ii. Plots 3170 and 3174 Congo Road Kamenza, Chililabombwe on the Copperbelt Province of the Republic of Zambia; and***
- iii. A farm at Fitobaula Area, Chililabombwe on the Copperbelt Province of the Republic of Zambia.***

- 9.6 **RW1** further explained that the Search and Seizure were carried out within the confines of the law and was conducted in the presence Counsel for the Petitioners as well as the Property Manager.
- 9.7 In cross-examination, **RW1** stated that on page 31 of the Respondent's Bundle of Documents, there is a Search Warrant signed by a Magistrate of the Subordinate Court but that not all Seizures and Searches are supervised by the Court.
- 9.8 According to **RW1**, **Section 52** of the **Narcotic Drug and Psychotropic Substances Act No. 35** gives power to the Director General of the DEC to conduct searches.
- 9.9 In further cross-examination, **RW1** informed the Court that he was not aware that once a Search Warrant is issued by the Director General, the Search Warrant must be signed by the Magistrate.
- 9.10 In further cross-examination, **RW1** admitted that in his Bundle of Documents, there are no Search Warrants signed by a Magistrate.
- 9.11 In further cross-examination, **RW1** admitted that a Search Warrant signed by a Magistrate is one of the correct documents to use when conducting a Search.
- 9.12 In further cross-examination, **RW1** informed the Court there is a Search and Seizure Warrant prepared by the Drug Enforcement Commission when conducting a Search, issued pursuant to **Section 52** of the **Narcotic Drug and Psychotropic Substances Act No. 35 of 2021**.
- 9.13 In further cross-examination, **RW1** informed the Court that he is not sure of the correct interpretation of **Section 52** and that

he would dispute that the enforcement of **Section 52** was an abuse of power.

9.14 In further cross-examination, **RW1** informed the Court that he is not aware that Mr. Silomba prepared and signed the Form while at the premises of the Petitioners.

9.15 In further cross-examination, **RW1** informed the Court that the premises for the Petitioners were searched on 18th of May, 2023, while the arrest was effected on the 1st Petitioner on the 14th of December, 2023.

9.16 In further cross-examination, **RW1** informed the Court that on pages 58 and 59 there is a Declaration Form and a Declaration of Income and Assets dated 7th of November, 2011 and that on the document on page 59, there is a house that was seized but that he is not able to link it to the Notice of Seizure.

9.17 That was the close of the Respondent's case.

10.0 PETITIONERS' SUBMISSIONS

10.1 It was the submission of Counsel for the Petitioner that the evidence of **RW1** should be disallowed because it is hearsay. Hearsay is oral or written statements made by a person other than the witness who has been called to testify to the truth of these statements in Court. Such evidence by the witness is hearsay evidence and is generally not receivable to prove the facts stated in the statements. Counsel referred to the case of **Subramaniam Vs Public Prosecutor**⁽¹⁾ where it was held:

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

hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement but the fact that it was made”.

10.2 It was Counsel’s submission that the Director General of the DEC has no authority to issue a Search Warrant and Seizure Warrant.

10.3 According to Counsel, an Officer from the DEC authorized to investigate a matter or conduct a Search must obtain a Search Warrant from Court, in line with the provisions of **Sections 52 (1) and 53 of the Narcotic Drug and Psychotropic Substances Act. Section 52 (1)** provides:

“52 (1) Where the Director General has reasonable grounds to suspect that in or on, any premises there is concealed or deposited any property liable to forfeiture under this Act or as to which an offence under this Act is reasonably suspected to have been committed, or any book or document directly or indirectly relating to, or connected with any dealing or intended dealing, whether within or outside the Republic in respect of any property liable to seizure or forfeiture under this Act, or which would, if carried out be an offence under this Act, the Director General may, by order in writing, authorize an Investigating Officer or Police Officer to –

a. Enter premises and search for, seize and detain the property, book or document...”.

10.4 It was Counsel’s submission that the above provision means that Officers cannot search or seize property unless and until

they are authorized by the Director General in writing to approach a Magistrate to obtain a Warrant and proceed to execute it at the named premises or property.

10.5 It was Counsel's submission that even with the authorization from the Director General, the Officer needs to have a Warrant issued by a competent Court before a Search is conducted or any property is seized pursuant to **Section 53** of the **Narcotic and Psychotropic Substances Act**. **Section 53** provides:

"1 An Investigating Officer may, with a Warrant, at any time –

(a) enter and search any premises or any other premises, including a private dwelling, where information or documents which may be relevant to an investigation be kept;

(b) search any person on the premises if there are reasonable grounds for believing that the person has personal possession of any document or article that has a bearing on the investigations, except that a person shall only be searched by a person of the same sex..."

10.6 According to Counsel when **Sections 52 (1)** and **53** are read together, it appears that the authorization by the Director General is not an equivalent of a Warrant or Written Authorization from the Magistrate because the authorization by the Director General ought to be accompanied by a Warrant.

10.7 Counsel further emphasized that before any Seizure or Search is conducted, the Officers from DEC ought to prove before a Magistrate on oath that indeed there is reasonable suspicion in

line with **Section 118** of the **Criminal Procedure Code Cap 88** of the **Laws of Zambia**. **Section 118** provides:

“Where it is proved on oath to a Magistrate that, in fact or according to reasonable suspicion, anything upon, by or in respect of which an offence has been committed or anything which is necessary to the conduct of an investigation into any offence is in any building, vessel, carriage, box, receptacle or place, the Magistrate may, by Warrant (called a Search Warrant) authorize a Police Officer or other person therein named to search the building, vessel, carriage, box, receptacle or place (which shall be named or described in the Warrant) for any such thing and, if anything searched for be found, to seize it and carry it before the court of the Magistrate issuing the Warrant or some other Court to be dealt with according to law”.

