

National Prosecutions Authority.

For the Interested Party:

Mr. I. Simbeye – Messrs. Malisa
and Partners Legal Practitioners.

JUDGMENT

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

CASES REFERRED TO:

1. *Simon Prophet Vs The National Director of Public Prosecutions Case CCT 56;*
2. *Director of Public Prosecutions Vs Jessie Bwalya Kapyelata Tapalu;*
3. *The Director of Public Prosecution Vs Dhiraj Dhumputha 2020/HP/1287;*
4. *Director of Public Prosecution and ZMK157,040, US\$23,007.14, ZMK50,000, and ZMK82,333.83 held in different Bank Accounts 2019/HP/1784;*
5. *Director of the Assets Recovery Agency Vs Szepietowski & Ors (2007) EWCA Civ. 755;*
6. *Abdulrahman Mahmoud Sheikh and 6 Others Vs Republic and Others 2016 eKLR;*
7. *Kumarnath Mohunram & Shelgate Investments CC Vs The National Director of Prosecutions BOE Bank Limited & The Law Review Project (As Amicus Curiae) CCT 19/06/2007/ZACC;*
8. *National Director of Public Prosecutions Vs RO Cook Properties (260/03) [2004] ZASCA 36;*
9. *The People Vs Austin Chisangu Liato Appeal No. 291 of 2014;*
10. *Bwalya Chitalu Kalandanya and Others Vs The Attorney General (2023) ZMHC 5;*
11. *Godfrey Miyanda Vs The High Court (SCZ Judgement No.5 of 1984) [1984] ZMSC 19 (18 June 1984);*
12. *Rosemary Chibwe Vs Austin Chibwe SCZ Judgment No. 38 of 2000;*
13. *The Attorney General Vs Roy Clarke (2008) Z.R. 38 Vol. 1 (S.C.);*
14. *Regina Chifunda Chiluba Vs The People, HPA/15/2009;*
15. *Kabwe Transport Company Limited Vs Press Transport Company Limited (1985) Z.R. 24 (HC);*

16. *Shamwana and Seven (7) Others Vs the People* (1985) Z.R. 41 (SC);
17. *The People Vs Fredrick Chiluba* (2003) ZR 153;
18. *R Vs Ilham Anwoir, Brian McIntosh, Ziad Meghrabi and Adnan Elmoghrabi* [2008] EWCA Crim 1354;
19. *Criminal Assets Bureau Vs James Gately and Charlene Lam* (2024) IEHC 399;
20. *Sydney Mwansa Vs The Director of Public Prosecutions Appeal No. 276/2021*;
21. *Nathan Mbaya and 2 Others Vs the Director of Public Prosecution Appeal No. 123 of 2024*;
22. *Melrose General Services Limited Vs The Economic and Financial Crimes Commission SC 1519 of 2019*;
23. *Asset Recovery Vs Peter Oluwafemi Olaiwon Civil Suit No. E002 of 2022*;
24. *NFC Africa Mining PLC Vs Techro Zambia Ltd (SCZ Judgment 22 of 2009) [2009] ZMSC 168 (3 September 2009)*;
25. *The Director of Public Prosecutions Vs Dalitso Lungu 2023/HPEF/24*;
26. *The Director of Public Prosecutions In Re Property Chiyeso Lungi 2023/HPEF/26*;
27. *Richard Musukwa and 7 Others Vs The Attorney General 2023/HPEF/21*;
28. *The Director of Public Prosecutions in Re Property Esther Nyawa Lungu 2023/HPEF/23*;
29. *General Nursing Council of Zambia Vs Ing'utu Milambo Mbagweta (2008) ZR 105 (SC)*;
30. *Matilda Mutale Vs Emmanuel Munaile (SCZ Judgment 14 of 2007) [2007] ZMSC 188 (25 July 2007)*;
31. *Minister of Information and Broadcasting Services and Another Vs Chembo and Others (76 of 2005) [2007] ZMSC 11 (14 March 2007)*;
32. *The Director of Public Prosecutions Vs Sharon Lee Brown (S.C.Z. Judgment 10 of 1974) [1974] ZMSC 1 (8 July 1974)*;
33. *Johannes Kenneth Soigopi (T/A Nam Transport Co. A Partnership) Vs Director of Public Prosecutions Appeal NO. 196/2020*;
34. *Milner Vs Minister of Pension [1947] 2 All E.R. 372*;
35. *Sundi Vs Ravalia (Civil Appeal Cause 49 of 1948) [1949] ZMHCCR 1 (1 June 1949)*;
36. *Manuel Mota De Sousa Vs John Kees Mumba SCZ Appeal No. 17 of 1993*;
37. *Examinations Council of Zambia Pension Trust Scheme Registered Trustees & Another Vs Tecla Investments Limited (37) (Appeal 127 of 2015) [2018] ZMSC 313 (19 September 2018); and*

38. *The Director of Public Prosecution In Re Property Henry Banda and 2 Others 2022/HPEF/16.*

LEGISLATION REFERRED TO:

1. *The High Court Rules of the High Court Act, Chapter 27 of the Laws of Zambia;*
2. *The Forfeiture of Proceeds of Crime Act No. 19 of 2010 of the Laws of Zambia;*
3. *The Income Tax Act Chapter 323 of the Laws of Zambia;*
4. *The Prohibition and Prevention of Money Laundering (Amendment) Act No. 44 of 2010 of the Laws of Zambia;*
5. *The Prohibition and Prevention of Money Laundering Act No. 14 of 2001 of the Laws of Zambia;*
6. *The Rules of the Supreme Court of England (White Book) 1999 Edition Sweet & Maxwell;*
7. *The Constitution of the Republic of Zambia Act No 18 of 1996 of the Laws of Zambia;*
8. *The Prevention of Organised Crime Act Number 121 of 1998 (South Africa);*
9. *The Electronic Communications and Transactions Act No. 5 of 2022 of the Laws of Zambia;*
10. *The Evidence Act, Chapter 43 of the Laws of Zambia;*
11. *The Interpretations and General Provisions Act Chapter 2 of the Laws of Zambia;*
12. *The Anti-Corruption Act No 3 of the 2012 of the Laws of Zambia; and*
13. *The Lands and Deeds Act Chapter 185 of the Laws of Zambia.*

OTHER WORKS REFERRED TO:

1. *Murphy on Evidence. 5th Edition (1995) Universal Law Publishing;*
2. *1988 Vienna Convention on Money Laundering;*
3. *Financial Action Task Force (FATF);*
4. *Phipson on Evidence 17th Edition Thompson Reuters, 2010; and*
5. *Black's Law Dictionary, 11th Edition. Bryan A. Garner Editor in Chief, Thomson Reuters.*

1. INTRODUCTION

- 1.1 The Applicant filed Originating Notice of Motion for an Application for 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 Crimes Act No. 19 of 2020** of the **Laws of Zambia**.

- 1.2 The Notice of Motion, filed on 13th June, 2023, was accompanied with an Affidavit in Support, List of Authorities and Skeleton Arguments of even date.
- 1.3 The Interested Party opposed the Application through an Affidavit in Opposition accompanied with List of Authorities and Skeleton Arguments filed on 16th May, 2024.
- 1.4 The Applicant filed Affidavit in Reply with List of Authorities and Skeleton Arguments on 18th June, 2024.

2. THE APPLICANT'S APPLICATION

- 2.1 The Applicant's Affidavit in Support was sworn by **EMMANUEL KHONDOWE**, a Senior Investigations Officer in the employ of the Drug Enforcement Commission (DEC) working under the Anti-Money Laundering Investigations Unit (AMLIU).
- 2.2 In his Affidavit in Support, Mr. Emmanuel Khondowe deposed that in May, 2022, DEC received information to the effect that there was real property that was reasonably suspected to be proceeds of crime situate at Plot No. LUS/38478 in Lusaka. That the property belonged to politically exposed persons and their close associates and was acquired between 2013 and 2022.
- 2.3 It was deposed to that in the same month of May, 2022, the DEC, on receipt of the information, constituted a team of Investigators and instituted investigations into the matter and that the Deponent was assigned to lead the said investigations.
- 2.4 It was deposed that investigations revealed that the real Property in question belonged to Charles Phiri and a search at Ministry of Lands and Natural Resources established that the Property in question is

registered in the name of Charles Phiri as per exhibit marked "**EK1**", being a copy of the Register.

- 2.5 The Deponent averred that on 1st November, 2022, he recorded a Statement, exhibited and marked "**EK2**", from Mr. Andrea Chuni, a Senior Registrar at the Ministry of Lands, who stated that Property No. LUS/38478 at Entry Number 1 of the Lands and Deeds Register was a 99-year State Lease to Eric Mwaba Chimese who obtained title under Certificate of Title number 286342 on Entry Number 2 of the Register.
- 2.6 Further to the above that at Entry Number 3 of the Lands and Deeds Register is a Surrendered Deed, the Lessee being Eric Mwaba Chimese and the Lessor being the Commissioner of Lands. That on Entry Number 4 of the Register is a 99-year State Lease from the President of the Republic of Zambia to Charles Phiri under Certificate of Title Number CT_8508.
- 2.7 The Deponent avowed that he wrote to the Ministry of Infrastructure Housing and Urban Development (MIHUD) requesting for the estimated cost of construction of the 3 storey Lodge on the Property in question. That as at November, 2022, it was estimated to be ZMW15,549,422.22 as per copy of Bill of Quantities exhibited and marked "**EK3**".
- 2.8 Emmanuel Khondowe deposed that he interviewed and recorded a Statement, a copy of which was exhibited and marked "**EK4**", from Mickey Kaisi, a Quantity Surveyor from MIHUD, who explained that using the average United States Dollar rate of UDS1.00 to ZMW9.49 from 2015 to 2017, being the period between which the structures were constructed, the cost was interpolated to ZMW9,069,699.87.

- 2.9 That following the above, and upon receiving the Priced Bill of Quantities Report, the Deponent decided to investigate the financial capacity of Charles Phiri; that his investigations revealed that Charles Phiri holds an account with First National Bank (FNB).
- 2.10 It was avowed that a Statement, exhibited and marked "**EK7**", was recorded from Ms. Mwangala Sikombe, an Administration Manager at FNB, who confirmed that Charles Phiri holds a Kwacha Account Number 62545557780 and a United States Dollar Account Number 62650398813 at the Bank. That the Kwacha Account was opened on 2nd July, 2015, and is domiciled in Kitwe and the United States Dollar Account was opened on 20th October, 2016, also domiciled at the Kitwe Industrial Branch.
- 2.11 Further to the above, it was deposed that the Kwacha Account showed total debit entries worth ZMW874,653.11 and total credit entries worth a gross total of ZMW875,155.54 as debit and credit turnover between 2nd July, 2015, to 3rd January, 2023. A copy of the Kwacha Account Statement was exhibited and marked "**EK5**".
- 2.12 Further, that the United States Dollar Account had total debit entries worth USD2,850.00 and total credit entries worth a gross total of about USD2,101.33 as credit and debit turnover between 20th October, 2016, and 20th January, 2023. Copy of the United States Dollar Account Bank Statement was exhibited and marked "**EK6**".
- 2.13 The Deponent averred that he found that Charles Phiri was the sole signatory to both Accounts as per a Statement from Ms. Mwangala Sikombe exhibited and marked "**EK7**".
- 2.14 It was deposed that the Deponent extended his investigations to the Zambia Revenue Authority (ZRA) with regards to the Tax Returns for Mr. Charles Phiri and Crest Lodge. That a Statement was recorded

from Mr. Chilala Hakalima, the Assistant Director Investigations at ZRA who also provided attachments, though the same were not provided. A copy of the Statement, both written and typed, is exhibited and marked "**EK8**".

- 2.15 That investigations and a search on Charles Phiri's tax compliance showed that taxes on the three storey Lodge built on his land alluded to above had not been paid.
- 2.16 The Deponent avowed that, on the advice of Counsel and verily believing the same to be true, Tax Evasion is a serious offence which on conviction could attract a penalty of three (3) years imprisonment.
- 2.17 Emmanuel Khondowe deposed that investigations further revealed that around 16th November, 2021, Charles Phiri sold 10,892.3890 hectares of land being property number F/Mpika/1912933 for USD100,000.00 to Muneer Mitha and Mitha Ibrahim Hanif Mohamed and paid ZMW87,250.00 in Property Transfer Tax.
- 2.18 That the Deponent conducted an analysis of Charles Phiri's known income and known expenditure for the period 1st August, 2015, to 8th June, 2023, which revealed incomes of ZMW875,155.54, USD100,000.00 and USD2,850.00 with variations of ZMW502.43 and USD99,251.33.
- 2.19 That following the above analysis, the Deponent did a comparison of the known income of ZMW875,155.54 and USD102,101.33 which came after the construction period, against the three storey Property valued at ZMW9,069,699.87, which gave a variation of about ZMW5,642,011.08 above his known income.
- 2.20 The Deponent swore that his review of the Tax Returns, known income and known expenditure for Charles Phiri showed that during the estimated period for the construction of the three storey Lodge,

being between 2015 and 2017, there was no income to justify the estimated value of construction referred to in Paragraph 2.19 above.

2.21 The Deponent avowed that he seized the Property No. LUS/38478 in question, as it was reasonably suspected to be a proceed of crime. A copy of the Seizure Notice was exhibited and marked “**EK9**”.

2.22 That having been advised and verily believing the same to be true and correct, the Deponent averred that the above cited Property is tainted property and liable for forfeiture to the State because the Property is reasonably suspected to be a proceed of crime.

2.23 Further that the offences in **Section 71** of the **Forfeiture of Proceeds of Crime Act No. 10 of 2010** and **Section 102** of the **Income Tax Act Chapter 323** of the **Laws of Zambia** are serious offences.

2.24 In the Skeleton Arguments filed, Counsel for the Applicant begun by establishing this Court’s jurisdiction to hear the Matter by referring the Court to **Order XXX, Rules 15** and **17** which states as follows:

“15. Where any application is authorized to be made to the court or a Judge, such application, if made to a Judge in Court, shall be made by Motion.”

“17. There shall be served with the notice of motion a copy of any affidavit on which the party moving intended to rely at the hearing of such motion.”

2.25 Counsel further anchored the Application on **Sections 29** and **31** of the **Forfeiture of Proceeds of Crime Act (FPOCA)** and submitted that **Section 29** states as follows:

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

- 2.26 Counsel submitted that Non-Conviction Based Forfeiture, also known as Civil Forfeiture, provides a unique remedy used as a measure to combat organized crime. That it rests on the legal fiction that property, and not the owner, has contravened the law. Counsel submitted that it does not require a conviction or even a criminal charge against the owner. That this kind of forfeiture is in theory seen as remedial and not punitive.
- 2.27 Counsel fortified the above submission with the case of **Simon Prophet Vs The National Director of Public Prosecutions** ⁽¹⁾ where the Constitutional Court of South Africa was called upon to strike an appropriate balance between two constitutional principles, the first of which is that no one should be arbitrarily deprived of property, and the second is that the State is under an obligation to protect members of the public from criminal predations.
- 2.28 Counsel submitted that a Non-Conviction Based Forfeiture is meant to demonstrate that crime does not pay; to incapacitate criminal moguls so that property with which they allegedly committed the crime is taken away from them and by so doing to protect the public from criminal magnates.
- 2.29 It was Counsel's submission that Non-Conviction Based Forfeiture is constitutional and fortified his assertion with the decision in the case of the **Director of Public Prosecutions Vs Jessie Bwalya Kapyelata Tapalu** ⁽²⁾.
- 2.30 In addition, Counsel submitted that a Non-Conviction Based Forfeiture application may be brought whether a person has been acquitted, charged or not; that it is independent of a criminal trial hence, may run parallel with a criminal matter as was the decision

of the Court in the case of **The Director of Public Prosecution Vs Dhiraj Dhumputha** ⁽³⁾ and as per **Section 31(4)** of the **FPOCA**.

2.31 Counsel further submitted that in the case of **Director of Public Prosecution and ZMK157,040.00, US\$23,007.14, ZMK50,000.00, and ZMK82,333.83 held in different Bank Accounts** ⁽⁴⁾ this Court stated as follows:

“A non-conviction based forfeiture provides an effective avenue for confiscation in situations where it is not possible to obtain a criminal conviction, whether the defendant is dead, unknown, missing or immune from prosecution, or in cases where the statute of limitations prevents prosecution.”

2.32 Counsel submitted that in *casu*, the Applicant has filed a Notice of Motion for Non-Conviction Based Forfeiture Order against the tainted properties supported by an Affidavit in Support which provides clear evidence that the Property in question is a proceed of crime as its value exceeds the net worth of the Interested Party.

