

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

2023/HPEF/26

*(Civil Jurisdiction)*

IN THE MATTER OF: SECTIONS 29, 30,31 & 71 OF THE FORFEITURE  
OF PROCEEDS OF CRIME ACT NO. 19 OF 2010

**BETWEEN:**

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

CHIYESO LUNGU

INTERESTED PARTY

IN RE PROPERTY NO. L/9390/M CONTAINING 1 HIGH - COST HOUSE  
AND 4 CHICKEN RUNS IN STATE LODGE AND PROPERTY NO. LN-  
79093/1 CONTAINING 3 FLATS IN STATE LODGE.

BEFORE HONOURABLE JUSTICES A. MALATA-ONONUJU, I. M.  
MABBOLOBOLO and S. V. SILOKA ON 16<sup>TH</sup>APRIL, 2024.

**For the Applicant:**

*Ms. Margaret Kapambwe Chitundu- Deputy  
Chief State Advocate- National Prosecution  
Authority*

*Ms Rhoda Malibata Jackson – Senior State  
Advocate – National Prosecution Authority*

*Ms. Charity Alisinda Bauleni – State Advocate  
National Prosecution Authority*

**For the Interested Party:**

*Mr. I. Simbeye and Mr. D. Ncube – Malisa and  
Partners Legal Practitioners.*

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## JUDGEMENT

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**MABBOLOBOLO I. M. J, DELIVERED THE JUDGMENT OF THE  
COURT.**

## **A. CASES REFERRED TO**

1. *Simon Prophet v The National Director of Public Prosecutions* CCT55/ 05
2. *DPP v Jessie Bwalya Kapyelata Tapalu* 2018/HP/1888
3. *Director of Public Prosecutions and Dhiraj Dhumputha* 2020/HP/1287
4. *Director of Public Prosecutions and ZMK 157,040, USD 23,007.14, ZMK 50,000.00 and ZMK 82,333,83* 2019/HP/1784
5. *Director of Assets Recovery Agency v Szepletowsk* (2007) EWCA Civ 755; (2008) Lloyd's Rep. FC 10
6. *Abdulrahman Manhoud Sheikh and 6 Others v Republic and Others* (2016)Eklr
7. *Kumarnath Mohunram & Shelgate Investment CC v The National Director of Public Prosecution, BOE Bank Limited & The Law Review Project (As Amicus Curiae)* CCT 19/06/2007/ZACC
8. *African Banking Corporation Zambia Lintied (T/A Atlas Mara) v Mattamiah Investments Limited in Receivership, John Peter Sangwa, Leasing Finance Company, Agri Foods and Allied Industries Limited* (No.11.Of 2019)
9. *Joseph Gereta Chikuta v Chipata Rural Council* (1974) ZR. 241
10. *New Plast Industries v Commissioner of Lands and Another* (2001) ZR 51
11. *Twampane Mining Co – Operative Society Limited v E and M Storti Mining Limited* SCZ No.20 of 2011
12. *The People v Austin Chisangu Liato* Appeal No.291/2014
13. *Jessie Kapyelata Tapalu v The Attorney General and Another* 2019/HP/0932
14. *Godfrey Miyanda v The High Court* (1984) ZR 62
15. *Owners of the Motor Vessel Lillian "s" v Caltex oil (Kenya) Limited* (1989) KL19
16. *JCN Holdings Limited and 2 Others v Development Bank of Zambia* (2013) 3ZR 299
17. *Samuel Khan Macharia v Kenya Commercial Bank* (2012)
18. *Rosemary Chibwe v Austin Chibwe* (SCZ) No. 38 of 2000
19. *Attorney General v Roy Clarke* (2008) ZR 38 Vol. 1
20. *Kumanarth Mohunram and Another v The Director of Public of Public Prosecutions* CCT/906
21. *Regina Chiluba v The People* (2010) ZR 242 Vol.1
22. *Plascon Evans Paints Limited v Vanriebeeck (PVT) LTD*

23. *National Director of Public Prosecutions v Zuma*. 573/08
24. *Asset Recovery Agency v Peter Oluwafemi Onawan* E002
25. *DPP v Beauty Chama* 2023/HPEF/13
26. *Stellebosch Farmers Winery Ltd v Stellonvale (Pty)Ltd*, 1957 (4) SA 234 (C)
27. *Mc Intosh v Lord Advocate* (2001) Cr. APP. R. 498
28. *Assets Recovery Agency v Peter Oluwafemi Olaiwon* E002 of 2022