- 10.8 According to Counsel, failure to abide by the provisions of **Section 118** of the **Criminal Procedure Code** (hereinafter referred to as the CPC) renders the search unlawful and a violation of one’s constitutional rights to privacy, property and protection of the law as provided under **Articles 16, 17** and **18** of the Constitution, respectively.
- 10.9 Stretching his argument further, Counsel submitted that the enactment under **Section 52** of the **Narcotic Drugs and Psychotropic Substances Act** has not taken away the requirements for a person to go to Court and obtain the necessary Warrant for a Search or Seizure and failing to do so makes any such act illegal and void *ab initio*.

- 10.10 It was Counsel's submission that if **Sections 52 and 53** of the **Narcotic Drugs and Psychotropic Substances Act** gives the Director General of DEC power to issue Warrants, the Sections are *ultra-vires* **Article 18**.
- 10.11 It was Counsel's submission that in the unlikely event that this Court finds that **Sections 52 and 53** of the **Narcotic Drugs and Psychotropic Substance Act** when read together give the DG of DEC power to issue warrants, then the said provisions are *ultra-vires* **Article 18** of the **Constitution** and therefore null and void to the extent of the inconsistency as per **Article 1** of the **Constitution**.
- 10.12 According to Counsel, if the Director General of the DEC has the authority to issue Warrants, that would be a slap in the face for all suspects who are under investigations as DEC will then be left to operate unfairly against suspects who are yet to be accused persons. According to Counsel, allowing the Director General of the DEC to issue Warrants will be an act perpetrating arbitrariness which will result in the abuse of power. Counsel referred the Court to the case of *Major Isaac Masonga Vs The People*⁽²⁾ wherein the Supreme Court stated:
- “It is trite law and a constitutional duty for the prosecution to guarantee a fair trial and a fair trial starts with investigations. Any short comings in the investigations may seriously jeopardize the right to a fair proceeding, and thereby also prejudice the accused person's rights to be presumed innocent”.***
- 10.13 Further Counsel submitted that **Section 118** of the **CPC** which requires a Warrant to be issued by the Court was placed there to ensure that the right to a fair trial is protected from the

beginning of investigations. Therefore, the enactors of the law never intended that the Director General of the DEC should have power to issue Search Warrants. It simply allows the Director General to sanction an investigation and permit an officer to obtain a Search Warrant from Court. Allowing the Director General to issue Warrants would be erroneous as it would render **Section 118** of the **CPC** together with **Article 18** of the **Constitution** which it seeks to protect, *otiose*.

10.14 It was Counsel's submission that the said provisions of the **Narcotic Drug and Psychotropic Substances Act**, to the extent that they grant the Director General power to issue Warrants fly in the teeth of **Article 18 (1) and (2)** as interpreted by the Supreme Court in the *Major Masonga* case.

10.15 It was Counsel's submission that in the event that this Court finds **Sections 52 and 53** of the **Narcotic Drug and Psychotropic Substances Act** grant the Director General power to issue warrants, the Court should find **Sections 52 and 53** of the **Narcotic Drug and Psychotropic Substances Act** unconstitutional, a violation of human rights and null and void as per **Article 1 (1)** of the **Constitution**, which provides:

“(1) This Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency”.

10.16 Counsel further argued that the DEC Officers by entering on the premises of the Petitioners without their consent and without a Search Warrant violated the right to privacy of the

Petitioners which is protected by **Article 17 (1)** of the **Constitution** which provides:

“17 (1) Except with his own consent, no person shall be subjected to the search of his person or his property or to the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision...

- a. that is reasonably required in the interest of defence, public safety, public order, public morality, public health, town and country planning, the development and utilization of mineral resources, or in order to secure the development or utilization of any property for a purpose beneficial to the community;*
- b. that is reasonably required for the purpose of protecting the rights or freedoms of other persons; and*
- c. that authorizes an officer or agent of the Government, a local Government authority or a body corporate established by law for a public purpose to enter on the premises or anything thereon for the purpose of any tax, carry out work connected with any property that is lawfully on those premises and that belongs to that Government, authority, or body corporate, as the case may be...*

And except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably, justified in a democratic society”.

10.17 Further Counsel submitted that a person can only be searched where he gives his consent to be searched and one can only enter, onto the premises of another where consent has been given, otherwise that would be a violation of the right to privacy. Counsel referred the Court to the case of ***Patel Vs The Attorney General***⁽³⁾ where the Court stated:

“I now come to Section 19. The question I am asked on this Section is whether the opening examination and seizure of the postal article constituted a contravention of the applicant’s right to privacy of a person’s home and other property. Subsection (1) provides that, except with his own consent, no person may be subjected to the search of his person or his property without his consent by a customs officer purporting to act under the authority of Regulation 35. The search is supported by the Affidavit Evidence of Mr. Hilditch, and the absence of consent appears from the Record of the Subordinate Court proceedings at page 3, lines 3 - 5. There was, therefore, a prima facie breach of the Applicant’s rights under Section 19 (1)”.

10.18 Counsel further submitted that the right is not absolute and has claw backs or exceptions as provided for in **sub-article 2 paragraph (a) – (c)** which allows law enforcement officers to enter premises for specific purposes that are listed there under

which actions by DEC Officers do not fall in any of the categories of permissible acts under the claw backs.

10.19 It was Counsel's submission that the Respondents may seek to find solace in the provisions of **Sections 52** and **53** of the **Narcotic Drug and Psychotropic Substances Act**, however, there is no solace to be found as the provisions do not permit them to abrogate the provisions of **Article 17** of the **Constitution**. In fact, the provisions of **Section 53** requiring them to have a Warrant seeks to protect **Article 17** of the **Constitution**.

10.20 Building on the above argument, Counsel submitted that, **Section 52** does not override the requirement of **Section 118** of the **CPC** which requires that a Warrant be obtained on oath before a Magistrate. The power of the Director General of the DEC only goes as far as permitting a case to be investigated and the procedure of a Warrant is a preserve of the Court.