2.33 Counsel contended that it is clear that the Property owned by the Interested Party is proceeds of crime and that the possession of the said Property violates the provisions outlined in **Section 71** of the **FPOCA**. Counsel went on to quote the definitions of “proceeds of crime” and “property” under the **Prohibition and Prevention of Money Laundering (Amendment) Act No. 44 of 2010** as read with the **Prohibition and Prevention of Money Laundering Act No. 14 of 2001**, as well as the definition of “proceeds of crime” under the **FPOCA**.

2.34 Counsel argued that the Affidavit in Support of the Application shows that the estimated cost for the construction of the three storey

Lodge at Property No. LUS/38578 was ZMW9,069,699.87. That Charles Phiri's Bank Account No. 62545557780 has total debit entries worth about ZMW874,653.11 and total credit entries worth a gross total of about ZMW875,155.54 as credit and debit entries turnover between the period 2nd July, 2015, when the Account was opened, and 3rd January, 2023.

2.35 That Charles Phiri's Dollar Account had debit entries worth about USD2,850.00 and total debit entries worth a gross total of about USD2,202.33 as credit and debit turnover between the period the Account was open on 20th October, 2016, and 20th January, 2023.

2.36 It was Counsel's contention that the above evidence clearly shows the difference between the money that Charles Phiri had and the estimated cost for the construction of the property. That the construction expenses are far much higher than the money that Charles Phiri has in his Account and that he did not give any reasonable and sufficient explanation of how he managed to construct the property in question. Additionally, that the Affidavit in Support of the Notice of Motion clearly shows that Charles Phiri had no other source of income.

2.37 Counsel argued that the above proves the fact that Charles Phiri was in possession of Property suspected to be Proceeds of Crime as he failed to give proper and sufficient explanation of where the money, he used to construct the properties in issue, came from.

2.38 That further, Counsel argued, it is clear from the income and expenditure analysis and the comparison of known income tabulations shown for the period 1st August, 2015, to 14th March, 2023, that Charles Phiri had no capacity to possess and develop the properties in issue.

2.39 Counsel referred this Court to the case of **Director of the Assets Recovery Agency Vs Szepietowski & Others** ⁽⁵⁾ and the holding of Moore-Bick LJ at paragraphs 106 and 107 as follows:

“106 When deciding what the Director must prove, it is important to bear in mind that the right to recover property does not depend on the commission of unlawful conduct by the current holder. All that is required is that the property itself be tainted because it, or other property which it represents, was obtained by unlawful conduct...it is important therefore, that the Director should be required to establish clearly that the property which she seeks to recover, or other property which it represents, was indeed obtained by unlawful conduct.”

“109 In order to do that it is sufficient, in my view, for the Director to prove that a criminal offence was committed, even if it is impossible to identify precisely when or whom or in which circumstances, and that the property was obtained by or in return for it. In my view Sullivan J. was right, therefore, to hold that in order to succeed, the Director need not prove commission of any specific criminal offence, in the sense of proving that a particular person committed a particular offence on a particular occasion.”

2.40 Counsel submitted that the Affidavit in Support furthermore chronicled investigations which resulted in the seizure of the cited Property which are the subject of the Application as they are tainted properties as defined by **Section 2** of the **FPOCA**. Counsel went on to define “serious offence” as provided for under the said Section.

2.41 It was contended that the Property is proceeds of crime in that the Interested Party has not given any sufficient explanation on how he acquired the Property. That they are proceeds of crime and should be forfeited to the State.

2.42 Counsel submitted that in the Kenyan case of **Abdulrahman Mahmoud Sheikh and 6 Others Vs Republic and Others** ⁽⁶⁾ it was held that:

“The letter, spirit, purpose and gravamen of the Proceeds of Crime and Anti-Money Laundering Act is to ensure that one doesn’t benefit from criminal conduct and that should any proceeds of criminal conduct be traced then it ought to be forfeited, after due process, to the State, on behalf of the public which is deemed to have suffered some injury by the criminal conduct”

2.43 Counsel quoted **Section 31(1)** of the **FPOCA** and submitted that consequently, the balance of proving that the Property is tainted or proceeds of crime is lower than in criminal matters. That the standard of proof is on a balance of probabilities. Counsel submitted that as set out in the preceding Section, on a balance of probabilities, from the evidence set out, it can clearly be seen that the Property in question are proceeds of crime.

2.44 It was submitted that the offences of being in possession of property suspected of being proceeds of crime are serious offences because one can be sentenced to twelve months or more imprisonment when found guilty.

2.45 Counsel submitted that in addition to the above, it is essential to add the tax component in this discussion. Counsel submitted that taxation can be defined as a process of raising revenue for the

Central Government through levy on income and gains of resident persons. It was submitted that tax evasion, on the other hand, can be described as the illegal evasion of taxes by individuals, corporations and trusts.

2.46 Counsel argued that Charles Phiri deliberately misrepresented the true state of his affairs to the tax authorities perhaps to reduce his tax liability. That such dishonest tax reporting is described among other acts as an act of tax evasion, an illegal activity in which a person or entity deliberately avoids paying a true tax liability and that those caught evading taxes are generally subject to criminal charges and substantial penalties.

2.47 Counsel submitted that in accordance with the **Income Tax Act of 2018**, the General Penalty under **Section 98** highlights the following:

“Any person guilty of an offence against this Act shall, unless any other penalty is specifically provided therefore, be liable on conviction therefor to a fine not exceeding one hundred thousand penalty units or to imprisonment for a term not exceeding twelve months, or to both.”

2.48 It was submitted that the **Income Tax Act** goes further to outline the penalty for fraudulent returns as a form of tax evasion under **Section 102(1)** in the following terms:

“Any person who willfully with intent to evade or to assist another person to evade tax shall be guilty of an offence and on conviction shall be liable to a fine not exceeding three hundred thousand penalty units or to imprisonment for a term not exceeding three years, or to both.”

2.49 In conclusion, Counsel urged us to adopt the reasoning of Van Heerden AJ in the persuasive South African case of **Kumarnath Mohunram & Shelgate Investments CC Vs The National Director of Prosecutions BOE Bank Limited & The Law Review Project (As Amicus Curiae)** ⁽⁷⁾ wherein she cited with approval the holding of the Supreme Court in the **Case of National Director of Public Prosecutions Vs RO Cook Properties** ⁽⁸⁾ and submitted that the Applicant has established on a balance of probabilities that the Property cited above are proceeds of crime. That the Affidavit and exhibits have placed sufficient evidence to satisfy the Court that the Property stated above are proceeds of crime.

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

3. THE RESPONSE BY THE INTERESTED PARTY

3.1 The Interested Party filed an Affidavit in Opposition with List of Authorities and Skeleton Arguments on 16th May, 2024.

3.2 The Affidavit in Opposition was sworn by **Charles Phiri**, the Interested Party herein, who began by stating that having viewed the Application of the Director of Public Prosecutions (DPP) filed into Court on 13th June, 2023, and having been advised by his Lawyers, and verily believing the same to be true, he noted the following issues:

3.3 That the purported Originating Notice of Motion does not conform with the prescribed form for an Originating Notice of Motion in that the words "*Republic of Zambia*" followed by "*Originating Notice of Motion*" on top of the form, and the note "*NOTE: It will not be necessary for you to enter an appearance but if you do not attend*

either in person or by your Advocate, at the time and at the place above mentioned, such order will be made and proceedings taken as the Court may think just and expedient.” at the bottom of the form as contained in the Prescribed Form 11 in the First Schedule to the **High Court Act, Chapter 27** of the **Laws of Zambia**, are missing. It was argued that by virtue of the depositions in Paragraphs 5 and 6 of the Affidavit in Support, the purported Originating Notice is irregular in substance for want of conformity with the prescribed form.

- 3.4 That Paragraphs 5 to 8 and 10 of the Affidavit of Emmanuel Khondowe filed in Support are neither sworn in the first person nor do they disclose the source of the information deposed to.
- 3.5 That exhibit “**EK8**” is not certified to be a true copy of the original handwritten Statement.
- 3.6 Charles Phiri avowed that he is a qualified Registered Nurse, with extensive experience in various institutions, including the Ministry of Health, Zambia Airways, and Zambart and that his professional tenure spans since 1990.
- 3.7 The Deponent averred that indeed the Bank Account Numbers 62545557780 and 62650398813 held at FNB are his, and the money credited therein is his.
- 3.8 It was deposed that in 2015, the Deponent applied for land, being Property Number LUS/38478 situate in Lusaka, in the Lusaka Province, from the Ministry of Lands Natural Resources and Environmental Protection (Ministry of Lands).
- 3.9 That on 4th May, 2015, he was issued with an Invitation to Treat with respect to the said Property requesting him to pay the sum of ZMW2,122.51 indicating that upon remittance of the payment, the

Lands Department would generate and issue him with a formal Offer Letter, exhibited and marked "**CP1**".

- 3.10 It was deposed that on 5th May, 2015, the Deponent paid the sum required and upon presenting the deposit slip, the Ministry of Lands issued him with an official Government of Zambia Receipt Number G00998053 both exhibited and marked "**CP2a**" and "**CP2b**" respectively.
- 3.11 The Deponent averred that on 1st June, 2015, the Office of the Commissioner of Lands issued him with a formal Offer Letter exhibited and marked "**CP3**". That following the issuance of the Offer Letter, the Ministry of Lands proceeded to issue him with the Certificate of Title No. 8508, exhibited and marked "**CP4**", with respect to the Property, then numbered as Stand No. 38478.
- 3.12 The Deponent avowed that Mr. Edgar Chagwa Lungu, thereafter, offered to develop the Property together with his own property which was lying adjacent to the Deponent's Property by building a modern lodge thereon.
- 3.13 That the Deponent accepted the offer and Mr. Edgar Chagwa Lungu proceeded to develop the Property on the understanding that further to certain attainments, the Deponent would be allowed to receive rentals. A copy of the Land Use Agreement signed between Mr. Edgar Chagwa Lungu and the Deponent was exhibited and marked "**CP5**".
- 3.14 Charles Phiri avowed that contrary to the Affidavit in Support, he does not operate a business for which he has evaded any taxes.
- 3.15 It was sworn that in his Affidavit in Support, Mr. Emmanuel Khondowe has willfully concealed the fact that the Deponent gave a voluntary Statement to him explaining that it is Mr. Edgar Chagwa

Lungu who had developed the structures on the Deponent's Property and the terms on which he constructed the same.

- 3.16 That despite referencing and presenting Statements from other interviews, Mr. Emmanuel Khondowe has intentionally failed or neglected to provide the Statement he recorded from the Deponent or disclose the explanation given to him during their interactions. That he has neglected to disclose all the material information the Deponent voluntarily shared with him during the interrogation at his Offices.
- 3.17 It was deposed that even by merely relying on the Deponent's income as presented in the Affidavit in Support, it is not in dispute that at the material time of purchasing the Property, the Deponent had overwhelming capacity to acquire the said Property for which he needed to only pay less than ZMW3,000.00 to the Ministry of Lands.
- 3.18 The Deponent averred that Mr. Edgar Chagwa Lungu was a Lawyer who later served Government in various positions including the position of President of the Republic of Zambia for seven (7) years and as such, the Deponent has no reasonable basis for doubting his capacity to build the structure on his property.
- 3.19 It was deposed that with regard to the construction and further to the above, the Deponent firmly believes that Mr. Edgar Chagwa Lungu is likely to possess the most accurate information regarding the full construction costs.
- 3.20 It was deposed that having looked at the Priced Bill of Quantities in the Affidavit in Support, the same does not state the time period for the stated price estimates. That if the price estimates were as at November, 2022, then the Priced Bill of Quantities is materially

misleading because as at November, 2022, the structure had already been completed, occupied and commercially utilized.

- 3.21 That premised on the explanation above, the Deponent avowed that his Property is neither tainted nor is it a proceed of crime and therefore, the same is not liable for forfeiture to the State as there is no basis for forfeiting the Property contrary to the allegations in the Affidavit in Support.
- 3.22 The Deponent submitted that if Mr. Emmanuel Khondowe conducted thorough investigations, he would have found that the Deponent is not running any business with respect of which he has evaded tax as alleged in the Affidavit in Support.
- 3.23 Charles Phiri avowed that indeed in 2021, he sold his lawfully acquired property being F/Mpika/1912933 at a consideration of USD100,000.00, and that he paid Property Transfer Tax to ZRA and that there is nothing illegal or irregular with him selling the said property in the manner he did. That therefore, the depositions in the Affidavit in Support are immaterial save to demonstrate that he does lawfully make substantial money outside his formal employment and outside the monies going through his Accounts referred to above.
- 3.24 It was averred that Mr. Khondowe's analysis of the Deponent's known income and known expenditure and ability to construct the said building on his Property is unfounded as prior to this Application, the Deponent had disclosed to him the identity of the constructing party, which information Mr. Khondowe chose to withhold, thereby, fostering an artificial and unwarranted suspicion.
- 3.25 The Deponent reiterated that the Property is not tainted as in any case, the Applicant has not brought any evidence showing that the

said Property is connected to any crime whatsoever contrary to the allegations in the Affidavit in Support.

- 3.26 The Deponent avowed that he verily believes that the DPP cannot categorise his Property as tainted without the Court making such a determination; that the Property is lawfully his and does not form proceeds of any crime as it was lawfully acquired with legal and traceable sources of income.
- 3.27 In the Skeleton Arguments in Opposition to the Application for Non-Conviction Based Forfeiture Order filed on 16th May, 2024, Counsel for the Interested Party began by giving a summary of what is contained in the Affidavit in Opposition above which we shall not repeat here.
- 3.28 In objecting to the provisions of the Applicant's Affidavit in Support offending the mandatory Rules of Court, Counsel submitted that Paragraphs 5 to 8 and 10 of the Affidavit in Support are neither sworn in the first person nor do they disclose the source of information deposed to. That Paragraph 17 of the Affidavit is not sworn in the first person nor does the Deponent express any belief in the information and that this applies to the contents of exhibit "**EK3**" referred to therein. It was further submitted that exhibit "**EK8**" is not certified to be a true copy of the original handwritten Statement.
- 2.29 Counsel contended that the foregoing non-compliance in the Applicant's Affidavit in Support violates mandatory Rules of Court for preparing Affidavits and proceeded to argue the issues raised which we will not reproduce but have taken note of them.
- 2.30 With regards the rest of the arguments contained in the Skeleton Arguments, Counsel began by submitting on the novelty of the

proceedings under the **FPOCA** and the Zambian Jurisdiction. That the novelty of the proceedings under the **FOPCA** has been acknowledged in the Supreme Court case of **Austin Chisangu Liato Vs The People** ⁽⁹⁾ and in the High Court cases of **Jessie Kapyelata Tapalu Vs The Attorney General** ⁽²⁾ and **Bwalya Chitalu Kalandanya and Others Vs The Attorney General** ⁽¹⁰⁾.

- 2.31 In this respect, it was Counsel's submission that the point being made is that proceedings of this kind currently before this Court are in the realm of unsettled jurisprudence and as such, the Court is urged to approach the interpretation of the law in a way that will reflect the intention of the Legislature as expressed in the **FPOCA**.
- 2.32 It was submitted that the Court should not tightly constrain itself by the emerging jurisprudence that this Court finds to be inconsistent with the express provisions of the Statute. The Court was beseeched to seek the true meaning of the provisions presented to it for interpretation.
- 3.33 When it came to the basis of the DPP's Application, Counsel quoted **Sections 29** and **31** of the **FPOCA** and contended that pursuant to **Section 31**, in order to make an application such as the one presently before Court, the DPP should, firstly, demonstrate, on a balance of probabilities, that the assailed property is tainted as defined under **Section 2** of the **FPOCA**. Counsel submitted that **Section 31(2)** of the **FPOCA** accords an innocent party with a statutory defence.
- 3.34 It was submitted that the DPP has not demonstrated that the Interested Party's Property subject to this Application is tainted within the statutory meaning of 'tainted property'. Further, that even if the DPP demonstrated that the Property was tainted, the Interested

Party's Properties fall within the parameters of **Section 31(2)** of the **FPOCA**, and as such, forfeiture cannot lie against the Property, and to do so would fly in the teeth of mandatory statutory defence.

3.35 Counsel contended that by virtue of the cited provisions of the purported Originating Notice of Motion, the DPP seeks to have the Properties forfeited to the State on allegations that it is tainted in line with **Sections 29** and **31** of the **FPOCA**. That in this regard, it is cardinal to highlight that the phrase 'reasonable suspicion' does not appear in both Sections pursuant to which the present proceedings have been brought.

3.36 It was Counsel's submission that an application under **Sections 29** and **31** of the **FPOCA** cannot be premised on 'reasonable suspicion' but on evidence proving that, on a balance of probabilities, the property sought to be forfeited to the State is indeed tainted. That the DPP has not discharged the evidential burden of proving that the Property is tainted as required by law. That on this basis alone, the DPP's Application should be held to lack merit and therefore, this Court should dismiss it with costs.