## **B. LEGISLATION REFERRED TO**

1. *High Court Rules Chapter 27 of the Laws of Zambia*
2. *Forfeiture of Proceeds of Crime Act No. 19 of 2010 of the Laws of Zambia*
3. *Prohibition and Prevention of Money Laundering Act No. 14 of 2001 as read together with the Prohibition and Prevention of Money Laundering (Amendment) Act No. 44 of 2010.*
4. *The Constitution of the Republic of Zambia*

### **1. INTRODUCTION**

- 1.1 This is a Judgment on the Applicant's Originating Notice of Motion for a Non-Conviction Based Order of Tainted Property filed on 14<sup>th</sup> July, 2023 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 (FPOCA)** of the Laws of Zambia.
- 1.2 The Application is supported by an Affidavit and Skeleton Arguments of even date.
- 1.3 The Interested Party countered the Application by way of Affidavit in Opposition and Skeleton Arguments both filed into Court on 6<sup>th</sup> October, 2023.

## **2.0. AFFIDAVIT EVIDENCE**

- 2.1 The Applicant's Affidavit in Support of the Application was deposed to by Emmanuel Khondowe, a Senior Investigations Officer in the employ of the Drug Enforcement Commission working under the Anti-Money Laundering Unit.
- 2.2 The gist of the Mr. Emmanuel Khondowe's deposition is that the Drug Enforcement Commission received information in May 2022 from a reliable source to the effect that there was real property that was reasonably suspected to be Proceeds of Crime situate at stand No. L/9390/M and plot No. LUSAK LN 79093/1 situate in State Lodge.
- 2.3 It was avowed that following receipt of this information, the Deponent was assigned to lead the investigation.
- 2.4 The Deponent stated that he conducted a search at Ministry of Lands and Natural Resources where he recorded a statement from Andrea Chuni and where according to the Lands and Deeds Register marked "**EK1**", the real properties in question were registered in the names of Chiyeso Lungu.
- 2.5 It was deposed that Property No. L/9390/M at entry No. 8 of the Lands and Deeds Register is an assignment of property at the consideration of ZMW 3,000,000.00 with the assigner being Kalumbi Trevor while the assignee is Chiyeso Lungu as exhibited in "**EK2**". Further that Property No. LUSAK/LN-79093/1 is also registered in the name of Chiyeso Lungu as shown in the Statement of Andrea Chini marked "**EK3**".
- 2.6 It was stated that the Deponent wrote to the Ministry of Infrastructure, Housing and Urban Development Registry for

the estimated cost of the construction of the three flats or property No. LUSAK/LN-79093/1 as well as the High cost house and 4 chicken runs on property No. L/9390/M was K6, 679,543.34 as at November, 2022 as exhibited in the copy of the priced Bills of Quantities marked **"EK4"**.

- 2.7 The Deponent stated that he went on to interview and record a statement marked **"EK5"** from Micky Kaisi, a Quantity Surveyor from the Ministry of Infrastructure, Housing and Urban Development who explained that using the average United States Dollar rate of USD 1 to K18.08 from 2020 to 2022 being the estimated period for the construction of the 3 flats on LUSAK LN/79093/1, the cost was interpolated to K2, 695,895.28. Further that using the average United States Dollar rate of USD 1 to K13.82 from 2016 to 2021 being the estimated period for construction of the structure on property No. 9390/M, the cost was interpolated to K6, 679,543.34.
- 2.8 According to the Deponent, following receipt of the Priced Bill of Quantities Report, he decided to investigate the financial capacity of Chiyeso Lungu in relation to the properties she had acquired.
- 2.9 It was averred that investigations revealed that Chiyeso Lungu holds an account with First National Bank where according to the Statement marked **"EK6"** by Ms Diana Zulu (a Branch Administrator at First National Bank, Manda Hill Branch), it was confirmed that the Account Number is 62509453916.
- 2.10 It was stated that the Account was opened on 9<sup>th</sup> December, 2014 and that Chiyeso Lungu was the sole signatory.