10.21 Further, it was also submitted that there is no law that allows DEC Officers to enter premises without a duly signed Warrant and by the provisions of **Section 118** of the **CPC**, a duly signed Warrant is signed by a Magistrate. Therefore, the argument by the Respondent that the Director General has the power to issue Warrants falls off.

10.22 It was also submitted that the acts of the Respondent's Agents are in contravention of the presumption of innocence as the Petitioners are suffering a punishment even before they are charged with any offence and later on presented to any Court of competent jurisdiction. According to Counsel the acts of the State Agents violated the constitutional rights of the Petitioners to a fair trial and presumption of innocence. Counsel referred

the Court to **Article 18** of the **Constitution of Zambia**. This Article provides:

“18 (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law.

(2) every person who is charged with a criminal offence –

a) shall be presumed to be innocent until he is proved or has pleaded guilty...”.

10.23 Counsel also referred the Court to the case of **Major Isaac Masonga Vs The People** supra, wherein the Supreme Court held as follows:

“It is trite law and a constitutional duty for the prosecution to guarantee a fair trial and a fair trial starts with investigations. Any short comings in the investigations may seriously jeopardize the right to a fair proceeding, and thereby, also prejudice the accused person’s rights to be presumed innocent”.

10.24 The Court was also referred to the case of **Patel Vs The People** supra where it was stated that:

“The relationship between a law restricting the fundamental rights and freedoms of the individual set for in Chapter III of the Constitution and the permitted restrictions set forth in the said Chapter III must be rational and proximate”.

10.25 According to Counsel, the actions of DEC having been unjustified cannot form an exception to **Article 18** of the

Constitution and if **Sections 52** and **53** of the **Narcotic Drug and Psychotropic Substances Act** seeks to create such an exception the same is not rational and proximate to the exceptions in **Article 18**, thus unconstitutional and illegal.

10.26 It was Counsel's submission that DEC Officers having seized the properties of the Petitioners and having continued the seizure amounts to appropriating their properties and is an affront to **Article 16** of the **Constitution** which speaks against the State compulsorily taking possession of any person's property. The said Article provides:

“16(1) Except as provided in this Article no property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired...”

10.27 Counsel also referred the Court to the case of **Roy Chilumanda and Namwali Lodge and Car Hire Vs Attorney General**⁽⁴⁾ where the Court held that it was wrong for DEC to seize property based on rumours and the acts of the Respondents were unwarranted.

10.28 Counsel also submitted that the gun and the house for the First Petitioner were seized by Agents of the Respondent by malice as those properties were owned by the Petitioner even before he joined politics. Counsel referred the Court to the case of **The People Vs Peter Thomas London Tembo**⁽⁵⁾, wherein the Court had this to say:

“The behaviour of the Police must be condemned. It is time they moved away completely from the notion that anyone brought to the Police is guilty of the crime complained of. They should always be weary of the fact that there are in our communities, sadists who are interested in seeing others suffer even for crimes they did not commit. That certain complaints are filed with the Police based on petty jealousies while others arise out of sheer vengeance. As a professional body, the Police are encouraged to be objective, in their investigations and only bring cases to Court that merit prosecution...in that way the number of cases before Courts will be reduced as only deserving cases will be prosecuted”.

10.29 It was Counsel’s submission that the Respondent’s agents’ actions in seizing the Petitioners’ Properties are unjustified and should be found illegal and void *ab initio*.

10.30 Further Counsel submitted that the DEC Officers trespassed on the Petitioner’s property. According to Counsel, the actions of the DEC Officers amounted to trespass to land and to property/chattel. Counsel referred the Court to the case of **Shell & BP Zambia Limited Vs Conidaris and Others**⁽⁶⁾

where it was held:

“Trespass to land is an unlawful entry on land in the possession of another; a licence prevents the entry of the licensee from being a trespass and renders it lawful”.

10.31 According to Counsel, in *casu* the DEC Officers did not have consent to enter the Petitioners’ premises thus they had no

license to rely on. To that end they were trespassers on the premises and the Respondent being their principal in whose name they so trespassed ought to be held liable.

10.32 Counsel also submitted that it is trite law that common law does not permit Police Officers, or anyone else to ransack anyone's house, or to search for papers or articles therein, or to search his person, simply to see if he may have committed some crime or other, that would be trespass. Counsel referred the Court to the holding of Lord Denning MR., in the case of **Ghani Vs Jones**⁽⁷⁾ where it was held as follows:

“The common law does not permit Police Officers, or anyone else to ransack anyone's house, or to search for papers or articles therein, or to search his person, simply to see if he may have committed some crime or other. If Police Officers should do so, they would be guilty of trespass”.

10.33 It was Counsel's submission that as a result of the trespass, the Respondent is liable to the Petitioners in damages.

10.34 It was Counsel's further view that in the present case, there was no reasonable suspicion of the commission of any offence. According to Counsel, the Respondent's witness in this case said that there was mere suspicion and not reasonable suspicion.

10.35 Counsel invited us to the case of **Daniel Chizoka Mbendagoma Vs Attorney General**⁽⁸⁾, where the Court considered the meaning of reasonable suspicion and opined that in order to justify the arrest, the Arresting Officer must show that he had reasonable suspicion that a person had committed the offence, which can be justified if the facts as

they appear to the officer at the time, were such as to warrant bringing the man to Court.

10.36 It was Counsel's further submission that it is imperative for the Respondent to demonstrate the facts upon which the Officers formed the opinion that the Petitioners' funds in the Bank Accounts subject to the Seizure Notice were funds derived from or acquired from money laundering or proceeds of illegality.