3.37 Counsel went on to distinguish between the **FPOCA's Sections 29** and **31** on one part, and **Section 71** on the other, and submitted that the Applicant has placed reliance on **Section 71** of the **FPOCA**, but however that there is a clear distinction between the **FPOCA's** provisions in **Sections 29** and **31**, and those of **Section 71**.

3.38 Counsel was fortified by the fact that the statutory defences applicable to matters under **Sections 29** and **31** are different from the statutory defences applicable to **Section 71** offence found in **subsection (3)** and implored this Court to rule that the present Application is premised on **Section 29** and **31** of the **FPOCA** and not

on **Section 71**. That in any case, this Court has no jurisdiction to make any forfeiture Orders under **Section 71** whether under criminal proceedings or civil forfeiture proceedings.

3.39 Counsel defined jurisdiction and cited the Supreme Court case of **Godfrey Miyanda Vs The High Court** ⁽¹¹⁾ and the guidance therein as follows:

“The term ‘jurisdiction’ should first be understood. In one sense, it is the authority which a court has to decide matters that are litigated before it; in another sense, it is the authority which a court has to take cognizance of matters presented in a formal way for its decision. The limits of authority of each of the courts in Zambia are stated in the appropriate legislation.”

3.40 In this regard, Counsel argued that under **Section 71** of the **FPOCA**, there is no prescribed power premised on which this Court can draw Jurisdiction to make the Forfeiture Order being sought by the DPP against the Interested Party’s Property and therefore Non-Conviction based Forfeiture proceedings cannot be brought under **Section 71**.

3.41 Counsel argued that ultimately, this Court’s prescribed jurisdiction to forfeit property to the State is found under **Sections 29** and **31** of the **FPOCA**. That it is therefore, argued that it is misleading for the DPP to find solace in **Section 71** of the **FPOCA** in advancing its Application.

3.42 Counsel submitted that the **Zambian Constitution** guarantees the sanctity of property ownership under **Article 16** and cannot be abrogated except in the circumstances expressly provided under **Article 16(2)**. Counsel submitted that therefore, constitutionally, the Interested Party in *casu* cannot be deprived of their property

unless by way of penalty for breach of any law as that would be unconstitutional.

- 3.43 Counsel argued that in this regard, and in line with **Article 16(2)(b)**, under **Section 29** and **31** of the **FPOCA**, the DPP should have demonstrated that the Interested Party breached the law or indeed that the Property has been used or is intended to be used in a crime and as a result, the Forfeiture Order being sought is a penalty for breach of a specified provision of the law.
- 3.44 Counsel submitted that in other words, if the Court finds that **Sections 29** and **31** or indeed **71** or any other provisions of the **FPOCA** provides for forfeiting of property without the DPP proving that a particular offence was committed, the Court should declare such a provision *ultra virus* **Article 16 (2)(b)** of the **Constitution**.
- 3.45 Counsel submitted that the above-mentioned Sections are constitutional in that they require that when making an application, a public prosecutor must provide evidence to show that the property he or she is applying to be forfeited to the State is tainted within the statutory definition of 'tainted property', that is to say, the said property was used in the commission of a crime.
- 3.46 It was submitted that according to **Section 31** of the **FPOCA**, the DPP must specifically prove the elements of tainted property by producing evidence and the Court should be satisfied as such on a balance of probabilities.
- 3.47 Counsel quoted **Section 34** of the **FPOCA** and submitted that in this respect, the phrase 'matters necessary' refers to the elements of the crime of tainted property as defined by **Section 2**.
- 3.48 Counsel argued that from the wording of **Sections 31** and **34** of the **FPOCA**, the DPP cannot make an application for a Forfeiture Order

without first proving and satisfying the Court that the Interested Party's Properties are tainted. That the Court must first declare that the Property is tainted. Only thereafter, can the DPP or any other law enforcement institution make a discretionary application for a Forfeiture Order relating to the Property. Further, that neither the DPP nor an investigations officer has jurisdiction to declare any property tainted pre-emptively.

- 3.49 In demonstrating that the DPP's Application fails to meet the statutory threshold stipulated under **Sections 29** and **31** of the **FPOCA** to warrant the making of a Forfeiture Order by this Court, Counsel began by submitting that the two Sections are couched in discretionary terms in that they both use the term 'may'. That in this regard, the prosecutor 'may' apply and even when the Court finds the subject property is tainted, 'may' order that such property be forfeited to the State.
- 3.50 Counsel referred this Court to the definition of 'tainted property' and 'relevant offence' under **Section 2** of the **FPOCA**, and submitted that having demonstrated that the jurisdiction of this Court is not limitless and that it ought to be exercised in accordance with the law, Counsel contended that from **Section 29** and **31**, the only basis on which this Court can make a Forfeiture Order is upon being satisfied that such property is tainted property.
- 3.51 It was submitted that **Section 2** of the **FPOCA** sets out the elements which the DPP must prove before this Court to demonstrate that the subject Property is tainted. That taking into consideration the definition of 'relevant offence', it becomes irresistibly clear that the DPP should demonstrate a connection between the Property sought to be forfeited and the relevant offence.

- 3.52 Counsel submitted that it would appear that the present matter presents this Court with the first opportunity in our jurisdiction for the Court to consider the nexus between the **FPOCA's Sections 29, 31** together with the **Section 2** definitions of 'tainted property' and 'relevant offences' which clearly demonstrates that a property can only be declared tainted upon the relevant offence being proven to the court with evidence led on a balance of probabilities.
- 3.53 It was submitted that what is running through all the elements of tainted property is that there should be an offence and property should be connected to that offence. It was argued that under **Section 2** of the **FPOCA**, it is cardinal that the grounds upon which the DPP claims that the property is tainted are stated and proved by evidence being either that the property has already been used in the commission of an offence, or in connection with the commission of an offence, or the DPP must demonstrate by way of evidence that there is intention on the part of the Interested Party to use the Property in connection with the commission of an offence.
- 3.54 Counsel submitted that if the DPP makes no reference to the commission of a specific offence as directed by **Section 2**, as is the case in present Proceedings, then this Court is constrained to make a Forfeiture Order.
- 3.55 Counsel submitted that it follows that the only reason property can be forfeited to the State under **Sections 29** and **31** of the **FPOCA** is that it is declared tainted and property can only be declared tainted if it is connected to a serious crime. That the DPP had the obligation to prove that connection by providing evidence directed at meeting this threshold first. Counsel contended that without such evidence,

as is in the present case, the Court cannot decide based on conjecture.

3.56 Counsel was fortified by the guidance of the Supreme Court in the case of **Rosemary Chibwe Vs Austin Chibwe** ⁽¹²⁾ wherein the Court held that:

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

3.57 In a similar vein, Counsel further cited the case of **The Attorney General Vs Roy Clarke** ⁽¹³⁾ wherein the Supreme Court frowned upon the trial Judge’s finding which were not based on evidence on Record.

3.58 Counsel reiterated that this Court should religiously follow the guidance of the Supreme Court and only decide or make conclusions as to whether the besieged Property is tainted based on the evidence before it and that no Order or conclusion should be made which is not supported by such evidence on Record.

3.59 Counsel submitted that the foregoing is also the interpretation obtained in South Africa and reflected in the cases, relied on by the Applicant, of **Simon Prophet Vs The Director of Public Prosecutions** ⁽¹⁾ and **Kumarnath Mohunram and Another Vs The National Director of Prosecutions Case** ⁽⁷⁾, and further referred us to the provisions of the primary South African legislation that gives their court’s jurisdiction to make forfeiture orders being the **Prevention of Organised Crime Act Number 121 of 1998 (POCA)** which deals with civil recovery of property.

3.60 Counsel quoted **Sections 38(1), 48(1) and 50(1)** of the **POCA** and gave a brief summary of the facts in the cases of **Simon Prophet** and **Kumarnath Mohunram**. Counsel submitted that in both cases the

Court was able to refer to the properties the National Director of Prosecutions sought to be forfeited as instruments of crimes because the properties were specifically connected to a particular defined and proven offence.

- 3.61 It was submitted that in *casu*, there has been no demonstration as to how the Properties sought to be forfeited are connected to any crime.
- 3.62 Counsel argued that a careful construction of the **FPOCA** reveals that even in Zambia, a property cannot be deemed tainted and therefore, liable for forfeiture without demonstration by way of evidence that the property is connected to a specified crime. That under the **FPOCA**, a Forfeiture Order cannot be based on conjecturer, and mere suspicion no matter how high or reasonable such suspicion can be and that that is the intention of the Legislature as expressed under **Sections 29** and **31** of the **FPOCA**.
- 6.63 Counsel submitted that the DPP is under an obligation to prove that the Property is tainted by connecting them to a specific offence by evidence and the standard of proof is on the balance of probabilities, that therefore, the DPP cannot casually refer to property as instruments of crime or as tainted properties without proving the commission of any crime, relating to or in connection with such property.
- 3.64 It was Counsel's submission that comparative to the way the **POCA** is being interpreted and enforced in South Africa, a property liable for forfeiture must be connected to a crime, it must be proved to be an instrumentality of crime by violating or offending any law and only then can the National Director of Prosecutions institute an application for an order for forfeiture of such property. That without

citing any specific facts as violating any predefined law, the DPP herein has proceeded to make the Application that the Properties be forfeited to the State.

3.65 Counsel, in this regard, beseeched this Court to hold that the Application presently before us is misconceived and ought to be dismissed.

3.66 Counsel for the Interested Party submitted on the ambivalence and casual misuse of different terms interchangeably. It was submitted that in the Application before Court at page 2, upon citing **Section 29** of the **FPOCA**, the DPP has argued that civil forfeiture provides a unique remedy for combating 'organised crime'. That the DPP then slides into finding fortification in the South African jurisprudence as pronounced in the **Simon Prophet** case, *supra*. It was Counsel's argument that while prominently used in the **POCA**, the phrase 'organised crime' does not exist in the **FPOCA** and therefore, there is no such crime under the **FPOCA**. That similarly, the facts pertaining to what amounts to organised crime as was the case in the **Simon Prophet** case are far from resembling the facts as outlined in the case in *casu* as the DPP points to no crime as having been committed by the Interested Party. That there is no similarity between the facts in the **Simon Prophet** case and this case at all.

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

*"On the case in casu, the Notice of Motion for non-conviction based forfeiture order against tainted properties is supported by an affidavit deposed to by one **EMMANUEL KHONDOWE** filed herewith. The affidavit shows that the properties in issue are proceeds of crime*

as they are above the net worth of the interested parties.”

(Emphasis theirs)

- 3.68 Counsel contended that the phrases ‘tainted property’ and ‘proceeds of crime’, while sounding enticingly similar, the Statute has distinguished their meanings with an Application such as the one before this Court being justified only if it can be proved the property is tainted.
- 3.69 Further, that there is no law in this Country prescribing that if a person has property whose value is above the net worth of a person in so far as is known to a law enforcement officer, then such property turns into proceeds of crime or tainted property; that the learned DPP has not cited any statutory provision or case law to support such a submission.
- 3.70 It was submitted that law enforcement officers are obliged to enforce the law as enacted and not as they imagine, perceive or wish the law to be. That having combed the entire **FPOCA**, there is nothing therein which turns the Property under siege into proceeds of crime just because it has a value higher than a law enforcement officer can trace or declare as ‘known to him’, none whatsoever.
- 3.71 It was Counsel’s further submission that having demonstrated that the Proceedings before this Court are anchored on **Sections 29 and 31** of the **FPOCA**, he contended that it is a misdirection or rather misleading for the DPP to resort and belabour referring to the provisions of the **Anti-Money Laundering Act** and this Court was urged to hold as such.
- 3.72 With regard to statutory defence, Counsel submitted that in his Affidavit filed in Opposition to the Application for a Forfeiture Order, the Interested Party has deposed that he had and still has no

reasonable basis for believing that the Property is tainted within the meaning of the **FPOCA**. That he expressly stated that the Property was developed by his nephew, Mr. Edgar Chagwa Lungu and that he has no reasonable grounds to believe that Mr. Edgar Chagwa Lungu could not manage to develop the Property to the level it is now. The Interested Party has equally deposed that he has no reasonable grounds to believe that prior to acquiring the Property, it was tainted.

3.73 Counsel submitted that in the circumstances of the case therefore, in the unlikely event that the Court finds that there was anything tainted about the property prior to the Interested Party purchasing the same, then, by virtue of **Section 31(2)** of the **FPOCA**, this Court should hold that it cannot Order forfeiture of the Interested Party's Property herein.

3.74 Based on the foregoing, Counsel referred the Court to the case of **Regina Chifunda Chiluba Vs The People** ⁽¹⁴⁾ wherein the Three-Panel High Court, sitting in its criminal jurisdiction, espoused the principle that once the evidence shows that the Prosecution knows the origin of the thing, then there is no suspicion, should be applied to the present case.

3.75 It was argued that the Interested Party herein has informed this Court that he told the Investigating Officer how the Property was developed. That therefore, it is unreasonable for the Investigating Officer, having been furnished with undisputed evidence as to the arrangement surrounding the development of the Property, to then purport to harbour 'suspicions' as to the source of the Property as he had already been informed.

3.76 With regard to the authorities relied upon by the DPP, Counsel referred to the case of **Jessie Kapyelata** ⁽²⁾ raised by the DPP, and

submitted that the Court in that case was dealing with a question of the constitutionality of **Sections 29** and **31** of the **FPOCA** and held that the provisions were constitutional and did not contravene **Article 16(2)(b)** of the **Zambian Constitution** as amended by **Act No. 18 of 1996**. Counsel argued that in this regard, **Sections 29** and **31** if interpreted to mean that for the Court to Order forfeiture there is need to prove that the Property is tainted by being connected to a crime.

3.77 It was contended that this is the only way the provisions can be said to be constitutional and in accordance with **Article 16(2)(b)**. That in other words, should the Court interpret **Sections 29** and **31** as entailing that a Forfeiture Order can be issued even if it is not proven that the Property is connected to a crime, then such an interpretation would render the provisions inconsistent with **Article 16(2)(b)** which requires that the law under which property can be taken away from the owner can be 'by way of penalty for breach of any law, whether under civil process or after conviction of an offence'.

3.78 In conclusion, Counsel submitted that it has been demonstrated that for a property to qualify as tainted property, any of the three elements being either that (a) property was used in, or in connection with the commission of a serious offence, or (b) the property was intended to be used in, or in connection with the commission of a serious offence, or (c) the proceeds of the offence must be proved and that when used without reference to a particular offence means tainted property in relation to a serious offence.

3.79 That it has been demonstrated that when compared to the South African legal framework of similar legislation, an application cannot lie to forfeit property under **Sections 50(1)** and **48(1)** of the **POCA**

unless the owner of the property has used the subject property in violation of the law thereby qualifying it to be tainted property.

3.70 This Court was urged to hold that the DPP's Application has failed to outline what offence was committed by the Interested Party in connection with which the Property is sought to be forfeited to the State and as such, the Court's powers under **Section 29** and **31** of the **FPOCA** cannot be invoked. That such an Application cannot stand premised on feelings but on the facts placed on Record.

3.71 Counsel submitted that it has also been demonstrated that the provisions of the Affidavit which violate the mandatory Rules of Court should not be admitted into evidenced but expunged from the Record of Court.

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

4. APPLICANT'S REPLY

4.1 The Applicant filed an Affidavit in Reply to the Interested Party's Affidavit in Opposition on 18th June, 2024, and the same was sworn by **EMMANUEL KHONDOWE** who, having reviewed the Affidavit in Opposition sworn by Charles Phiri, responded accordingly.

4.2 The Deponent avowed that it is admitted that the Originating Notice of Motion is not in conformity with the prescribed form, but having been advised by Counsel and verily believing the same to be true, that non-conformity does not go to substance but form.

- 4.3 It was deposed that the issues raised above were earlier raised by the Interested Party as Preliminary Issues and the Court pronounced itself on the same, which have now been raised again.
- 4.4 The Deponent avowed that it is admitted that Paragraphs 5 to 8 and 10 of the Affidavit in Support are not in the first person and do not disclose the source of the information deposed to, and that on the advice of Counsel and verily believing the same to be true, non-disclosure goes to the weight to be attached to the averment, rather than its admissibility.
- 4.5 The Deponent acknowledged the deficiency in exhibit "**EK8**", which lacks certification as a true copy of the handwritten Statement, but having been advised by Counsel and verily believing the same to be true, the defect is curable and the Affidavit can be received by the Court once it is cured accordingly to confirm its authenticity.
- 4.6 It was averred that exhibit "**CP5**" does not show any proof of payments of rentals or compensation payable to the Landowner which directly contradicts the assertion that the Landowner would receive rentals based on certain attainments. That having obtained a Statement from the Interested Party before the Proceedings were commenced, the Deponent averred that the Interested Party never indicated that he had a contract with the former President, Mr. Edgar Chagwa Lungu.
- 4.7 That further to the above, the said exhibit "**CP5**" is a Land Use Agreement which was created eight (8) years after the alleged verbal agreement and only when the Interested Party was faced with a forfeiture application.
- 4.8 Further, it was avowed that the Interested Party has not exhibited proof to show the registration of the Lease Agreement as required by law.