Further that the Account had no significant transactions from the time it was opened until around mid 2018 when it started being used as a salary account as shown in the Bank Statement exhibited as **"EK7"**

- 2.11 The Deponent avowed that his further investigations revealed that Chiyeso Lungu became part of a Charity Organization called Education Outreach for Children and that he recorded a Statement marked **"EK8"** from Malambo Miyanda in relation to the Organization's Account No. 62549391085 with Chiyeso Lungu being one of the signatories to the Account.
- 2.12 The further deposition is that the Deponent seized the real properties in question as indicated in the Notice of Seizure marked **"EK9"** as they were reasonably suspected to be Proceeds of Crime and that he had been advised and believes the cited properties are tainted properties liable for forfeiture to the State.
- 2.13 The Deponent averred that he extended his investigation to the Zambia Revenue Authority for purposes of conducting a search of Chiyeso Lungu's Tax Returns and recorded a statement marked **"EK10"** from Chilala Hakalima, the Assistant Director, Investigations who stated in his statement that Chiyeso Lungu has never declared any income Tax with ZRA.
- 2.14 It was further deposed that the investigations showed that Chiyeso Lungu's company, the Crest Lodge situated at Property No. LUS/38478 off Twin Palm Road in Ibex Hill which declared VAT related income amounting to K14,306,103.87 and also declared a rental income

amounting to K375,00.00. Further that this resulted in a total income of K14,681,103.87 and VAT related expenses amounting to K8,021,370.14 and paid total salaries of K3,422,674.63 resulting in expenses for the stated period of K11,444,0457.77 and that the only disposable income the company made was K3,237,058.10.

2.15 The Deponent stated that he recorded a statement from Patrick Chilekwa, an Officer from the Patents and Registration Authority, who stated in his Statement marked **“EK11”** that Chiyeso Lungu is a Director and shareholder in the Crest Lodge.

2.16 It was the Deponent’s averment that he conducted an analysis of Chiyeso Lungu’s known income and known expenditure for the period 2<sup>nd</sup> January, 2015 to 3<sup>rd</sup> June, 2023 which revealed an income of K2,143,184.41 against an expenditure of K2,138,929.00 with a variation of K4,264.13.

2.17 The Deponent stated that after his analysis, he did a comparison of the known income of K2,143,184.41 against two properties valued at K9,375,438.62 which gave a variation of K7,232,254.49 above her known income. Further that during his investigations, he discovered that Chiyeso Lungu had no other income generating activities.

2.18 In the Affidavit in Opposition to the Application for a Non Conviction Based Forfeiture Order filed on 6<sup>th</sup> October, 2023, Chiyeso Lungu as the Interested Party, averred that she had been advised by her Advocates and believed to be true that the purported Originating Notice of Motion does not conform with the prescribed form for an Originating Notice of Motion

as contained in the first schedule to the **High Court Act Chapter 27** of the Laws of Zambia as certain words are missing.

2.19 The Interested Party deposed further that Paragraph 5 of the Affidavit of Emmanuel Kondowe is neither sworn in the first person nor does it disclose the source of the information deposed to. Further that Paragraphs 6, 7, 8, 16 to 26, 30 to 33 of the Affidavit of Emmanuel Kondowe filed in Support of the Originating Notice of Motion are not sworn in the 1<sup>st</sup> person.

2.20 Related depositions by Interested Party are that the information contained in Paragraphs 15, 16, 17, 18, 25, 29 and 30 of the Affidavit of Emmanuel Kondowe is not expressed to be from the personal knowledge of the deponent and neither does he disclose the source of such information nor express belief in the information being deposed herein. Further that the contents of Paragraphs 35 and 36 of the Affidavit of Emmanuel Kondowe, filed in support are neither from his personal knowledge, information or belief and the source is undisclosed and that the Interested Party had been advised by her advocates and she believes to be true that the outlined Paragraphs violate the mandatory rules for preparing affidavits and as such they ought to be expunged and not accepted as Affidavit evidence.

2.21 The Interested Party averred that she indeed bought all that piece of land in extent 2.2268 hectares more or less being lot No. 9390/M situate in Lusaka Province of Zambia which piece of land is more particularly delineated a diagram No.

298 of 1998 (*“the 1<sup>st</sup> Property”*) at a consideration of ZMW 3,000,000.00 in or about April 2017 as shown in the Contract of Sale marked **“CL1”**

2.22 Her further deposition was that on 9<sup>th</sup> September, 2022, when Emmanuel Kondowe, the Deponent of the Affidavit in Support of the Originating Notice of Motion, invited her for interviews at the Drug Enforcement Commission Offices, she did state that the consideration for the purchase of the 1<sup>st</sup> Property was paid by her parents named Edgar and Esther Lungu and verily believes that he opted to conceal or withhold that information.

2.23 The Interested Party stated that she verily believes that failure or neglect to inform this Court of what she explained to Mr. Kondowe during the aforesaid enquiry amounts to suppression of material facts or dereliction of duty on his part or on the part of the DPP, if not a mere calculation to mislead Court.