10.37 It was Counsel's submission that it was essential for the Respondent to demonstrate to the Court that there is factual basis upon which there is reasonable ground for suspicion that the funds seized were proceeds of crime or connected to the offence alleged to have been committed by the Petitioners. Counsel referred the Court to the case of *The People Vs Austin Liato*⁽⁹⁾.

10.38 In conclusion, Counsel submitted that the Petitioners are entitled to damages for the loss of use of property and trespass.

11.0 RESPONDENT'S SUBMISSIONS

11.1 It was Counsel's submission that the objection to the evidence of the Respondent Witness (**RW1**) contained in Paragraphs 9 to 18 of the Respondent's Witness Statement on the basis of being hearsay lacks merit.

11.2 It was contended by Counsel that the rule against hearsay evidence exists to prevent testimony based on what a witness has heard from another person, of which he has no personal knowledge or experience.

11.3 It was averred that the Witness Statement of **RW1**, particularly in Paragraphs 6 to 8 indicates that **RW1** in fact had personal knowledge of the matter as he was the Officer responsible for commencing the investigations into the Petitioners in the first

place after receipt of information that their properties were suspected to be proceeds of crime.

- 11.4 It was also submitted that **RW1** was responsible for requesting the aid of the DEC Officer on the Copperbelt to locate, search and seize the said properties.
- 11.5 It was Counsel's submission that following the conclusion of the investigation, **RW1** effected arrest of the 1st, 4th, 6th and 7th Petitioners as evidenced by the exhibit marked "**EK2**".
- 11.6 It was Counsel's submission that the rule against hearsay evidence is inapplicable in this matter, given the unique circumstances of this matter, and given the fact that **RW1** was heavily involved in the matter from investigations, commencement to the eventual arrest of the Respondents.
- 11.7 According to Counsel, the objection by the Petitioners is unreasonably late as it comes after the Witness Statement was already admitted into evidence and marked "**EK1**". An attempt to have certain paragraphs expunged at this stage of the proceedings is highly prejudicial to the Respondent.
- 11.8 It was Counsel's further argument that contrary to the allegations of the Petitioners, the Director General of DEC is authorized by law to issue Orders in writing or Warrants which authorize entry, search and seizure. Counsel referred the Court to **Section 52 of the Narcotic Drugs and Psychotropic Substances Act No. 35 of 2021** which provides:

"(1) Where the Director-General has reasonable grounds to suspect that in, or on, any premises there is concealed or deposited any property liable to forfeiture under this Act, or as to which an offence under this Act is reasonably suspected to have been

committed, or any book or document directly or indirectly relating to, or connected with, any dealing, whether within or outside the Republic, in respect of any property liable to seizure or forfeiture under this Act, or which would, if carried out, be an offence under this Act, the Director General may, by order in writing, authorize an Investigation Officer or Police Officer to –

a. enter the premises and search for, seize and detain the property, book or document”.

11.9 It was Counsel’s submission that **Section 52** authorizes the Director General to issue a Warrant for entry, search and seizure.

11.10 According to Counsel, the provisions of **Section 52**, do not require the Director General of DEC to authorize Officers to obtain a Warrant from the Magistrate, but authorizes the Director General of DEC himself by a Written Order, to authorize the entry, search and seizure.

11.11 Further Counsel submitted that the provisions of **Section 52** must be given their plain and literal meaning. Counsel referred the Court to the case of **Edith Tshabala Vs Attorney General**⁽¹⁰⁾ where the Supreme Court held that the fundamental rule of interpreting a statute is that it should be construed in line with intent expressed by Parliament which means that the literal interpretation will prevail where there is nothing to indicate or suggest that the language should be understood in any other special sense.

11.12 It was Counsel’s further submission that as firmly confirmed by the evidence of **RW1**, the Director General of the DEC does

have authority to issue Orders for search and seizure which are binding on citizens, as they have the backing of law under **Section 52** of the **Narcotic Drug and Psychotropic Substances Act**.

11.13 In responding to the assertion by Counsel for the Petitioners that if **Sections 52** and **53** of the **Narcotic Drug and Psychotropic Substances Act** gives the Director General of the DEC power to issue Warrants, then the two provisions are *ultra-vires* the provisions of **Articles 16, 17** and **18** of the **Constitution**, Counsel submitted that **Sections 52** and **53** are not *ultra vires* the Bill of Rights.

11.14 According to Counsel, the right to privacy under **Article 17**, right to fair trial under **Article 18** and the right to protection from deprivation of property under **Article 16** of the **Constitution** were not violated.

11.15 It was Counsel's submission that the actions taken by the Respondent were taken for the protection of the public at large and for the enforcement of the rights of the public, and that they thus fall within the ambit of **Article 17 (2) (b)** of the **Constitution** which provides:

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision -
b. that is reasonably required for the purpose of protecting the rights or freedom of other persons”.

11.16 It was Counsel's submission that the law pursuant to which the search and seizure of property was done is reasonably required to protect the rights and freedoms of other persons by

preventing others from benefiting or seeking to benefit from crime and proceeds of crime.

11.17 Coming to the breach of **Article 18** of the **Constitution**, Counsel submitted that **Article 18** was not breached as alleged because the 1st, 4th, 6th and 7th Petitioners were only arrested and charged after investigations were duly carried out.

11.18 As regards breach of **Article 16** of the **Constitution**, Counsel submitted that **Article 16** was not breached. According to Counsel, **Article 16** deals with compulsory acquisition with adequate compensation for the acquisition of the right or interest in land.

11.19 It was Counsel's submission that the seizure of the properties in this case is for purposes of investigations and does not amount to compulsory acquisition as envisaged by **Article 16** of the **Constitution**. According to Counsel, the law under which the assets were seized provides for the seizure on the basis that they are suspected proceeds of crime and to aid investigations, and does not provide that compensation ought to be paid.