- 4.9 The Deponent avowed that he did not conceal any information but disclosed all the material information that the Interested Party informed him of and what he gained during investigations.
- 4.10 Emmanuel Khondowe deposed that he admits that the Interested Party had capacity to purchase Lot LUS/38478 for less than ZMW3,000.00 and that the same was lawfully acquired, but contended that there are no clear, traceable, and legal sources of income used for the development of the Property.
- 4.11 It was deposed that Mr. Edgar Chagwa Lungu's alleged distinguished career as a Lawyer and his subsequent service in various Government roles, including a 7-year tenure as President of the Republic of Zambia, does not, *ipso facto*, establish his capacity to develop the Property in question. That the Interested Party has not exhibited any proof to show that the former President of the Republic of Zambia, Mr. Edgar Chagwa Lungu developed Lot LUS/38478, and there is nowhere that the Interested Party has shown that the former President transferred money from any bank account or directly paid for the construction of the Property.
- 4.12 The Deponent averred that the former President has not entered appearance as an Interested Party in this matter to categorically state that the Property is his, and to show the source of his income to construct the Property.
- 4.13 Further, that Chiyeso Lungu, who is shown to be a Director in the Lodge, has not entered Appearance in this Matter as an Interested Party. A copy of the Patents and Companies Registration Agency (PACRA) Printout was exhibited and marked "**EK1**".
- 4.14 It was deposed that Mr. Charles Phiri has also distanced himself from the Property, and that therefore, the Property is not being

claimed by any Interested Party in Court and should rightfully be forfeited to the State.

- 4.15 The Deponent averred that the Priced Bill of Quantities explicitly states that the price estimates are as at November, 2022, and that the assertion that the Priced Bill of Quantities is materially misleading is unfounded, as the document clearly denotes the time frame of estimates. That further, the completion, occupation, and commercial utilization of the structure by November, 2022, does not negate the validity of the cost estimates provided for that period.
- 4.16 It was the Deponent's contention that the Property in question is tainted property and reasonably suspected to be proceeds of crime. It was averred that the Interested Party was involved in tax evasion.
- 4.17 The Deponent avowed that he admits that the Interested Party sold property F/Mpika/1912933 for USD100,000.00 and paid Property Transfer Tax but that however, he disputes that his averments in Paragraphs 31 and 32 of his Affidavit in Support which speak to the sale of the said property and the analysis of the Interested Party's known income and expenditure for the period 1st August, 2015, to 8th June, 2023, are immaterial and serve to demonstrate that the Interested Party makes substantial money outside his formal employment.
- 4.18 It was averred that the information regarding the construction was disclosed, yet the financial transactions and sources of funding for the development of the Property remain highly suspicious. That the detailed analysis shown in the Affidavit in Support justifies the concerns raised, regardless of the disclosed identity of the constructing party.

- 419 The Deponent avowed that the Property subject of the Application is tainted property and that substantial evidence has been brought to show that the Property is connected to a crime in that it is reasonably suspected to be proceeds of crime.
- 4.20 The Deponent averred that on the advice of Counsel, and verily believing the same to be true, that the DPP can categorise property as tainted property as provided by law.
- 4.21 In the Skeleton Arguments of even date, Counsel for the Applicant gave a background to the Matter as already submitted above and stated that Mr. Charles Phiri, the Interested Party herein, has had a career as a Registered Nurse, with a professional tenure spanning over four decades having worked in various institutions such as the Ministry of Health, Zambia Airways and Zambart since 1990.
- 4.22 That according to industry benchmarks, a mid-career Registered Nurse can expect a total compensation package averaging ZMK75,000.00, based on data from 9 salaries, equivalent to approximately ZMW8,330.00 per month.
- 4.23 It was Counsel's contention that the Interested Party lacked the financial wherewithal to develop the Property. That despite asserting that the developments on the Property were constructed by former President Mr. Edgar Chagwa Lungu and he only provided the bare land thereby distancing himself from the Lodge or any dealings with it.
- 4.24 It was submitted that the Interested Party raised several other contentions which Counsel addressed as follows:
- 4.24.1 **Use of Defective Affidavits in Legal Practice**
- Counsel acknowledged and admitted the defects in their Affidavit in Support as well as the fact that the exhibited "EK8"

lacked certification as a true copy. They argued that the defects pertain to form rather than substance of the evidence presented and are curable and presented arguments and authorities to support their assertions. We have taken note of the same and will not repeat them here.

4.24.2 Counsel submitted that **Order V Rule 14** of the **High Court Rules** empowers the Court to allow the amendment and re-swearing of the defective affidavits, ensuring that procedural defects do not impede the administration of justice. Counsel submitted that he respectfully seeks the Court's Leave to re-swear the Affidavit in Support to correct its formal defect.

4.24.3 **Argument Against Admitting Exhibit "CP5"**

The Applicant submits that exhibit "CP5", purportedly a Contract between the Interested Party and Mr. Edgar Chagwa Lungu, is inadmissible as it violates legal principles and potentially constitutes fabricated evidence, a criminal offence punishable with imprisonment for seven (7) years under **Section 108** of the **Penal Code** and tampering with evidence.

4.24.4 It was submitted that the Contract was drafted and executed on May 2nd, 2024, coinciding with the Interested Party's preparation of their response to the Application for a Forfeiture Order, despite the Originating Notice being filed on June 13th, 2023. It was contended that this suggests an afterthought, and the Court should prevent the sanitisation of potentially fabricated evidence.

4.24.5 Counsel submitted that the Interested Party's decision to execute a contract a year after the matter commenced, and their failure to disclose any information regarding an oral contract during the investigation and in the Statement recorded, raises serious

concerns. It was suggested that this constitutes fabrication of evidence, and the Court should disregard exhibit "CP5" in its entirety.

- 4.24.6 It was submitted that based on the provisions and requirements of **Section 30(b)** of the **FPOCA**, the former President has not shown any interest in the Property. It was contended that only the Interested Party has shown interest in the Property to the extent that he purchased the land, and he has distanced himself from the developments thereon, therefore, as it stands, no one has shown interest in the developments on Property No. LUS/38478.
- 4.24.7 Counsel submitted that the Property in question is tainted property as there has been no evidence that has been adduced by the Interested Party to the effect that the former President developed the land; that the Property is in the name of the Interested Party and he bears the onus to show how he developed the land and a mere statement that it was developed by the former President is not sufficient to prove that it is not tainted property.
- 4.24.8 Counsel then proceeded to submit reasons for non-admission which were that the timing of the creation of exhibit "CP5" raises serious issues of fabricating and tampering with evidence, that the same was a violation of legal principles and inconsistent with standard business practices.
- 4.24.9 Counsel submitted that the exhibit "CP5" lacks independent evidence to corroborate its authenticity or the terms of the alleged oral agreement and contravenes rules of evidence. That there are no contemporaneous records, witnesses, or other documentation supporting the existence of this agreement prior to its recent and untimely drafting. It was Counsel's contention that without

verifiable evidence, the Court cannot reasonably rely on exhibit “CP5” as credible.

- 4.24.11 It was further submitted that admitting “CP5” would unfairly prejudice the Applicant’s case by introducing new evidence at a late stage in the Proceedings and would deprive the Applicant of the opportunity to adequately challenge the authenticity and veracity of the Contract resulting in an imbalance of legal rights and remedies.
- 4.24.12 Counsel submitted that investigations revealed that the development costs of the Property far exceed the Interested Party’s financial means and the financial outlay required for the Property’s development remains unexplained casting doubt on the Interested Party’s claim of having overwhelming financial capacity to both acquire and develop the Property within the declared means.
- 4.24.13 It was submitted that despite the Interested Party’s assertions, including claims regarding Mr. Edgar Chagwa Lungu’s development of the Property, concrete evidence such as financial transactions and formal agreements with suppliers for the Property’s construction is required to substantiate their claims. That the lack of such evidence leaves significant questions unanswered.
- 4.24.14 Counsel argued that the cornerstone of any legal system is the principle that claims must be substantiated by credible evidence. It was submitted that the Interested Party’s role was to demonstrate the legitimate acquisition and development of the Property. That while the Interested Party has provided sufficient evidence regarding the acquisition of the land, his explanation

concerning the development of the land is insufficient and unsubstantiated. It was submitted that the stark contrast between the detailed evidence of land acquisition and the complete lack of evidence for the Property development raises serious concerns about the source of the money that was used to develop the land.

4.24.15 Counsel submitted that mere statements are insufficient to establish facts, especially in cases involving substantial financial transactions and property development. Counsel referred us to **Murphy on Evidence**, where it was emphasised that the burden of proof lies with the party making the allegation; that the Interested Party's failure to provide such evidence falls short of this legal standard.

4.24.16 Counsel cited the case of **Kabwe Transport Company Limited Vs Press Transport Company Limited** ⁽¹⁵⁾ wherein the Court underscored the necessity of presenting concrete evidence to support one's claims. It was argued that the absence of evidence in *casu*, means that the Interested Party has not met the required standard of proof.

4.24.17 Counsel further cited the case of **Shamwana and Seven (7) Others Vs the People** ⁽¹⁶⁾ that it illustrates that documentary evidence is crucial in establishing the veracity of claims. It was submitted that the Interested Party's inability to provide such evidence for property development significantly undermines his position.

4.24.18 Counsel submitted that despite the Interested Party's assertions that the Priced Bill of Quantities do not state the time period for the stated price estimates, they explicitly state that the price

estimates are as at November, 2022. That the costs listed reflect the market values as at that specific time, providing an accurate and relevant financial reference for evaluating the Property's development expenses and any claims to the contrary lack substantive merit.

- 4.24.19 Counsel submitted that the Property is suspected proceeds of crime. He cited the case of **The People Vs Fredrick Chiluba** ⁽¹⁷⁾ where the former President Fredrick Chiluba was tried for the theft of public funds and the Court emphasised that properties and assets obtained through these stolen funds were proceeds of crime. Counsel submitted that this includes suspicious financial transactions and activities, as well as unexplained sources of income linked to the Property's development.
- 4.24.20 It was submitted that the sale of property F/Mpika/1912933 and the payment of USD100,000.00 and Property Transfer Tax to ZRA is another red flag. Counsel contended that the profile of Charles Phiri, a male nurse who was largely employed by the Ministry of Health (essentially a civil servant) with a salary, raises serious suspicions as to where and how such a person could have been able to afford a property for which attracted such Property Transfer Tax.
- 4.24.21 It was submitted that the suspicion becomes cogent when asked how he acquired the Property, he points to the former President who in turn does not enter appearance, does not explain the source of his money and how he developed the Property. It was submitted that unexplained funds and financial inconsistencies highlighted in the supporting Affidavit remain relevant, indicating

potential illegal activity with the reversible burden of proof placed in the Interested Party to disprove.

4.24.22 Counsel went on to reiterate his earlier submission on detailed analysis and lack of financial transactions with regards to the development of the Property, as well as the substantial evidence that links the Property to crime and submitted that the evidence supports a reasonable suspicion that the Property is connected to criminal activities, warranting serious consideration for the Forfeiture Application.

4.24.23 In conclusion, Counsel submitted that the Applicant has presented ample evidence to support the reasonable suspicion that the Property is tainted and connected to criminal activities and is a proceed of crime. It was submitted that the Interested Party must provide concrete evidence to substantiate his claims about the Property's acquisition and development. That without such proof, his assertions remain unconvincing and fail to address the substantial financial anomalies and unexplained wealth identified in the investigations.

4.24.24 Counsel contended that excluding the suspicious evidence and ensuring thorough scrutiny of all claims is essential to maintaining public trust in the legal system and preventing potential abuse of process. That the Court must carefully consider all evidence presented and ensure that justice is served.

5. HEARING

5.1 The Hearing of the Originating Notice of Motion was held on 23rd July, 2024, and present before Court was Counsel for the Applicant and the Interested Party.

5.2 In augmenting their submissions, Counsel for the Applicant, Mrs. Margaret Kapambwe Chitundu, begun by submitting that she wished to bring to the attention of the Court, the Court of Appeal of England and Wales' case of **R Vs Ilham Anwoir, Brian McIntosh, Ziad Meghrabi and Adnan Elmoghrabi** ⁽¹⁸⁾ as heard by Lord Justice Latham, Mr. Justice David Clerk and Mr. Justice MacDuff, at Paragraph 21 which reads as follows:

"We consider that in the present case the Crown are correct in their submission that there are two ways in which the Crown can prove the property derives from crime, a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or those kinds is unlawful, or b) by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from crime."

5.3 Counsel further referred the Court to the High Court of Ireland case of **Criminal Assets Bureau Vs James Gately and Charlene Lam** ⁽¹⁹⁾ and submitted that following the reasoning of these two cases, it was Counsel's submission that the circumstances in which the subject property was found in the possession of Mr. Charles Phiri leads to an irresistible inference that it is a proceed of crime.

5.4 Counsel submitted that the investigations in this Matter pointed to the Lodge, the subject Property, being in the possession and control of Mr. Charles Phiri.

5.5 It was submitted that possession in itself is an exclusive claim to the property against the whole world because by being in possession of

the property, a person declares to the whole world that the property belongs to him/her.

- 5.6 Counsel submitted that **Section 71** of the **FPOCA** creates an offence of being in possession of proceeds of crime, and that **Section 71** in itself is complete in creating the offence of being in possession.
- 5.7 It was submitted that contrary to what was decided in the cases of **Sydney Mwansa Vs The Director of Public Prosecutions** ⁽²⁰⁾ and the **Nathan Mbaya and 2 Others Vs the Director of Public Prosecutions** ⁽²¹⁾ by the Court of Appeal, the two cases cited herein are in aid to her submission that once a person is found in possession of property which is a proceed of crime there is no other evidence required to show the criminality of how they acquired it because **Section 71** itself creates an offence therefore, anyone in possession of those proceeds of crime is guilty of a criminality.
- 5.8 Counsel submitted that **Section 71** does not require anything more than simply showing that you are in possession of property for which you cannot account for. That going beyond that would defeat the very essence why the asset forfeiture regime was advocated for by the provisions of the **Vienna Convention** and the **Financial Action Task Force** and their immediate outcomes and recommendations, where they have placed an obligation on Countries to ensure that they have effective asset recovery and in particular Non-Conviction Based mechanisms in place.
- 5.9 It was contended that to require that the State must bring evidence required in the **Sydney Mwansa** and **Nathan Mbaya** cases would be demanding the standard of evidence needed in proving a criminal matter and that would be defeating the requirements of Non-

Conviction Based Forfeiture which demands the State to prove its case on a balance of probability and on a balance of probability only.

5.10 It was Counsel's submission that the balance of probability is enough to say you have been found in possession of property to which you cannot account for and by this mere fact, you have committed an offence and that offence therefore, taints the property. You must therefore, give a reasonable explanation as to how you came into possession of this property.

5.11 Counsel emphasised that the elements of the offence under **Section 71** is merely being in possession of tainted property; just as it would be needed in a case of murder that there was a killing, malice aforethought and those other elements. That in **Section 71**, that element or those elements are being in possession of property suspected to be proceeds of crime, and failing to account for it.

5.12 It was submitted that someone cannot just say, as it was suggested in the **Sydney Mwansa** case and the **Nathan Mbaya** case, that it is irrelevant that the person was in possession as there is need for more evidence. Counsel contended that being in possession is the crux of the matter itself and it has all the relevance. That what the higher Court failed to see in those two cases is what was stated in the case of **R Vs Ilham Anwoir, Brian McIntosh, Ziad Meghrabi and Adnan Elmoghrabi** ⁽¹⁸⁾ cited above. Counsel invited this Court to critically consider the two ways of proving that the property was derived from crime at Paragraph 21, 5.2 above, and that their emphasis is on b) the circumstances that raise an irresistible inference that the property can only be derived from crime.

5.13 It was submitted that in the present case, Mr. Charles Phiri, a Nurse all his life, was found in possession of a Lodge, the subject Property.

That the Evaluation Report illustrates the worth of this Property. He could not account for this property; all he said was that he bought the land on which the Property is sitting for less than ZMW3,000.00. He later referred to the Property being that of former President, Mr. Edgar Chagwa Lungu, therefore, Mr. Charles Phiri, to whom the State thought had an interest in the Property because of him being in possession of it, has totally distanced himself from the subject Property.