11.20 As regards trespass on the Petitioners' property, Counsel submitted that there can be no trespass when there was authority for the entry on to land, as was the case in this matter.

11.21 As regards whether DEC Officers acted arbitrary and outside permissible exceptions under the Bill of Rights, Counsel submitted that there was no arbitrariness as alleged by the Petitioner because there was reasonable suspicion that an offence had been committed.

11.22 According to Counsel, there was reasonable suspicion which warranted the entry, search and seizure and eventual arrest of the 1st, 4th, 6th and 7th Petitioners.

11.23 As regards the Petitioners being entitled to damages for the loss of use and trespass, Counsel submitted that the Petitioners are not entitled to damages for the loss of property and trespass owing to the fact that the property was seized in accordance with provisions of the law, pursuant to a lawful Order or Warrant.

12.0 PETITIONERS' SUBMISSIONS IN REPLY

12.1 The submissions in Reply were essentially a rehash of the initial submissions centring on the search being illegal and having been conducted without reasonable suspicion which in turn violated the Petitioners' right to privacy, fair trial and right of ownership of property. As a result of the perceived Human Rights violation the Petitioners prayed for Declaratory Orders and Damages.

13.0 ISSUES FOR DETERMINATION

13.1 The following issues have been framed for determination:

- i. Whether the testimony of RW1, specifically in Paragraphs 9 to 18 of the Respondent's Witness Statement constitutes hearsay evidence and should thus be excluded or expunged from the record;*
- ii. Whether the Director General of the DEC possesses the authority to issue a Warrant;*
- iii. Whether the Search Warrants issued were ultra vires the Bill of Rights; and*

iv. Whether the DEC Officers trespassed upon the Petitioners property, thereby entitling the Petitioners to damages for the loss of use and trespass.

14.0 ANALYSIS AND DECISION

14.1 We are grateful to the Parties for the well-researched rival submissions made before us. The said submissions have been taken into consideration by the Court.

i. Whether the testimony of RW1 specifically in Paragraphs 9 to 18 of the Respondent's Witness Statement constitutes hearsay evidence and should thus be excluded or expunged from the record.

14.2 Counsel for the Petitioner submitted that the testimony of **RW1** specifically in Paragraphs 9 to 18 of the Respondent's Witness Statement is hearsay and should be expunged from the Record. On the other hand, Counsel for the Respondent submitted that the testimony of **RW1** is not hearsay and should not be expunged from the Record.

14.3 In resolving the first question we posed to ourselves, resort will be had to the case of **Subramaniam Vs Public Prosecutor** where it was held that evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made.

14.4 As stated in the above cited case, hearsay evidence is inadmissible unless it falls within the exceptions.

14.5 In *casu*, we agree with Counsel for the Petitioners that the said impugned paragraphs amount to hearsay because the Officer who carried out the Search and Seizure Warrants on the Copperbelt was not called as a Witness.

14.6 However, the said impugned paragraphs shall not be expunged because the objection was made very late. As guided by **Order V, Rule 21** of the **High Court Rules**, which provides as follows:

“In every case and at every stage thereof, any objection to the reception of evidence by a Party affected thereby shall be made at the time the evidence is offered:

Provided that the Court may, in its discretion, on appeal, entertain any objection to evidence received in a Subordinate Court, though not objected to at the time it was offered”. (Emphasis Ours)

14.7 In conforming with the above provision, the Petitioner should have objected at the time the Application was made by the Respondent to tender the Witness Statement of **RW1**. Therefore, having not objected to the Witness Statement at the time of production, entails that the Petitioners cannot object the contents of the Witness Statement in their submissions. Further, we are fortified by the guidance of **Miyanda Vs Levy Patrick Mwanawasa, Electoral Commission of Zambia and the Attorney General**⁽¹¹⁾ where the Supreme Court guided that:

“Thus, in a case where a defence and or in our view, any matter not pleaded is let in evidence and not objected to by the other side, the Court is not and should not feel precluded from considering it...In our considered opinion, the Respondent having not objected to the evidence immediately it was adduced,

the Court is not precluded from considering that evidence”.

14.8 In our view, the no objection that was offered by the Petitioner at the time of producing the Witness Statements amounts to a fresh step envisioned by **Order 2, Rule 1** of the **Rules** of the **Supreme Court of England** which provides that:

“An application to set aside for irregularity any proceedings, any step in any proceedings or any document, Judgment or Order therein made within a reasonable time and before the Party applying has taken any fresh step after becoming aware of the irregularity”. (Emphasis Ours)

14.9 *ii. Whether the Director General of the DEC has authority to issue a Warrant.*

14.10 It was the Petitioners’ submission that, the Director General has no authority under any law to issue a Search Warrant and Seizure Warrant. On the other hand, the Respondent submitted that the Director General of DEC has power under the **Narcotic Drug and Psychotropic Substances Act** to issue a Warrant.

14.11 In order to resolve this issue, resort will be had to **Sections 52** and **53** of the **Narcotic Drug and Psychotropic Substances Act**.

14.12 **Section 52 (1)** provides:

“52 (1) Where the Director General has reasonable grounds to suspect that in, or on any premises there is concealed or deposited any property liable for forfeiture under this Act, or as to which an offence under this Act is reasonably suspected to have been

committed, or any book or document directly or indirectly relating to or connected with, any dealing or intended dealing, whether within or outside the Republic, in respect of any property liable to seizure or forfeiture under this Act, or which would, if carried out, be an offence under this Act, the Director General may, by order in writing, authorize an Investigating Officer or Police Officer to –

a. enter the premises and search or seize and detain the property, book or document”.

14.13 Further, **Section 53** of the **Narcotic Drug and Psychotropic Substances Act** provides that:

“(1) An Investigating Officer may, with a Warrant, at any time –

a. enter and search any premises or any other premises, including a private dwelling, where information or documents which may be relevant to an investigation may be kept;

b. search any person on the premises if there are reasonable grounds for believing that the person has personal possession of any document or article that has a bearing on the investigation except that a person shall only be searched by a person of the same sex”.