- 5.14 It was submitted that later on, after the Matter had commenced, Mr. Charles Phiri and Mr. Edgar Chagwa Lungu decided to execute a Contract which had not been in existence at the time the Matter commenced and it was signed on 2nd May, 2024, a few days before the Interested Party filed Affidavit in Opposition.
- 5.15 Counsel submitted that this issue has been extensively argued in the Affidavit in Reply and stated that it was their wish that this Court pronounce itself on the issue whether that amounted to tampering with Court evidence.
- 5.16 It was Counsel's submission that if at the time the Matter was brought to Court, there was only an oral agreement between the two, and not a Contract, the oral agreement should have been what was laid before this Court as the Interested Party's evidence and not to execute a Contract which was not in existence at the time.
- 5.17 Counsel submitted that as of the morning and afternoon of the Hearing, there was no Affidavit or appearance of a third-party interest entered by Mr. Edgar Chagwa Lungu to claim this Property before Court as his, or to state how he acquired it if he claims it is his.

- 5.18 It was contended that therefore, Mr. Lungu too has not claimed this Property. That Chiyeso Lungu, who appears as Co-Director with Mr. Charles Phiri, has also not entered any appearance or claimed this Property.
- 5.19 It was therefore, Counsel's submission that this Property must be forfeited to the State and given back to the people of Zambia to whom it rightfully belongs.
- 5.20 It was Counsel's prayer that this Court, in the interest of justice, Orders the forfeiture of the subject Property to the State.
- 5.21 Counsel for the Interested Party, Mr. I. Simbeye, in response, submitted that by virtue of **Section 34** of the **FPOCA**, the Applicant bears the onus of proving the necessary elements in order to succeed in such an Application.
- 5.22 That by **Section 78** of the **FPOCA**, unless provided otherwise, the standard of proving such elements referred to in **Section 34** is on the balance of probabilities. It was their submission, therefore, that this standard applied in all civil matters in our jurisdiction.
- 5.23 It was submitted that the other principle they would like to bring to this Court's attention comes from **Phipson on Evidence** at Paragraph 6 as follows:

“So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues.”

- 5.24 It was submitted that in this regard, the Party in these Proceedings who asserts affirmative that the subject Property is tainted is the DPP and therefore, they bear the burden of proving that the subject Property is tainted Property and the proof has to be on a balance of

probabilities and not on suspicion or doubt as also confirmed by **Section 31(1)** of the **FPOCA**.

- 5.25 It was contended that the law is always prescribed and this Court is a Court of law which, by Counsel's understanding, means that this Court ought to interpret the law as pronounced by the Legislature.
- 5.26 Counsel submitted that a tainted property is defined and the net effect of that definition is that it has to be connected to a crime either by way of being acquired from the commission of a crime, or by using that property to commit a crime.
- 5.27 Counsel found fortification in the Court of Appeal case of **Nathan Mbaya and 2 Others Vs the Director of Public Prosecution** ⁽²¹⁾ and the case of **Sydney Mwansa Vs The Director of Public Prosecutions** ⁽²⁰⁾ and argued in reply to the submissions which suggest that the Court of Appeal was misdirected or that it missed some points amounts to calling upon this Court to overrule the Court of Appeal. Counsel contended that having followed Counsel for the Applicant's submissions, it was Counsel for the Interested Party's understanding that Counsel for the Applicant's submissions were not to distinguish the cases, but rather the purpose was to show that the Court of Appeal did not interpret the law properly as, according to Counsel for the Applicant, such interpretation by the Court of Appeal overlooked the spirit of the **FPOCA**.
- 5.28 Counsel submitted that he vehemently beseeched this Court not to be persuaded by those submissions as doing so would amount to turning the Judiciary and its structure on its head, and that what might follow next is that the Subordinate Court might overrule this Court.

- 5.29 Counsel submitted on the Nigerian case of **Melrose General Services Limited Vs The Economic and Financial Crimes Commission** ⁽²²⁾ where the Supreme Court equally confirmed that there is need for linkage between the crime and the property sought to be forfeited to the State.
- 5.30 It was submitted on **Section 71** of the **FPOCA**, that whilst the crime under this Section is Possession of Property Reasonably Suspected to be Proceeds of Crime, **Subsection (3)** relieves the Prosecution from proving a serious offence. It was Counsel submission that those are the only offences which the Prosecution is excluded from proving a serious offence for purposes of securing a conviction; that **Subsection (3)** does not state that the Prosecution should not prove anything.
- 5.31 It was argued that even if a person is convicted under **Section 71**, when bringing an application based on a conviction under **Section 4** of the **FPOCA** such an application can only be sustained if the conviction arises from a serious crime. That the wording of the Section is clear in this regard.
- 5.32 It was Counsel's further submission that a serious offence has been defined by the **FPOCA** in a way that it ought to have either of the two elements; that is either the sentence attracts a minimum mandatory sentence of one year or it is a capital punishment. That therefore, if the offence in question does not attract a death sentence or a minimum mandatory sentence of one year it cannot be a serious crime.
- 5.33 Counsel submitted that ultimately, they urge this Court to find that the offence under **Section 71** of the **FPOCA** is not a serious offence because it falls outside those two elements of a serious offence.

- 5.34 Counsel contended that in any case in these Proceedings even the very offence which is not serious under **Section 71(1)** has not been proven and therefore, it cannot be the basis for seeking a Forfeiture Order.
- 5.35 Counsel submitted that the submission that the Interested Party in this Matter has distanced himself from the Property goes against the weight of the evidence on the Court's Record and that the same should be disregarded on that basis.
- 5.36 It was submitted that as Counsel for the Applicant has submitted, the Applicant has violently attacked the exhibit before Court without citing any evidential rule or law which it violates. That it is on this basis that they find no means of effectively responding to the attack on the piece of evidence but to leave it to this Court which is the umpire of justice.
- 5.37 Counsel submitted that when an application such as the one in *casu* has been launched, and the interested person appears as he has done, **Section 31(2)** of the **FPOCA** clearly explains what such an interested person is supposed to do; that what he is supposed to do is simply demonstrate that he has interest in the property and that he did not acquire the interest in the property as a result of any serious offence, and that if at all any serious offence is connected to the property, that he acquired the property before the commission of the serious offence or after the serious offence; and that there was no way he would have known that the property is connected to the serious offence committed previously.
- 5.38 Counsel contended that those are the defences stipulated by the law and that there is nothing under **Section 31(2)** putting a responsibility on the interested person to assert anything

affirmatively requiring him to produce evidence in accordance with the principle in **Phipson on Evidence** already cited above.

- 5.39 It was Counsel's contention that the burden, according to **Section 34**, does not shift at any point to the Interested Party. That even after a full hearing just as this one, just as is the case in all civil proceedings, the Court at the end of the trial or hearing will still ask the question has the applicant or plaintiff proven his or her case on a balance of probabilities considering the totality of the evidence before the Court. And if the answer is in the negative, no matter what can be said of the defence, the applicant or plaintiff cannot succeed as a matter of right.
- 5.40 Counsel submitted that the defence under **Section 31(2)** of the **FPOCA** confirms that applications such as this ought to be anchored on a specific crime which has been proven and that once this crime has been proven the Interested Party's job is then to say something to that crime to which he has been directed.
- 5.41 That if no crime is being pointed at, the scenario becomes such that the Interested Party has to defend himself against all the crimes in the world which in Counsel's humble opinion, is not the intention of the Legislature.
- 5.42 Counsel submitted that the spirit of the **FPOCA** is to fight crime and not to forfeit any property that the DPP looks at and feels it has to be forfeited. That if the spirit is to fight crime, these Proceedings should have been evolving around a specified crime primarily and forfeiture proceedings should only be a consequence and not the other way around.
- 5.43 Counsel submitted that there are Paragraphs in the Affidavit in Support of the Originating Notice of Motion which violate the

mandatory Rules of Court which have been highlighted and which the State has gracefully admitted in their Affidavit in Reply and they have even asked the Court to allow them to amend. It was Counsel's submission that such Paragraphs should not form part of the evidence on Record on which this Court should anchor its decision.

- 5.44 It was Counsel's humble prayer that the Application be dismissed with costs to the Interested Party.
- 5.45 In Reply, Counsel for the Applicant, Mrs. Rhoda Malibata-Jackson submitted that they acknowledged that **Section 34** of the **FPOCA** places the onus on the Applicant to prove, but however, this onus is on a balance of probabilities and all that the Applicant has to show is that the Property in issue is a proceed of crime and once that is done, the burden shifts to the Interested Party to show how he or she acquired the Property.
- 5.46 Counsel referred us to the Kenyan case of **Asset Recovery Agency Vs Peter Oluwafemi Olaiwon** ⁽²³⁾ where the Court stated that all the applicant had to do is to create doubt by providing some initial *prima facie* evidence that the funds, assets, or property that the respondent holds may have been acquired through crime or other dubious means such as money laundering.
- 5.47 That the moment that has been established, the evidentiary burden then shifts to the respondent to show how the funds, assets, or property were acquired. That the respondent is also expected to provide evidence to support that explanation he or she has in rebuttal; they must offer satisfactory explanation and evidence that is solid, honest and beyond guess work.

5.48 Counsel submitted that in the now famous case of **Sydney Mwansa Vs The Director of Public Prosecutions** ⁽²⁰⁾, *supra*, the Court of Appeal, in explaining **Section 71** of the **FPOCA**, stated as follows:

“For this offence, it is our considered view that it is sufficient for the prosecution to establish, on the balance of probability, that the accused was in possession of property and that there was reasonable suspicion of the property being proceeds of crime. It thus remains on the person so charge, to show that he, or she, had sufficient resources to acquire such property (negating reasonable suspicion) or that he or she had no reasonable grounds for suspecting that the property in their possession, was derived or realised, directly or indirectly, from any unlawful activity as per the defence in Section 71(2) of the Act.”

5.49 It was Counsel’s submission that the above cited cases clearly show that all the Applicant needs to do is to show that there is suspicion that the Interested Party is in possession of property suspected to be proceeds of crime. That once the Applicant has shown reasonable suspicion, the onus is on the Interested Party to show that the property was not proceeds of crime.

5.50 That in *casu*, the Applicant has shown on a balance of probability that the Property is a proceed of crime and all the Interested Party has said is that it was developed by another person.

5.51 With respect to the issue of tainted property as submitted by Counsel for the Interested Party on **Section 2** of the **FPOCA**, it was Counsel’s submission that the subsections a) to c) are separated by semi colons

which means that they all stand alone and when looking at tainted property, the Court can consider any of the listed definitions.

5.52 It was the Applicant's submission that this Property is tainted in relation to a serious offence as per **Section 2(c)** of the **FPOCA** and that **Section 71** is a serious offence in that the punishment for this offence when one is found guilty is more than 12 months.

5.53 Counsel for the Applicant submitted that Counsel for the Interested Party cited **Section 31** of the **FPOCA** to convince this Court that the Interested Party has shown evidence of their interest in the Property and it was submitted that as it stands, the former Head of State, Mr. Edgar Chagwa Lungu, has not shown any interest in the Property subject of this Application because **Section 30(b)** of the **FPOCA**, which Counsel for the Interested Party skipped and went to **Section 31**, clearly states what a party with interest in the property should do as follows:

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

5.54 It was Counsel's submission that from the time the Proceedings started to date, the former Head of State has not shown interest in the property and therefore the contract that has been exhibited does not confirm that he has interest in the Property as he has not claimed interest in the said Property and that leaves only Charles Phiri as the only Interested Party in this case.

5.55 It was submitted that in as much as the Interested Party had capacity to buy the land, he has not adduced any evidence to show how it was developed and therefore Counsel submitted that the Property should be forfeited to the State as it is tainted Property.

6. ANALYSIS AND DECISION OF THE COURT

- 6.1 We have considered the Affidavit and Skeleton Arguments filed by the Parties both in Support, in Opposition and in Reply and we are grateful for the spirited arguments and authorities therein as well as those submitted *viva voce* during the Hearing of the Application.
- 6.2 The Applicant's Originating Notice of Motion is made pursuant to **Order XXX Rule 15** and **17** of the **High Court Rules** as read together with **Sections 29, 30, 31**, which provisions give this Court jurisdiction to hear such applications, and **Section 71** of the **FPOCA** which creates the offence of being in possession of property suspected of being proceeds of crime and deems it a serious offence.
- 6.3 The preamble of the **FPOCA** fittingly sums up the purpose and crux of the **Act** as follows:

“An Act to provide for the confiscation of the proceeds of crime; provide for the deprivation of any person of any proceed, benefit or property derived from the commission of any serious offence; facilitate the tracing of any proceed, benefit and property derived from the commission of any serious offence; provide for the domestication of the United Nations Convention against Corruption; and provide for matters connected with, or incidental to, the foregoing.”

- 6.4 It is trite that the **Constitution of the Republic of Zambia**, being the grundnorm and which determines the validity of all laws, does afford its citizens property rights under **Part III**, however, these do have derogations that allow for the forfeiture and confiscation of assets as will be elaborated later in our Judgment.

- 6.5 In the Matter before us, we have an Application by the Director of Public Prosecutions (DPP) for Non-Conviction Based Forfeiture Order of tainted property, being Property No. LUS/38478 housing one three storey Lodge in the Ibex Hill area of Lusaka. The Application has been opposed by Mr. Charles Phiri, being the Interested Party herein.
- 6.6 We shall begin by considering the issues raised by the Interested Party with regard to the Applicant's Originating Notice of Motion and Affidavit in Support filed herein.
- 6.6.1 The Interested Party contends that the Originating Notice of Motion filed does not conform with the prescribed form as contained in Prescribed Form II in the First Schedule to the **High Court Act**.
- 6.6.2 It was contended that Paragraphs 5 to 8 and 10 of the Affidavit in Support sworn by Emmanuel Khondowe are neither in the first person nor do they disclose the source of the information deposed to.
- 6.6.3 That exhibit "**EK8**" is not certified to be a true copy of the original handwritten Statement.
- 6.6.4 In response, the Applicant admits that the Originating Notice of Motion filed is not in conformity with the prescribed form but argues that this does not go to substance, but to form.
- 6.6.5 They further admit that Paragraphs 5 to 8 and 10 of their Affidavit in Support are not in the first person and do not disclose the source of information deposed to but argue that non-disclosure goes to the weight to be attached to the averment rather than its admissibility.
- 6.6.6 The Applicant acknowledged the deficiency in their exhibit marked "**EK8**", but argued that not only is the defect curable

and that the Affidavit can be received by the Court once it is cured accordingly to confirm its authenticity, but that the defect pertains to the form rather than the substance of the evidence presented and remains authentic and reliable.

6.6.7 We have considered the submissions by both Parties as well as the authorities cited. From the onset, we wish to reinstate this Court's firm view that Rules of Court must be adhered to. The importance of these Rules and the adherence to the same was pronounced upon in a plethora of cases including the case of **NFC Mining Vs Techpro Zambia Limited** ⁽²⁴⁾ wherein the Supreme Court guided as follows:

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

6.6.8 With regard to the above issues raised by the Interested Party, we do agree that there are defects in the manner in which the Originating Notice of Motion was presented but however, wish to point out that we have dealt with a similar issue, in the Ruling of this Court in the case of **The Director of Public Prosecutions In Re Property Vs Dalitso Lungu** ⁽²⁵⁾ and found as follows:

“5.7. However, as pointed out by the Applicant, the Originating Notice of Motion filed is not wildly different from the prescribed form and in fact, is presented in a manner that has been allowed to be filed into this Court. The prescribed form requires the user to specify the statute where applicable and the Applicant correctly specified Section 30 of the Forfeiture of Proceeds of

Crimes Act inter alia which indeed does give notice and direction to the Interested Party as would the omitted Notice in the prescribed form.

5.8. It is therefore our considered view that slight deviation from the prescribed Form 11 in the First Schedule of the High Court Act goes to form and not substance and is not misleading to this Court nor to the Interested Parties herein especially considering that they have made the appropriate responses to the Application in the main.”

6.6.9 We held the same position in the case of **The Director of Public Prosecutions In Re Property Chiyeso Lungu** ⁽²⁶⁾. We wish to point out that both Counsel for the Applicant and the Interested Party herein, were Counsel for the Parties in the above cited cases and are aware of our Findings in those Matters. It is mischievous for Counsel to raise the same issues that they are fully aware that this Court has rendered a position on. We will not depart from our finding in the above cited cases of this Court.

6.6.10 With regards to the impugned Paragraphs of the Applicant's Affidavit in Support of Notice of Motion, we refer to this Court's recently decided case of **Richard Musukwa & 7 Others Vs The Attorney General** ⁽²⁷⁾ at J40 and J41, it was found as follows: *“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 to the contents of the Witness Statement.

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)”.

6.6.11 We held the same position in the case of **The Director of Public Prosecution In Re Property Esther Nyawa Lungu** (28)

where the Interested Party therein objected to the admission into evidence certain exhibits on the basis that they were computer generated and were contrary to the provisions of **Section 9 (4) of The Electronic Communications and Transactions Act** which provides as to how computer generated 'data message' is required to be certified and further that some exhibits had not met the requirements of **Section 3 of The Evidence Act**, which requires that an original of the document must be produced and the maker called as a witness in the proceedings.

6.6.12 In the above case, having referred to **Order V Rule 21** of the **High Court Rules** as well as **Order 2 Rule 1** of the **Rules of the Supreme Court of England** we found as follows:

"7.29 Based on the foregoing provisions, on being served the Affidavit in Reply, which was filed into Court on 9th August, 2023, and the Interested Party becoming aware of the alleged irregularities in the said exhibited documents, she ought to have filed an application to expunge the said documents. Instead, the Interested Party took a fresh step in the proceedings when she filed a Notice to Raise Preliminary Issues on 11th August, 2023, wherein amongst other issues, she objected to the admission into evidence of documents contained in the Applicant's Affidavit in Support of the Application and did not extend her objection to the impugned Documents in the Applicant's Affidavit in Reply or

exhibit "EK 4", in the Affidavit in Support of the Application.

7.30 Therefore, it is our considered view that the Interested Party waived her right to object to the said documents. Consequently, her objection to the admission into evidence of the impugned documents is dismissed."

6.6.13 The Interested Party herein should have made the necessary application to set aside for irregularity in good and reasonable time and before fresh steps had been taken after becoming aware of the above defects. It is our considered view consequently, that the Interested Party has slept on its rights and the above objections have come late.

6.6.14 We shall therefore, proceed to determine the Matter in the main without expunging the Originating Notice of Motion and the impugned Paragraphs and exhibit of the Affidavit in Support filed by the Applicant for the reasons given above.

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

(a) Has the Interested Party shown that he has interest in the subject Property;

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

(c) Has the Interested Party shown, based on the evidence tendered and on a balance of probability, that he did not acquire the said interest in the

Property as a result of any serious offence carried out by him.

6.8 We will begin by considering the Interested Party's contentions with regards to the procedure under the **FPOCA** and the provisions that deal with Non-Conviction Based Forfeiture procedure.

6.9 Counsel for the Interested Party submits the DPP seeks to have the Properties forfeited to the State on allegations that it is tainted in line with **Sections 29** and **31** of the **FPOCA** and contends that the phrase 'reasonable suspicion' does not appear in both Sections pursuant to which the present Proceedings have been brought. Further that an application under **Sections 29** and **31** of the **FPOCA** cannot be premised on 'reasonable suspicion' but on evidence proving that, on a balance of probabilities, the property sought to be forfeited to the State is indeed tainted.

6.10 Perusal of the **FPOCA** indeed shows that the phrase 'reasonable suspicion' is absent.

6.11 **Black's Law Dictionary** defines 'suspicion' as:

"The apprehension or imagination of the existence of something wrong based only on inconclusive or slight evidence, or possibly even no evidence at all."

6.12 **Black's Law Dictionary** defines 'reasonable suspicion' as:

"A particularised and objective basis, supported by specific and articulable facts, suspecting a person of criminal activity."

6.13 Law Enforcement Agencies, such as the Drug Enforcement Commission, commence investigations on a mere suspicion, and based on their findings may, based on specific and articulable facts,

progress to having reasonable suspicion sufficient enough to institute proceedings under **Sections 29 and 31** of the **FPOCA**.

6.14 In *casu*, as forfeiture proceedings are against property and not the person, reasonable suspicion would be a particularised and objective basis, supported by specific and articulable facts, suspecting a property of being proceeds of crime or tainted property.

6.15 **Black's Law Dictionary** refers the definition of 'balance of probabilities' to 'preponderance of the evidence' as follows:

"The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to the fact but by the evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be."

6.16 It is our considered view that based on the above, and the standard of proof required in Non-Conviction Based Forfeiture, being on a balance of probabilities, the use of this phrase 'reasonable suspicion' is appropriate and that indeed the Applicant may commence forfeiture proceedings where they have reasonable suspicion, supported by articulable fact, suspecting a property of being proceeds of crime or tainted property.

6.17 The Interested Party submits that the DPP cannot categorise his Property as tainted without the Court making such a determination.

That the Court must first declare that the Property is tainted and only thereafter can the DPP or other Law Enforcement Agencies make a discretionary application for a Forfeiture Order relating to the Property; that the DPP nor an investigations officer has no jurisdiction to declare any property tainted pre-emptively.

6.18 This submission by the Interested Party flies in the teeth of the provisions of the **FPOCA** and in particular **Section 29** which states as follows:

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

6.19 It is our considered view and based on the above provision, that the Applicant is at liberty to designate a property as tainted based on reasonable suspicion of it being proceeds of crime following an investigation and prior to making an application before this Court for an Order forfeiting to the State the said property. The Applicant clearly has the jurisdiction to declare any property as tainted pre-emptively.

6.20 Other contentions raised by Counsel for the Interested Party are in relation to **Sections 29, 31** and **71** of the **FPOCA**.

6.21 Firstly, Counsel for the Interested Party contended that there is a clear distinction between **Sections 29** and **31** and **Section 71** of the **FPOCA**. From the submissions on Record, Counsel is fortifying his assertions based on the statutory defences applicable to matters under **Sections 29** and **31** being different from the statutory defences applicable to **Section 71** found in **subsection (2)**. Counsel implored this Court to rule that the present Application is premised only on **Sections 29** and **31** of the **FPOCA** and not on **Section 71**.

6.22 Secondly, Counsel contends that a property which is the subject of forfeiture proceedings under **Sections 29, 31 and 71** of the **FPOCA** should be connected to a crime. In support of their contention above, the Interested Party found fortification in the cases of **Nathan Mbaya and 2 Others Vs the Director of Public Prosecution** ⁽²¹⁾ and the case of **Sydney Mwansa Vs The Director of Public Prosecutions** ⁽²⁰⁾ as well as the Nigerian case of **Melrose General Services Limited Vs The Economic and Financial Crimes Commission** ⁽²²⁾ that there is need for linkage between the crime and the property sought to be forfeited to the State.

6.23 Thirdly, Counsel has argued that this Court does not have jurisdiction to make Forfeiture Orders under **Section 71** of the **FPOCA**.

6.24 There is a plethora of cases that give guidance on the interpretation of statutes and amongst them is the case of **General Nursing Council of Zambia Vs Ing'utu Milambo Mbagweta** ⁽²⁹⁾ where the Supreme Court held that:

“The primary rule of construction or interpretation of statutes is that enactments must be construed according to the plain and ordinary meaning of the words used, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to the declared or implied intention of the framers of the law, in which case the grammatical sense of the words may be extended or modified.”

6.25 Similarly, in **Matilda Mutale Vs Emmanuel Munaile** ⁽³⁰⁾, it was held that:

“If the words of the statute are precise and unambiguous, then no more can be necessary than to expand on those words in their ordinary and natural sense. Whenever a strict interpretation of a statute gives rise to an absurdity and unjust situation, the judges can and should use their good sense to remedy it by reading words in it, if necessary, so as to do what Parliament would have done had they had the situation in mind.”

6.26 The definition of the word ‘construe’ was given in the case of **Minister of Information and Broadcasting Services and Another Vs Chembo and Others** ⁽³¹⁾ as follows:

“The word "construe" in our considered opinion means reading the statute in whole and not piecemeal.”

6.27 The position is therefore that the provisions of any Statute must be construed according to the plain and ordinary meaning of the words and they must be in consonance with other related provisions in the Statute when read as a whole. It is only when the plain or literal meaning is not clear that the purposive approach should be used.

6.28 It is our considered view therefore, that this is in keeping with the settled principle of law that in interpreting any provision of a statute, the statute must be read as a whole and every section or provision bearing on the subject matter in question must be considered. In this regard, **Section 9** of the **Interpretation and General Provisions Act, Chapter 2** of the **Laws of Zambia**, is very specific and provides that every schedule to or table in any written law, together with notes thereto, shall be construed and have effect as part of such written law.

6.29 **Section 29** of the **FPOCA** gives a public prosecutor the authority to make an application for Non-Conviction Based Forfeiture of tainted property. We wish to state here that such an application can be brought by a public prosecutor even when an interested party is facing criminal prosecution on matters directly or indirectly related to the subject matter in the forfeiture proceedings as was guided in the case of **The Director of Public Prosecution and Dhiraj Dhumputha** ⁽³⁾, where the Court of Appeal 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.” (Emphasis ours)

6.30 Under **Section 31** of the **FPOCA**, the Court, upon being satisfied on a balance of probability that the property the subject of an application is tainted property, may make an Order as to forfeiture. **Section 31** goes further and provides an interested party the opportunity to put forward a defence in relation to the property by showing, *inter alia*, that they do have an interest in the property and that they did not acquire the interest in the property as a result of any serious offence carried out by them. This is the defence as found in **Section 71(2)** of the **FPOCA**.

6.31 The definition of ‘tainted property’ is equally clear as follows:

“Tainted property ” in relation to a serious offence or a foreign serious offence, means—

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

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

(c) proceeds of the offence;

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

6.32 A ‘serious offence’ is defined as one in which the maximum penalty prescribed by law is death, or imprisonment for a term not less than twelve months.

6.33 **Section 71** of the **FPOCA** creates an offence and states 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.

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

6.34 The **FPOCA** defines ‘proceeds of crime’ as follows:

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

–

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

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

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

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

6.35 Having considered the above Sections of the **FPOCA**, it is clear that when the public prosecutor files an application for an Order for Non-Conviction Based Forfeiture under **Section 29**, based on reasonable suspicion that the property is tainted and is proceeds of a crime, the interested party is at liberty to defend the property sought to be

forfeited and guidance for such defence is found in both **Section 31(2)** and **Section 71(2)** of the **FPOCA**.

- 6.36 The Court upon consideration of the totality of the evidence before it, and the Court depending on whether it is satisfied on a balance of probability that the property is tainted and proceeds of a crime, it may or may not grant the public prosecutor's application. Should the Court grant the public prosecutor's application and find that the impugned property is indeed tainted, the property is considered to be either an instrumentality, that is it is used in or intended to be used in the commission of an offence, or a proceed of the crime or the offence.
- 6.37 As guided in the case of **Minister of Information and Broadcasting Services and Another Vs Chembo and Others** ⁽³¹⁾, as well as the **Interpretation and General Provisions of Statutes Act**, the **FPOCA**, must be read as a whole and not piecemeal. In doing so, we find that **Section 71** cannot be read in isolation from the other provisions of the **Act**, including **Sections 29** and **31**.
- 6.38 We find as above for the simple and clear reason that a public prosecutor will attach and refer to **Section 71** in his application for a Forfeiture Order, whether Conviction Based or Non-Conviction Based, for the simple reason of finding that an offence of being in possession of property reasonably suspected of being proceeds of crime has been committed by the interested party which is a serious offence. Possession is the serious offence as required by the **FPOCA**. When an application is brought before Court under **Section 29** of the **FPOCA**, an interested party will defend the application as provided for under **Sections 31(2)** and **71(2)**.

6.39 We are buttressed by Olsson J in **The Director of Public Prosecutions Vs Sharon Lee Brown** ⁽³²⁾ where he said that:

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

6.40 Therefore, in an application for Non-Conviction Based Forfeiture of tainted property, the tainted property must be tainted in relation to a serious offence and one such serious offence, when there has been no reference to a particular offence, is provided for by **Section 71(1)**, that is, being in possession of property suspected of being proceeds of crime.

6.41 It is important to note, in relation to the above, that **Section 71** also provides as follows:

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

6.42 This, in our considered view, is what lends to the very essence and crux of Non-Conviction Based Forfeiture applications under the **FPOCA** in that with or without the attachment of an offence or proof of a crime committed, mere possession of property deemed to be tainted is an offence under the **Act**.

6.43 We take cognizance of the Findings of the Court of Appeal in the cases of **Nathan Mbaya and 2 Others Vs the Director of Public Prosecution** ⁽²¹⁾ and **Sydney Mwansa Vs The Director of Public Prosecutions** ⁽²⁰⁾ that there is need for linkage between the crime and the property sought to be forfeited to the State. We are however, fortified and guided by the finding of the Supreme Court in the case

of **The People v Austin Liato** ⁽⁹⁾ wherein this was emphasised as follows:

“To prove reasonable suspicion under section 71 (1) of the Act, therefore, the prosecution does not have to show the link between the source of the money or the accused to possible criminal conduct. It is sufficient that possession and reasonable suspicion are proved.” (Emphasis ours)

- 6.44 Counsel’s further contention is that this Court has no jurisdiction to make any Forfeiture Orders under **Section 71** whether under criminal proceedings or civil forfeiture proceedings. That **Section 71** of the **FPOCA** only creates an offence, the elements of the offence and possible statutory defence without giving the Court any power to forfeit property for whatever reason, let alone without a conviction of any sorts.
- 6.45 We have already found and demonstrated above that all provisions of the **FPOCA**, let alone **Sections 29, 31** and **71** cannot be read in isolation nor piecemeal. **Sections 29** and **31** give this Court jurisdiction to make Non-Conviction Based Forfeiture Orders and **Section 71** provides the offence and penalties under the **Act** as well as a defence for the interested party, they must be read together.
- 6.46 Counsel for the Interested Party will do well to note that the **FPOCA** provides for procedure for Conviction Based Forfeiture under **Section 10** or **Division 2** as well as Civil Forfeiture under **Division IV** which includes Non-Conviction Based Forfeiture and both give this Court jurisdiction to make Orders as to forfeiture; and further, **Section 71** applies to both Non-Conviction Based and Conviction Based Forfeiture proceedings.

6.47 One need only to read the Preamble of the **FPOCA**, as provided in paragraph 6.3 above, to appreciate the objective of the **Act** and to conclude that it would be absurd to hold that there is no provision for forfeiture under **Section 71** when the **Act** is read as a whole.

6.48 Counsel also argued that there is no law in this country prescribing that if a person has property whose value is above the net worth of that person, then such property turns into proceeds of crime or is tainted property. That having combed the entire **FPOCA**, there is nothing therein which turns the impugned Property into proceeds of crime just because it has a value higher than a law enforcement officer can trace or declare as 'known to him'.

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

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

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

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

- 6.50 Evidently, where a person has wealth or assets, in whatever form, whose value Law Enforcement Agencies have found to be above the known legitimate sources of income of that person, and that person, having failed to proffer an adequate explanation as to their origins or the disproportion, may find that the wealth or assets are considered tainted property and proceeds of crime and forfeiture proceedings commenced against the said property.
- 6.51 It is our considered view that a public prosecutor may make an application for Non-Conviction Based Forfeiture under **Section 29** of the **FPOCA** with a very clear understanding that **Section 71** of the **FPOCA**, creates an offence of possession of property that may be reasonably suspected of being proceeds of crime. The Interested Party is at liberty to defend the property as provided for under **Sections 31(2)** and **71(2)**. As long as the public prosecutor has reasonable suspicion and adduced sufficient evidence on a balance of probabilities to make his case to the satisfaction of the Court that the property is tainted, the onus shifts to the Interested Party to adduce evidence in rebuttal.
- 6.52 The **FPOCA** provides for the confiscation and forfeiture of the proceeds of crime, the deprivation of any proceeds, benefit or property derived from the commission of serious offences and facilitates the tracing of any proceeding, benefit and property derived from the commission of any serious offence. Non-Conviction Based Forfeiture Orders can be enforced against unexplained property as long as sufficient evidence has been adduced by the public prosecutor based on a lack of explanation of the legitimate source of the property and the conduct of the Interested Party.

6.53 Lastly, Counsel for the Interested Party contended that forfeiture orders are in breach of **Article 16** of the **Constitution** in that the **Zambian Constitution** guarantees the sanctity of property ownership under **Article 16** and cannot be abrogated except in the circumstances expressly provided under **Article 16(2)**.

6.54 **Article 16**, which provides for the protection from deprivation of properties states as follows:

“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.

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

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

ours)

6.55 It was Counsel’s contention that in line with **Article 16(2)(b)**, under **Section 29** and **31** of the **FPOCA**, the DPP should have demonstrated that the Interested Party breached the law or indeed that the Property has been used or is intended to be used in a crime.

That if the Court finds that **Sections 29** and **31** or indeed **71** or any other provisions of the **FPOCA** provides for forfeiting of property without the DPP proving that a particular offence was committed, the Court should declare such a provision *ultra virus* **Article 16(2)(b)** of the **Constitution**.

6.56 We do not agree with this position and have stated so in a number of cases that have been brought before us. One such case is the case of **The Director of Public Prosecutions In Re Property Chiyeso Lungu** ⁽²⁶⁾, where the very same argument was presented and we stated as follows with regards to **Article 16**:

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

We do not share the views expressed by the Interested Party that the Director of Public Prosecutions should have demonstrated to the satisfaction of the Court that the Interested Party had breached a particular law or that the properties have been used or intended to be used in the commission of a prescribed criminal offence. We say so because if that were the case, that approach would never ever give effect to the intention of the Legislature in passing the Forfeiture of Proceeds of Crime Act.”