14.14 In our reading of the two Sections, what we distil is that the Director General of DEC has power to issue a Search Warrant to an Investigating Officer or Police Officer to enter and search a dwelling house as provided for in **Section 52 (1)** of the **Narcotic Drug and Psychotropic Substances Act**.

- 14.15 Where a Search Warrant is issued under the hand of the Director General of DEC pursuant to **Section 52 (1)**, there is no requirement for the Warrant to be signed by the Magistrate as submitted by Counsel for the Petitioners.
- 14.16 Coming to **Section 53** of the **Narcotic Drug and Psychotropic Substances Act**, it is important from the outset to understand that the said section talks of an Investigating Officer who **MAY** with a Warrant at any time enter and search premises.
- 14.17 In our considered view, what this **Section** implies is that an Investigations Officer can carry out investigations using a Warrant but **Section 53** does not specifically state under whose hand the said Warrant should be generated from. **Section 53** is open ended.
- 14.18 Therefore, using the literal interpretation of statutes (see **Edith Tshabalala Vs AG**) such a Warrant can either be obtained from the Director of DEC pursuant to **Section 52 (1)**. Where it is obtained from the Director General of DEC under **Section 52 (1)**, there is no requirement for such a Warrant to be signed by the Magistrate. Under **Section 52 (1)**, the supervisory oversight by the Magistrate is excluded. This is so because at certain times, urgent investigations arise, which require quick actions by investigative agencies to investigate matters so as to protect the evidence.
- 14.19 However, if the Investigating Officer opts to obtain a Warrant under **Section 53**, the Officer has two options; one option is to approach the Director General, so that the Director General can issue a Warrant. The second option is to approach the Court for the issuance of the said Warrant.

- 14.20 Where the Officer approaches the Court for a Warrant, it is important that the Officer must comply with **Section 118** of the **CPC**. Under **Section 53**, the Officer must establish reasonable suspicion before the Warrant is issued. It is only after the requirements of **Section 118** of the **CPC** are met that a Magistrate can then proceed to issue a Search Warrant.
- 14.21 Having stated the above, it is our considered position that the arguments advanced by Counsel for the Petitioners that the Director General has no power to issue a Search Warrant lacks merit.
- 14.22 We say so because it has been demonstrated by the Respondent that the Director General of DEC has power pursuant to **Section 52 (1)** of the **Act** to issue a Search Warrant.
- 14.23 Having established that the Director General of DEC has power to issue a Search Warrant under **Section 52**, just like the Court has power to issue a Search Warrant under **Section 53**, where requirements of **Section 118** of the **CPC** have been met, an Investigation Officer depending on the urgency of the investigations being carried out, has an option to choose where to obtain a Search Warrant. Either choice is lawful.
- 14.24 Having found that the impugned Search Warrants were lawfully issued and valid, the same cannot be quashed as prayed.
- 14.25 Under the same argument, it was also argued that if we find that **Sections 52** and **53** when read together give power to the Director General of DEC to issue Search Warrants, we should find the said provisions *ultra vires* **Article 18** and therefore

null and void to the extent of the inconsistency as per **Article 1** of the **Constitution**.

14.26 In essence, what the Petitioners seek this Court to do is to declare **Sections 52 (1)** and **53** of the **Narcotic Drug and Psychotropic Substances Act** unconstitutional.

14.27 In addressing the said issue, we state from the outset that the said provisions are contained in a statute passed by the Legislature. In this regard, we are guided by the holding in the case of **Kachasu Vs The Attorney General**⁽¹²⁾ wherein the then Chief Justice Blagden sitting as a High Court Judge and citing Bate, J in the case of **Arzike Vs Gov. N. Region**⁽¹³⁾ stated:

“There is, however, a presumption that the Legislature has acted constitutionally and that the laws which it has passed are necessary and reasonably justifiable”.

14.28 Further we find it useful to cite Magnus, J. in the case of **Patel Vs The Attorney General** where it was stated:

“The presumption in favour of constitutionality is dealt with at some length by Basu in his “commentary on the Constitution of India,” 4th Edition, it has been held at Page 199, et seq...in the United States, that all reasonable doubt of a statute’s validity must be resolved in favour of the statute and it should not be pronounced to be unconstitutional unless it is clearly proved to be so...The presumption means that – there should be such an opposition between the Constitution and the law that the Judge should feel a

clear and strong conviction of their incompatibility...”.

14.29 In the light of the above guidance, we decline to declare **Sections 52 and 53 of the Narcotic and Psychotropic Substances Act**, unconstitutional because the Petitioners have not proved that the provisions are unconstitutional in light of the derogations provided in the Constitution and our finding under paragraph 14.23 herein.

14.30 Before leaving this point, we have to emphasize that Courts sparingly give declaratory reliefs. This was the guidance given in the case of **Communications Authority Vs Vodacom Zambia Limited**⁽¹⁴⁾ wherein the Supreme Court stated, *inter alia* that:

“A declaration is a discretionary remedy. A Party is not entitled to it as of right or course, the discretion must be judiciously exercised. The Court –

a. will not pass a declaration Judgment casually, lightly or easily. The remedy should be granted for good cause, or proper principles and considerations. It must be granted sparingly; with care and utmost caution. It is a remedy which Courts discourage, except in very clear cases.

b. will not grant a declaration when no useful purposes can be served or when an obvious alternative and adequate remedy, such as damages, is available...”