- 6.57 Further in the case of **The Director of Public Prosecutions Vs Jessie Bwalya Kapyelata Tapalu** ⁽²⁾ it was found that Non-Conviction Based Forfeiture is constitutional. We therefore find no basis for departing from our position.
- 6.58 Having clarified the issues raised by Counsel for the Interested Party above, we shall proceed to consider the issues for determination in the main.
- (a) Has the Interested Party shown that he has interest in the subject Property.*
- 6.59 In the Affidavit in Support, the Deponent averred that investigations revealed that the real Property in question belonged to Mr. Charles Phiri and that a search conducted at the Ministry of Lands and Natural Resources established that the Property is registered in the name of Charles Phiri as per exhibit marked "**EK1**" being a copy of the Register.
- 6.60 That a Statement, exhibited and marked "**EK2**", from Mr. Andrea Chuni, a Senior Registrar at the said Ministry, confirmed that on Entry Number 4 of the Register, there is a 99-year State Lease from the President of Zambia to Charles Phiri under a Certificate of Title CT_8508.
- 6.61 It was also averred in the Affidavit in Support that a Seizure Notice exhibited and marked "**EK9**" was issued to Mr. Charles Phiri, being the established owner and being in possession of the subject Property.
- 6.62 In the Affidavit in Reply, the Deponent averred that the Interested Party, having stated that the Property was developed by Mr. Edgar Chagwa Lungu, has distanced himself from the Property and therefore, the Property has not been claimed by either the Interested

Party, Mr. Edgar Chagwa Lungu, who it was stated developed, constructed and owned the said Property as purported by the Land Use Agreement, or Ms. Chiyeso Lungu, a Co-Director with Mr. Charles Phiri in the Lodge built on the Property.

6.63 However, in the oral submissions in Reply, Counsel for the Applicant stated that from the time the Proceedings started to date the former Republican President, Mr. Edgar Chagwa Lungu, has not shown nor claimed interest in the Property, and that this leaves only Charles Phiri as the only Interested Party in this case.

6.64 In the Affidavit in Opposition, the Deponent, being Mr. Charles Phiri, averred that he applied for and was granted title, after following laid down procedures and processes and following a payment of ZMW2,122.51 as exhibited and marked "CP2b" being a copy of the Government of Zambia Receipt Number G00998053 in his name, to the said Property by way of Certificate of Title No. 8508 exhibited and marked "CP4".

6.65 It was avowed that Mr. Edgar Chagwa Lungu offered to develop the said Property by building a modern Lodge thereon and the Deponent accepted the offer on the understanding that further to certain attainments, the Deponent would be allowed to receive rentals. That a Land Use Agreement, exhibited and marked "CP5", was entered into between the Deponent and Mr. Edgar Chagwa Lungu in fulfilment of the same.

6.66 Counsel for the Interested Party argued in his oral submissions that the Applicant's submission that the Interested Party has distanced himself from the Property, goes against the weight of the evidence on Record and urged this Court to disregard it.

6.67 **Section 30 (a) and (b)** of the **FPOCA** states as follows:

“Where a public prosecutor applies under section twenty-nine for a forfeiture order—

(a) the public prosecutor shall give not less than thirty days written notice of the application to any person who is known to have an interest in the tainted property in respect of which the application is being made;

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

6.68 From the Court Record, the Applicant did indeed make an Application under **Section 29** of the **FPOCA** and did give the requisite Notice to the known Interested Party as evidenced by an Affidavit of Service filed on 30th June, 2023, and deposed to by Emmanuel Khondowe. An exhibit marked “**EK1**” therein shows that service was made on and acknowledged by Charles Phiri on 25th June, 2023.

6.69 It is also apparent from the Record that Charles Phiri, in accordance with **Section 30(b)** of the **FPOCA**, claimed interest in the Property and appeared and produced evidence, including a Certificate of Title in his name, at the Hearing of the Application.

6.70 Having taken the above into consideration, it is our considered view that despite the Applicant submitting on one hand that the Interested Party had distanced himself from the Property and on the other had declaring him the only Interested Party hereto with possession and control of the said Property, the Interested Party has not only shown his interest in the Property by filing an Affidavit in

Opposition with exhibits, List of Authorities and Skeleton arguments, but through his Counsel, who appeared in Court throughout the Hearings, opposing the Application.

6.71 We are further fortified by the Court of Appeal in the case of **Johannes Kenneth Soigopi (T/A Nam Transport Co. A Partnership) Vs Director of Public Prosecutions** ⁽³³⁾ wherein it was held that documentary evidence showing ownership of the property establishes interest.

6.72 Despite the Land Use Agreement exhibited as "CP4" in the Affidavit in Opposition and alluded to in Counsel's oral submissions, the former Republican President, Mr. Edgar Chagwa Lungu, has opted not to make an appearance and adduce evidence in relation to his interest in the Property as envisioned by **Section 30(b)** of the **FPOCA**. It is our considered view that this is his prerogative and does not take away from Charles Phiri's apparent interest in the said Property and the need for him to defend it against the allegations made by the Applicant.

6.73 We therefore, find that Charles Phiri has shown interest in the subject property and is rightfully and legally indicated and referred to as an Interested Party in these Proceedings

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

6.74 Tainted property is defined under **Section 2** of the **FPOCA** as shown above. It is abundantly clear from the definition of tainted property that if the properties are tainted property, it is tainted in relation to a serious offence, it is proceeds of the offence. A serious offence is equally defined under **Section 2** of the **FPOCA** as:

“‘Serious offence’ means an offence for which the maximum penalty prescribed by law is death, or imprisonment for not less than twelve months.”

6.76 Based on **Section 31(1)** of the **FPOCA**, the onus of proving that a property is tainted to the satisfaction of the Court falls on the Applicant. The provision states as follows:

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

6.76 This is further underscored by **Section 34** of the **FPOCA** which states that:

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

6.77 The standard of proof required is on a balance of probabilities used in civil proceedings, as opposed to the standard of proof in criminal matters which is beyond a reasonable doubt. We are fortified by **Section 33** of the **FPOCA** which states as follows:

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

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

- a) *the rules of construction applicable only in relation to criminal law do not apply in the interpretation of this Act; and*
- b) *the rules of evidence applicable in civil proceedings apply, and those applicable only in criminal proceedings do not apply, to proceedings under this Act.”*

6.78 Other than the definition of ‘balance of probabilities’ in **Black’s Law Dictionary** above, Lord Denning, in explaining the meaning of “a balance of probabilities” in the case of **Miller v Minister of Pensions** ⁽³⁴⁾ stated as follows:

“That degree is settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: ‘we think it more probable than not’ then the burden is discharged.”

6.79 The Applicant must adduce evidence to satisfy this Court in attempting to fulfil the prescribed requirements of **Sections 31(1)** and **34** of the **FPOCA**.

6.80 The Applicant has submitted in the Affidavit in Support and Reply as well as in their oral submissions that having received information to the effect that the subject Property, being Plot No. LUS/38478 in Lusaka, acquired between 2013 and 2022, was reasonably suspected to be proceeds of crime, instituted investigations and found that the said Property belonged to the Interested Party, Mr. Charles Phiri as per Certificate of Title. It was submitted that the estimate cost of construction of the three storey Lodge on the property as per the Priced Bill of Quantities exhibited and marked

“**EK3**” was ZMW15,549,422.22, interpolated to ZMW9,069,699.87 as per the Statement recorded from a Quantity Surveyor from the MIHUD exhibited and marked “**EK4**”.

- 6.81 Based on the findings above, it was decided to investigate the financial capacity of the Interested Party which revealed that he had a Zambian Kwacha Account and a United States Dollar Account with FNB opened on 2nd July, 2015, and 20th October, 2016, respectively. Further that the Interested Party had around 16th November, 2021, sold 10,892.3890 hectares of land, being Property No. F/Mpika/1912933 for USD100,000.00 and paid ZMW87,250.00 in Property Transfer Tax.
- 6.82 That following analysis of the Interested Party’s accounts and known income and expenditure for the period 1st August, 2015, to 8th June, 2023, it was revealed that the Interested Party had incomes of ZMW875,155.54, USD100,000.00 and USD2,850.00 which revealed a variation of ZMW502,43 and USD99,251.33 respectively.
- 6.88 That following this analysis, a comparison of the known income of ZMW875,155.54 and USD102,101.33, which it was submitted came after the construction period around 16th November, 2021, against the estimated cost of construction of the three storey Property valued at the interpolated amount of ZMW9,069,699.87, gave a variation of about ZMW5,642,011.08 above the Interested Party’s known income.
- 6.84 The Applicant extended its investigations to ZRA with regards to the Tax Returns for the Interested Party and Crest Lodge, being the three-storey building constructed on the Property. It was submitted that the investigations, which included a recorded Statement from the Assistant Director Investigations at ZRA exhibited and marked “**EK8**”, revealed that taxes on Crest Lodge, a going concern since

2017, had not been paid which pointed to the serious offence of Tax Evasion.

- 6.85 It was submitted that a review of the Interested Party's Tax Returns and known income and expenditure showed that during the estimated period of construction of the Lodge, between 2015 and 2017, there was no income to justify the estimated cost of construction of the said Crest Lodge on the Property.
- 6.86 With regards to the Land Use Agreement, exhibited as "**CP5**" in the Interested Party's Affidavit in Opposition, it was the Applicant's submission that the same was created Eight (8) years after the alleged verbal agreement and only when the Interested Party was faced with a Forfeiture Application and, being a Lease Agreement, was not registered as required by law.
- 6.87 It was the Applicant's contention that the creation of the said Agreement, does not *ipso facto* establish the Developer's, being Mr. Edgar Chagwa Lungu, capacity to develop the property in question. Further to this, that no evidence was tendered to show that Mr. Edgar Chagwa Lungu actually developed the said Property nor was evidence tendered in the form of money transfers from any bank account or directly paid for the construction of the Property.
- 6.88 It was further contended that Mr. Edgar Chagwa Lungu has not entered Appearance as an Interested Party and adduced the relevant evidence to show his interest in the said Property and to show his capacity to construct the said Property.
- 6.89 It was submitted that despite the PACRA Print Out, exhibited and marked as "**EK1**" in the Affidavit in Reply, showing that Chiyeso Lungu is a Director in the Lodge, she too has not entered Appearance as an Interested Party.

- 6.90 It was submitted that the Interested Party failed to give reasonable and sufficient explanation of how he managed to construct the Property in question. This led to the seizure of the said Property as it was submitted that evidence has been sufficiently adduced showing that the Property is tainted property and liable for forfeiture to the State as it was reasonably suspected, on a balance of probabilities, to be tainted property and therefore a proceed of crime. The copy of the Seizure Notice was exhibited and marked “EK9”.
- 6.91 We agree with the Applicant’s assertions as well as the evidence tendered that the development costs of the Property far exceeds the Interested Party’s legitimate financial means, and that the financial outlay required for the Property’s development remains unexplained. This does cast doubt on the Interested Party’s financial capacity to develop the Property based on the Applicant’s investigations coupled with the Land Use Agreement created haphazardly in May, 2024.
- 6.92 Based on the evidence adduced above by the Applicant, it is our considered view that the Applicant has, on a balance of probabilities, satisfied this Court that the Property is tainted property in relation to a serious offence. As the Interested Party was in possession of a Property that was worth far more than his known legitimate sources of income, it is our further considered view that the said Property is proceeds of crime, and therefore, liable to forfeiture to the State.

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

- 6.93 The Applicant having satisfied this Court accordingly as per **Section 31(1)** of the **FPOCA**, the onus of disproving the assertions made by the Applicant and adducing evidence to the contrary now falls on the Interested Party.
- 6.94 **Section 31(2)** and **Section 71(2)** of the **FPOCA** affords defences to the Interested Party. Having found that the Interested Party had interest in the Property above, the Interested Party must now adduce evidence to show that he did not acquire the Property as a result of any serious offence carried out by him nor was it derived from any unlawful activity or conduct.
- 6.95 The Interested Party, Charles Phiri, asserted that he is a qualified Registered Nurse who worked in various institutions and whose professional tenure spans since 1990.
- 6.96 The Interested Party submitted that he had applied for land from the Ministry of Lands and Natural Resources and Environmental Protection in 2015 and was issued with a Certificate of Title Number 8508 for the Property in question being Number LUS/38478 situate in Lusaka. That he paid ZMW2,122.51 as consideration for the same.
- 6.97 The Interested Party submitted that the Property was developed by the former Republican President, Mr. Edgar Chagwa Lungu and a copy of the Land Use Agreement between them was exhibited and marked "**CP5**".
- 6.98 The Interested Party submitted that at the time of purchasing the Property he had the capacity to pay the ZMW2,122.51 consideration, but that it was Mr. Edgar Chagwa Lungu who developed the Property and erected the three Storey Lodge thereon, as he had the capacity as he is a Lawyer who later served in various positions including that of President of the Republic of Zambia for Seven (7) years. The

Interested Party deposed in his Affidavit in Opposition that he firmly believes that Mr. Edgar Chagwa Lungu is likely to possess the most accurate information regarding the full construction price or costs of the Lodge.

- 6.99 The Interested Party argued that the Bill of Quantities exhibited by the Applicant in their Affidavit in Support does not state the period the estimated prices were obtained and that if the price estimates were as at November, 2022, then the Bill of Quantities is materially misleading as the structure on the Property had already been completed, occupied and commercially utilised by then.
- 6.100 As regards the allegation of Tax Evasion, the Interested Party deposed that had Mr. Emmanuel Khondowe conducted a thorough investigation, he would have found that the Interested Party is not running any businesses at all that would warrant such an accusation.
- 6.101 It was the Interested Party's submission that having sold his lawfully acquired property being F/Mpika/1912933 at a consideration of USD100,000.00 and paid Property Transfer Tax to ZRA, this demonstrates that he does lawfully make money outside his formal employment and outside the monies going through his Accounts.
- 6.102 It was the Interested Party's contention that the Property is not tainted nor can it be categorised as such as the Applicant has not brought any evidence showing that the Property is connected to any crime whatsoever.
- 6.103 Further to the above, it was submitted that the Property was lawfully acquired with legal and traceable sources of income and further that the Interested Party had disclosed to the Applicant the

identity of the constructing party as per exhibit "CP5" being the Land Use Agreement. That the Interested Party had no reasonable grounds to believe that prior to acquiring the said Property, it was tainted. It was contended therefore, that the Applicant's analysis of the Interested Party's income and expenditure and ability to construct the said building on his Property is unfounded.

- 6.104 It was submitted that by virtue of **Section 31(2)** of the **FPOCA**, the Court cannot order forfeiture of the Property and referred us to the case of **Regina Chifunda Chiluba Vs The People** ⁽¹⁴⁾, *supra*, and contended that having informed the Applicant or investigating officer how the property was acquired and developed, it was unreasonable for the Applicant to harbour suspicions as to the source of the property.
- 6.105 We have considered the Interested Party's submissions in defence of the impugned Property.
- 6.106 The Interested Party, in defending the impugned Property, has submitted that he is a qualified and Registered Nurse who has worked since 1990. A perusal of the evidence submitted by the Interested Party with regards to these assertions shows that he has failed to produce evidence that he is a qualified and Registered Nursed by way of Academic Certificates and further to this, he has failed to adduce evidence to show his earnings over the period he claims to have worked.
- 6.107 We have no doubt, based on the Applicant's evidence of the Interested Party's Bank Statements covering the period in question that the Interested Party had the financial capacity to obtain Title to the said Property by paying the requisite

Consideration of ZMW2,122.51 to the Ministry of Lands in 2015, and the Applicant has not disputed this.

- 6.108 The Applicant's contention in *casu* is the Interested Party's capacity to construct the three-storey building or Lodge known as Crest Lodge, on the said Property.
- 6.109 In his defence of the Property, the Interested Party submitted that the Lodge was constructed on the Property by Mr. Edgar Chagwa Lungu by way of the Land Use Agreement exhibited as "CP5" dated Eight (8) years after the fact. It was the Interested Party's contention that Mr. Edgar Chagwa Lungu had the capacity, presumably financial, to erect the three-storey building thereon and that it is only him that is likely to possess the most accurate information regarding the full construction price or cost estimated at ZMW9,069,699.87.
- 6.110 Mr. Edgar Chagwa Lungu is not an Interested Party in these Proceedings and has not therefore tendered evidence to defend the Property, nor to substantiate the Interested Party's assertions as to his capacity financial or otherwise to construct the three-storey lodge.
- 6.111 The only evidence tendered by the Interested Party with regards to the construction of the three-storey building on the Property is the Land Use Agreement.
- 6.112 The Applicant has vigorously argued against the Land Use Agreement's validity and submitted that the Agreement was not registered as required by law and that none of the conditions contained therein, being payments of rentals or compensation upon certain attainments to the landowner, the Interested Party, have been fulfilled.