14.31 ***Whether the Search Warrants issued were ultra vires the Bill of Rights.***

To answer this question properly, the question has been broken down as follows:

- a. Whether by the issuance of the Search Warrants in question, the Petitioners' right to privacy was violated?*
 - b. Whether the right to a fair trial was violated?*
 - c. Whether the Petitioners' right to protection against deprivation of property was violated?*
-
- a. Whether the issuance of the Search Warrants in question violated the Petitioners' right to privacy?*

14.32 It was submitted that the right to a fair trial is enshrined and protected under **Article 18** of the **Constitution of Zambia**. The said **Article** in part enacts as follows:

- “18 (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law. (2) every person who is charged with a criminal offence –*
- a. shall be presumed to be innocent until he is proved or has pleaded guilty...”.*

14.33 It was further submitted that the above provision was a subject of interpretation in the case of *Major Isaac Masonga Vs The People*⁽²⁾ wherein the Supreme Court held as follows:

- “It is trite law and a constitutional duty for the prosecution to guarantee a fair and a free trial. Trial starts with investigations. Any short comings in the*

investigations may seriously jeopardize the right to a fair proceeding, and thereby also prejudice the accused person's rights to be presumed innocent".

14.34 It was submitted that the acts of the Respondent's agents were in contravention of the presumption of innocence as the Petitioners are suffering a punishment even before they are charged with any offence and later on presented to any Court of competent jurisdiction.

14.35 In response, the Respondent submitted that the actions taken by the Respondent were taken for the protection of the public at large and for the enforcement of the rights of the public and that they thus fall within the ambit of **Article 17 (2) (b)** of the **Constitution** which provides:

***"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision -
b. that is reasonably required for the purpose of protecting the rights or freedoms of other persons".***

14.36 It was submitted that the law pursuant to which the search and seizure of property was done was reasonably required to protect the rights and freedoms of other persons by preventing others from benefiting or seeking to benefit from crime and proceeds of crime.

14.37 In our considered view, the Search was not arbitrary because it was issued by the Director General of the DEC pursuant to **Section 52** of the **Narcotic Drug and Psychotropic Substances Act** on reasonable suspicion that a serious crime was committed (see **Austin Liato Vs The People**).

14.38 Consequently, what has to be determined is whether the Search Warrant and Warrant of Seizure contravenes the provisions of the Constitution.

14.39 The Petitioners' claim is that the Warrant of Seizure infringes the right to privacy enshrined in **Article 17** of the **Constitution**. The subject **Article** provides:

“17 (1) Except with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision-

- a. that is reasonably required in the interest of defence, public safety, public order, public morality, public health, town and country planning, the development and utilization of mineral resources or in order to secure the development or utilization of any property for a purpose beneficial to the community;*
- b. that is reasonably required for the purpose of protecting the rights or freedoms of other persons;*
- c. that authorized an officer or agent of the Government, a local government authority or a body corporate established by law for a public purpose to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or*

in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government, authority or body corporate, as the case may be; or

- d. that authorizes, for the purpose of enforcing the Judgment or Order of a Court in any civil proceedings, the search of any person or property by Order of a Court or entry upon any premises by such Order; and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not, to be reasonably justifiable in a democratic society”.*

14.40 From the onset, we acknowledge that fundamental rights as enshrined in the **Constitution** must be respected. However, it must be observed that the said Human Rights as enshrined in the **Constitution** are not absolute but are subject to derogation as contained under **Article 17 (2)** cited above.

14.41 The question that we then have to answer is whether the right to privacy of the Petitioner was violated as alleged.

14.42 In our considered view, the right to privacy was not violated because the Search Warrants were issued lawfully pursuant to **Sections 52 and 53** of the **Narcotic and Psychotropic Substances Act** as read together with **Section 118** of the **CPC**.

14.43 Therefore, having established that the Search Warrants were lawfully issued, **Article 17 2 (d)** is triggered, making the search lawful, thus allegation of the violation of the right to privacy does not arise.

14.44 **c. Whether the Petitioners’ right to protection**

against deprivation of property was violated?

It was submitted that the DEC Officers having seized the properties of the Petitioners and having continued the seizure amounts to appropriating their properties and is an affront to **Article 16** of the **Constitution** which speaks against the State compulsorily taking possession of any person's property. **Article 16 (1)** provides:

“16 (1) Except as provided in this Article, no property of any description shall be compulsorily taken in or right over property of any description shall be compulsorily acquired, unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right, to be taken possession of or acquired...”

14.45 Counsel also referred the Court to the case of **Roy Chilumanda and Namwali Lodge and Car Hire Vs Attorney General** where the Court held that it was wrong for DEC to seize property based on rumours and that the acts of the Respondent were unwarranted.

14.46 It was further submitted that the whole process is marred with malice and sadism so as to inflict pain on all the people that served in the previous regime.

14.47 Counsel referred the Court to the case of **The People Vs Peter Thomas London Tembo**, where the Court had this to say:

“The behaviour of the Police must be condemned. It is time they moved away completely from the notion that any one brought to the Police is guilty of the crime complained of, they should always be wary of

the fact that there are in our communities, sadists who are interested in seeing others suffer even for crimes they did not commit. That certain complaints are filed with Police based on jealousies while others arise out of sheer vengeance. As a professional body, the Police are encouraged to be objective in their investigations and only bring cases to Court that merit prosecution...in that way the number of cases before Courts will be reduced as only deserving cases will be prosecuted”.

14.48 In response, the Respondent submitted that the seizure of the properties in this case was for the purposes of investigations and does not amount to compulsory acquisition as envisaged by **Article 16** of the **Constitution**.

14.49 It was Counsel’s submission that the properties in question were seized on the basis that they were suspected to be proceeds of crime and to aid investigations.

14.50 We have considered the submissions of both Parties, and in our considered view the Petitioners’ arguments are two-fold namely:

(a) Whether by carrying out the Search and eventual issuance of the Warrant of Seizure violated the Petitioners’ right to be presumed innocent.

(b) Whether the seizure of the property violated Article 16 of the Constitution.

14.51(a) *Whether by carrying out the Search and eventual issuance of Warrant of Seizure violated the Petitioners’ right to be presumed innocent.*

In our considered view, the right to be presumed innocent was not violated because the Officers of the Respondent merely carried out investigations.

14.52 In our further analysis, the investigations by Officers of the Respondent were fair as guided in the case of ***Major Masonga*** relied on by the Petitioner. We say so because we have established that the Search Warrant was correctly and properly issued by the Director General of DEC.

14.53 Further, the fact that the 1st Petitioner was later charged while other Petitioners were not, confirms that the investigations carried out were fair.

14.54 **(b) *Whether the seizure of the property violated Article 16 of the Constitution.***

In our considered view, the fact that the properties in question were seized does not entail that the said properties were compulsorily acquired by the Respondent.

14.55 It must be stated that the right to own property is not absolute as the said right is also subject to claw backs. In *casu*, the properties were not compulsorily acquired but merely seized for investigations. Depending on how the matter is prosecuted in Court, the properties in question can be handed back to the Petitioners. Therefore, seizing property for purposes of investigations does not amount to compulsory acquisition of property.

14.56 It must also be stated that granting the declaration being sought by the Petitioners that the properties were legitimately acquired and should be handed back would effectively curtail the investigations by the Respondent. This would fly in the teeth of established principle that civil matters cannot stop

criminal investigations as alluded to in the cases of **C & S Investments Limited and Another Vs The Attorney General**⁽¹⁵⁾ and that of **Rajan Lekhraj Mahtani and John Sangwa Vs The People**⁽¹⁶⁾.

14.57 (c) ***Whether the DEC Officers trespassed on the Petitioners' property.***

It was Counsel's submission that the actions of the DEC Officers amounted to trespass to land and to property/chattel. Counsel referred the Court to the case of **Shell & BP Zambia Limited Vs Conidaris and Others:**

“Trespass to land is an unlawful entry on land in the possession of another; a license prevents the entry of the licensee from being a trespass and renders it lawful”.

14.58 It was Counsel's submission that in *casu* DEC Officers did not have consent to enter the Petitioners' premises thus they had no licenses to be on it. To that end they were trespassers on the premises.

14.59 It was Counsel's submission that at common law, Police Officers or anyone else is not allowed to ransack anyone's house, or to search for papers or articles therein or to search his person, simply to see if he may have committed some crime or other, as that would be trespass as per Lord Denning M. R. in the case of **Ghani Vs Jones** where it was held as follows:

“The common law does not permit Police Officers, or anyone else to, ransack anyone's house, or to search for papers or articles therein or to search his person simply to see if he may have committed some crime or

other. If Police Officers should do so, they would be guilty of trespass”.

14.60 In response, the Respondent submitted that there can be no trespass when there is authority for the entry to land as was the case in this matter where there was authority in writing in the form of Warrants from the Director General of the DEC.

14.61 We have considered the arguments of both Parties.

14.62 In our considered view, there was no trespass because there was a Search Warrant issued by the Director General of the DEC to allow the Officers to carry out the Search pursuant to **Section 52** of the **Narcotic Drug and Psychotropic Substances Act**.

14.63 As regards arbitrariness, it is our considered view that there was no arbitrariness because the search was triggered by reasonable suspicion. This is exemplified by the Warn and Caution Statement recorded from the 1st Petitioner which showed that as at 7th November, 2011, the 1st Petitioner had declared total assets of K3,439,390.40 but as of 30th November, 2023 he was found in possession of property estimated at the cost of construction of K21,472,858.60.

14.64 ***(d) Whether the Petitioners are entitled to damages as a result of the trespass?***

It was submitted that the Petitioners have been denied proper use of their properties which were seized, as such, the Petitioners must be compensated for the loss they have suffered.

14.65 In response, Counsel submitted that the Petitioners are not entitled to damages for loss of property and trespass owing to

the fact that the properties were seized in accordance with the provisions of the law pursuant to lawful Order or Warrant.

14.66 We have considered the arguments of both Parties. In *Morgan Vs Sim*⁽¹⁷⁾ it was held that:

“The Party seeking to recover compensation for damages must make out that the Party against whom he complains was in the wrong. The burden of proof is clearly upon him, and he must show that the loss is attributed to the other Party. If at the end, he leaves the case in even scales and does not satisfy the Court that the loss was occasioned by the default of the other Party, he cannot succeed”.

14.67 In the light of the above guidance, it is our considered view that the Petitioners have not proved that they are entitled to any damages. This is so because the Search and eventual Seizure were lawful. Further, the Petitioners have not proved that they have suffered any damage for them to be awarded damages. This is in line with the guidance laid down in *J. Z. Car Hire Vs Chala Scirocco and Enterprises Limited*⁽¹⁸⁾

wherein the Supreme Court states as follows:

“This Court has said it in a number of cases such as Zulu Vs Avondale Housing Project and Mhango Vs Ngulube and Others that it is for the party claiming the damages to prove the damage, never mind the opponent’s case”.

15.0 CONCLUSION

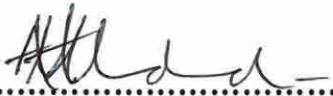
15.1 Having considered the arguments of both Parties in the light of the authorities, we find that the Petitioners have failed to prove their case on a balance of probabilities, as such, the

Petition is dismissed with costs to the Respondent to be taxed in default of agreement.

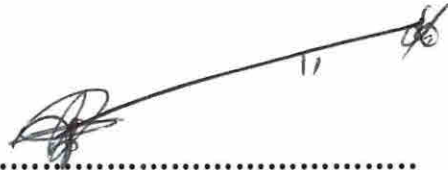
DELIVERED AT LUSAKA THIS 13TH DAY OF NOVEMBER, 2024.



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P. K. YANGAILO
HIGH COURT JUDGE



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



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