- 6.113 Other than the fact that the Land Use Agreement was created Eight (8) years after the alleged verbal agreement, it was the Applicant's contention that the Interested Party has failed to produce substantial evidence in the form of clear, traceable and legal sources of income used to develop the Property.
- 6.114 Perusal of the Land Use Agreement ("**CP5**"), made on 2nd May, 2024, and described as a documentary embodiment of an oral agreement entered into in the year 2016, shows that the terms and condition therein meet the description of documents that requires registration as prescribed by **Section 4** of the **Lands and Deeds Registry Act**.
- 6.115 It stipulates that the Landowner, being the Interested Party herein, leases to the Developer, Mr. Edgar Chagwa Lungu, and the Developer leases from the Landowner property known as Stand 38478, the impugned Property, for the sole purpose of constructing and operating a lodge. It is stated that the term of agreement is for a period of 20 years commencing the 1st day of May, 2016, during which period the Developer shall be at liberty to operationalise the Property.
- 6.116 The Land Use agreement goes on further to state that the Developer shall at the termination of the agreement relinquish all interest in the Property, and subject to entry into a new agreement or a renewal, the Landowner shall be at liberty to take full control and possession of the Property.
- 6.117 It states under the heading Use of the Property and Construction Value at Paragraph 3 as follows:

"The Developer shall have the exclusive right to use the Property for the construction and operation of a lodge at a

value estimate of ZMW12,000,000.00, including any ancillary facilities deemed necessary for the operation of the lodge.”

6.118 The document is signed by both the Interested Party, as Landowner, and Mr. Edgar Chagwa Lungu, as Developer.

6.119 It is trite that a document, such as the Land Use Agreement must be registered. This is a mandatory requirement under the **Lands and Deeds Registry Act Chapter 185** of the **Laws of Zambia**. **Section 4** of the said Act states as follows:

“(1) Every document purporting to grant, convey or transfer land or any interest in land, or to be a lease or agreement for lease or permit of occupation of land for a longer term than one year, or to create any charge upon land, whether by way of mortgage or otherwise, or which evidences the satisfaction of any mortgage or charge, and all bills of sale of personal property whereof the grantor remains in apparent possession, unless already registered pursuant to the provisions of "The North-Eastern Rhodesia Lands and Deeds Registration Regulations, 1905" or "The North-Western Rhodesia Lands and Deeds Registry Proclamation, 1910", must be registered within the times hereinafter specified in the Registry or in a District Registry if eligible for registration in such District Registry:...

(2) Any document required or permitted to be registered affecting land, persons, property or rights

in any district for which a District Registry has been appointed may be registered either in such District Registry or in the Registry.”

6.120 The time frame for registration of documents is prescribed in **Section 5** as follows:

“(1) All bills of sale must be registered within three months of the execution of the same.

(2) All other documents, except probate of a will, required to be registered as aforesaid shall be registered-

(a) in the case of a document executed at the place where it is registered, within thirty days from its date.”

6.120 Further to the above, **Section 6** of the **Lands and Deeds Registry Act** states that any document that requires registration, and is not registered, is null and void. The provision states as follows:

“Any document required to be registered as aforesaid and not registered within the time specified in the last preceding section shall be null and void...”

6.122 It is our considered view that based on the above cited provision, and without evidence of registration of the Land Use Agreement being tendered, nor an application having been made to extend time within which to have the said document registered as per **Section 5** of the **Lands and Deeds Registry Act**, the said Land Use Agreement is null and void.

6.123 We are buttressed in our finding by the case of **Sundi Vs Ravalia** ⁽³⁵⁾ where the equivalent of **Section 6** of the **Lands and Deeds Registry Act** was interpreted to mean that such documents not registered were without legal effect.

6.124 In the case of **Manuel Mota De Sousa Vs John Kees Mumba** ⁽³⁶⁾, the Supreme Court found as follows:

“An option, just as a contract of sale, is an interest in land and in terms of Section 4(1) of the Lands and Deeds Registry Act, Cap 287, this ought to be registered and in terms of Section 5(2)(a) of the same Act must be registered within thirty days of its execution. Failure to do so makes the document null and void as provided under Section 6 of the Lands and Deeds Registry Act and makes the contract unenforceable. In our present case there is no evidence that the sale agreement or "option" was registered in the Lands and Deeds Registry as required within the stipulated time or at all. Further there is no evidence that an application is pending before the High Court for it to be registered out of time. The effect of this failure is that the document is null and void.” (Emphasis ours)

6.125 Further in the case of **Examinations Council of Zambia Pension Trust Scheme Registered Trustees & Another Vs Tecla Investments Limited** ⁽³⁷⁾ the requirements and consequences of non-registration of a document was equally espoused by the Supreme Court as follows:

"It is agreed that the lease agreement was not registered as required by section 4(1) of the Lands and Deeds Registry Act. There can be no dispute either that section 6 of the Act provides for the consequences of failure to register any document that is required to be registered under section 4. Such document shall be null and void. In Krige and another v Christian Council of Zambia and Makanya Tobacco Company Limited v J & B Estates Limited we dealt with the same issues and we held that the effect of non-registration of a document that is required to be registered is that it is void for all purposes whatsoever. This is well settled law... Whatever may be said about the lease, the truth is that since it was void for lack of registration, it could not be enforced or relied upon."

6.126 We adopt the Supreme Courts pronouncement on the requirements of **Section 4** of the **Lands and Deeds Registry Act** as well as the guidance given in the above cited cases. It is consequently our considered view that the Land Use Agreement being fronted by the Interested Party is null and void for want of registration and cannot be enforced nor relied upon. We will not consider it as it has no legal effect.

6.127 Having found that the Land Use Agreement has no legal effect, all that remains is for the Interested Party to adduce evidence to show that he did not acquire the interest in the Property as a result of any serious offence carried out by him.

The standard of the evidence to be adduced has been aptly set out in the persuasive Kenyan case of **Assets Recovery Vs Peter Oluwafemi Olawon** ⁽²³⁾ as follows:

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

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

- 6.129 Perusal of the Record shows that the Interested Party's only defence to the allegations made by the Applicant with regards to the Property being proceeds of crime and tainted property are that Mr. Edgar Chagwa Lungu offered to develop the Property and build a modern lodge thereon and proceeded to do just that. The Interested Party goes on to give a summary of Mr. Edgar Chagwa Lungu's career attainments and submits that he has no reasonable basis for doubting his capacity to build the structure on his Property.
- 6.130 We, as a Court, cannot be swayed by mere declarations and posturing as to Mr. Edgar Chagwa Lungu's capacity, or indeed the Interested Party's capacity to construct the said building without reliable and provable evidence demonstrating legitimate financial wherewithal as guided in the case of **Assets Recovery Vs Peter Oluwafemi Olawon**, *supra*. We have held this position in various cases such as **The Director of Public Prosecutions In Re Property Chiyeso Lungu** ⁽²⁶⁾, and emphasised the need for Interested Parties to offer satisfactory explanations and evidence that is solid, honest and beyond conjecture or misinformation in **The Director of Public Prosecution In Re Property Henry Banda and 2 Others** ⁽³⁸⁾.
- 6.131 The Interested Party's submission that he firmly believes that Mr. Edgar Chagwa Lungu is likely to possess the most accurate information regarding the full construction costs is equally insufficient to meet the requirements of **Sections 30(b)** and **31(2)** of the **FPOCA** and fails to reduce the doubt raised by the Applicant. Mr. Edgar Chagwa Lungu has not risen to the call of **Section 30(b)** and **Section 31(2)** and has not presented

himself as an Interested Party in the defence of the said Property.

6.132 Once the Applicant has discharged its obligation and satisfied this Court on a balance of probabilities that the Property is tainted property, the onus is on any Interested Party to come forward in defence of the Property. The Applicant is not obliged to compel any Interested Party to come forward beyond the Notice of Application as provided for in **Section 30** of the **FPOCA**.

6.133 The attempt by the Interested Party to present the Land Use Agreement as the basis for legitimising his interest in the said Property has not only failed as a result of the non-registration of the Agreement as required by the **Lands and Deeds Registry Act**, but even if it were registered accordingly, it would not, by itself, be sufficient to show interest as required by the **FPOCA**. The Land Use Agreement is expected to have been tendered with evidence that must be solid, honest, beyond peradventure, beyond guesswork or misinformation. It must also be clear, logical, consistent, believable, and convincing. It must be backed or supported by sufficient evidence by the Developer of his capacity to build the Lodge and the legitimacy of his source(s) of income.

6.134 We agree with the Applicant's submissions, and the findings in the cases referred to of **Kabwe Transport Company Limited Vs Press Transport Company Limited** ⁽¹⁵⁾ and **Shamwana and Seven Others Vs The People** ⁽¹⁶⁾ which underscored the necessity of presenting concrete evidence to support one's claims and that documentary evidence is crucial in

establishing the veracity of claims, that concrete evidence such as financial transactions, and formal agreements with suppliers for the Property's construction, *inter alia*, is required and that the lack of such evidence leaves significant questions unanswered.

6.135 Counsel for the Interested Party referred us to the case of **Regina Chifunda Chiluba Vs The People** ⁽¹⁴⁾ and submitted that the Court espoused the principle that once the evidence shows that the Applicant knows the origin of the thing, then there is no suspicion as to the source of the Property; that essentially, the Interested Party having disclosed how the Property was built and by whom, has discharged its burden under **Section 31(2)** of the **FPOCA** and that this principle should be applied to the case in *casu*.

6.136 It is our considered view that this rendition of the **Regina Chifunda Chiluba** case, *supra*, is fiction. We will proceed to quote our position from our Judgment in the case of **The Director of Public Prosecutions In Re Property Chiyeso Lungu** ⁽²⁶⁾ where Counsel for the Parties are the same in *casu*, as follows:

"5.40 The Interested Party's submission that once the Interested Party had pointed the Applicant to the father as the source of money, then the Applicant should have followed the father does not, in our view, hold sway. We are not persuaded by the case of the Regina Chiluba v The People²¹ cited by the Interested Party. The view we take is that Regina Chiluba case is distinguishable from the case in

casu on many fronts as will be demonstrated presently to put into context our position.

5.41 In the Chiluba case, evidence was adduced pointing to the fact that the Appellant in that case Regina Chiluba used to receive money from former and now late Republican President, Dr. Chiluba. There was a document prepared by the Appellant for tax purposes and in that document the Appellant was declaring that she had received from Dr. Chiluba, over a period of time, US\$352,000. There was a witness who had dealt with the Appellant's declaration from the Zambia Revenue Authority who told Court that the Appellant prepared the declaration form in the presence of Dr. Chiluba. There was also another witness, the First Secretary at the Zambia High Commission in London, who testified that Dr. Chiluba instructed him to deliver to the Appellant, in London, a sum of US\$45,000.00 which amount the witness said he actually delivered.

5.42. Flowing from the above, the Supreme Court held that the moment evidence was adduced pointing to Dr. Chiluba as being the source of the money which could not be accounted for by the Appellant's businesses, then the suspicion that the Appellant had stolen or unlawfully obtained the extra money was effectively removed."

- 6.137 We reiterate that the **Regina Chifunda Chiluba** ⁽¹⁴⁾ case is distinguishable as further and solid evidence was adduced by the applicant to substantiate her claim that the former and late Republican President, Dr Chiluba, was the source of the impugned funds. Therefore, mere disclosure of the constructing party, let alone the production of the Land Use Agreement, is not sufficient evidence to defend the Property and discharge the evidentiary burden that the **FPOCA** casts upon persons who claim and present themselves as an Interested Party in property deemed to be tainted or proceeds of crime.
- 6.138 The Interested Party attacks the Priced Bill of Quantities exhibited as “**EK3**” in the Applicant’s Affidavit in Support contending that it does not state the period the estimated prices were obtained and that if the price estimates were as at November, 2022, then the Priced Bill of Quantities is materially misleading as the structure on the Property had already been completed, occupied and commercially utilised by then.
- 6.139 The Applicant in Reply submitted that the price estimates contained in the Bill of Quantities are as at November, 2022, and therefore clearly denote the time frame of the estimates. It was the Applicant’s contention that completion, occupation, and commercial utilisation of the structure by November, 2022, does not negate the validity of the cost estimates provided for that period.
- 6.140 Having perused the documents submitted by Counsel, we have taken note that in the Applicant’s Affidavit in Support, they have submitted, as per the Priced Bill of Quantities, that the

estimated cost of construction of the building on the Property as at November, 2022, was ZMW15,549,422.22, and based on the Dollar rate from 2015 to 2017, the period the Lodge was constructed, the cost was interpolated to ZMW9,069,699.87 showing a more accurate estimate of the cost of construction.

6.141 It is this interpolated cost of construction that the Applicant has used to argue its case and we find nothing misleading about it. It is equally not lost on us that the Land Use Agreement entered into between the Interested Party and Mr. Edgar Chagwa Lungu, and described as a documentary embodiment of an oral agreement entered into in the year 2016, estimates the construction cost at ZMW12,000,000.00, a price higher than that estimated by the Priced Bill of Quantities. We therefore find no merit in the Interested Party's argument.

6.142 The Interested Party in his Affidavit in Opposition refutes the Applicant's allegations of Tax Evasion by submitting that had the Applicant conducted thorough investigations, it would have been found that he does not run any business to warrant this allegation. The Interested Party goes further and submits that having sold his lawfully acquired property, F/Mpika/1912933, at a consideration of USD100,000.00, and paying the requisite Property Transfer Tax, which was known to the Applicant, it demonstrates that he does lawfully make substantial money outside his formal employment and outside monies going through his accounts.

6.143 The Interested Party's submissions above only further serve to show that he has no discernible legitimate income made

through enterprise that could be proffered as evidence to defend the Property, and further he has not produced any shred of evidence that he makes substantial money outside of his formal employment apart from stating the amount earned from the sale of the property F/Mpika/191933. The Interested Party has not provided proof of income earned in and outside his formal employment, supported by income tax returns nor payslips or bank statements.

6.144 Having considered the evidence tendered by the Interested Party in defence of the Property, we find that the Interested Party has not adduced sufficient evidence on a balance of probabilities, that he had capacity to develop the Property to the satisfaction of this Court, nor has he refuted the Applicant's conclusions based on its investigations that the Property was acquired by unlawful conduct.

6.145 Pointing to the Land Use Agreement has not served the Interested Party not only because of the failure to register the Agreement as required by law, but further that no additional evidence was tendered to show that legitimate sources of income were used to construct the Lodge thereon. The Interested Party has not submitted sufficient evidence to show that the Property is not proceeds of crime and was lawfully acquired by tendering into evidence proof of legal and traceable sources of income used in the development of the Property.

6.146 Submissions on Record point to the fact that the Property was built between 2015 and 2017 and that it was commercially viable in November, 2022. Lack of evidence to show that the conditions set out in the Land Use Agreement have been or are

being fulfilled may lead one to infer that not only was it an afterthought, having been produced eight (8) years after the fact, and close to one year after commencement of these Proceedings, but that it is indeed fabricated evidence that does offend **Section 108** of the **Penal Code** and can be conceived as tampering with evidence as alleged by the Applicant.

6.147 The Interested Party has, in our view not discharged the evidentiary burden that the **FPOCA** casts upon persons who claim an interest in property deemed to be tainted or proceeds of crime as required by **Sections 31(2)** and **71(2)** of the **FPOCA**.

7. CONCLUSION

7.1 For the avoidance of doubt, we find that the Applicant's Originating Notice of Motion for an Application for Non-Conviction Based Forfeiture Order of tainted property succeeds.

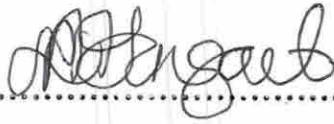
7.2 We find that the Interested Party was in possession of Property which was reasonably suspected to be proceeds of crime, as stated in **Section 71** of the **FPOCA**, which is a serious offence and for which he failed to explain its acquisition.

7.3 The Interested Party's Property, being Property No. LUS/38478 housing one (1) three Storey Lodge in Ibex Hill, is forthwith forfeited to the State to be applied as the Director of Public Prosecutions deems fit within the confines of the law.

7.4 The Interested Party, having satisfied this Court as per **Section 31(2)(a)** and **(b)(i)** of the **FPOCA**, shall forthwith be reimbursed the value of the land only, being LUS/38478 situated in Ibex Hill Lusaka, by the Applicant.

7.5 The Interested Party is, in consequence, condemned in costs to be taxed, in default of agreement.

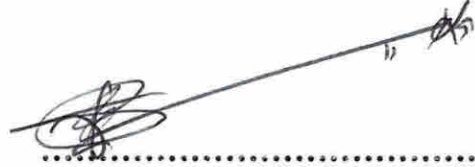
DELIVERED AT LUSAKA THIS 28TH DAY OF MARCH, 2025



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



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



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