2.24 She averred that she knows her father to have been an accomplished and long serving Legal Practitioner who was called to the Zambian Bar in 1981. That in addition to him working as a Legal Practitioner in various institutions for a period of 30 years, her father had served in various Government portfolios from being Member of Parliament for Chawama Constituency from 2011 to 2015.

2.25 It was elaborated that during the time that her father was serving as MP, he had served in various Ministerial positions from being the Deputy Minister in the Office of the Vice President to subsequently being promoted to the position of

Home Affairs Minister in July, 2012 and later Minister of Defence in December 2013 and subsequently as the Republican President following the demise of the late Micheal Chilufya Sata in 2014. Further that having also held the Office of Minister of Justice from August, 2014, on 25<sup>th</sup> January, 2015, her father was sworn in to the Office of the President of Zambia becoming the 6<sup>th</sup> President of the Country, an office which he held for 7 years until August, 2021.

2.26 The Interested Party averred that throughout her childhood and early adult life, during which she had no or limited income earning capacity, she has had continued access to various facilities and material possessions such as quality education, clothing, paid medical care, recreation and safe and clean housing which have all been above her earning capacity, all of which have been a result of her parents' ability to support her livelihood. Further that she believes that there is no law in this country which makes it a criminal offence for a responsible parent to provide financial and material support to their children in the manner that her parents have consistently done throughout her life.

2.27 Related to the above depositions, the Interested Party stated that she had and still has no reasonable basis to suspect or doubt her parents' capacity to raise a sum of ZMW3,000,000.00 which they availed to her for purchasing the 1<sup>st</sup> Property which was already developed with improvements being referred to as "*the high cost house*" and the 4 chicken runs. Further that Exhibit marked "**CL2**"

being the true copy of Form DR53 indicating that at the time of registration of the Deed of Assignment transferring the 1<sup>st</sup> property into her name, there were already residential and agricultural improvements built on the 1<sup>st</sup> Property.

- 2.28 The Interested Party averred that she verily believes that the Deponent of the Affidavit in Support being an Investigator should have known that at the time the Interested Party was purchasing the 1<sup>st</sup> Property, it was already fully developed and as such his attempts to differentiate between the cost of purchasing the 1<sup>st</sup> Property and construction of a house thereon and attribute the latter to the Interested Party as deposed in Paragraphs 15 to 18 of the Affidavit in Support are either a result of negligence, mistake or are carefully calculated at misleading the Court.
- 2.29 It was deposed that after buying the 1<sup>st</sup> Property and following a conveyancing process, change of ownership was effected at the Ministry of Lands and a Certificate of Title exhibited as **“CL3”** was issued into the Interested Party’s name.
- 2.30 The Interested Party deposed that she purchased the already developed 1<sup>st</sup> Property in Zambian Kwacha currency which fact, she believes the Deponent of the Affidavit in Support knew or ought to have known and as such reference to Dollar exchange in his Affidavit filed on 14<sup>th</sup> June, 2023, is an attempt to materially alter the facts and mislead this Court.
- 2.31 It was the Interested Party’s averment that later in 2019, she applied to the Ministry of Lands, Natural Resources and Environmental Protection to be allocated the piece of land which is in front of the 1<sup>st</sup> Property and on 20<sup>th</sup> August 2020,

she was issued with an Invitation to Treat marked **“CL4”** with respect to property No. LUSAK/LN-79093/1 indicating that upon payment of the sum of the sum of ZMW5,638.68, the Ministry of Lands would generate and issue to her a formal offer letter.

2.32 The Interested Party deposed that on 15<sup>th</sup> September, 2020, she proceeded to pay the sum of ZMW 5, 638.68 to the Ministry of Lands and on even date the Commissioner of Lands generated and issued an offer letter to her as shown by general government receipt No. G3105294 marked **“CL5a”** and the formal letter marked **“CL5b”**.

2.33 The Interested Party stated that as an officer of this Honorable Court practicing Law in the Firm of Messrs Muyatwa Legal Practitioners from where she earns a monthly salary which has at least been deposed to by the Deponent of the Affidavit in Support, she had the full capacity, from her earnings, to pay the sum of ZMW 5, 638.68 as indicated on the receipt from the Ministry of Lands.

2.34 A further deposition is that following the issuance of the Formal Offer Letter, the Ministry of Lands issued the Interested Party with Certificate of Title No. CT No. 10154 with respect to the 2<sup>nd</sup> property numbered as NO. LUSAK/LN-79093 situate right in front of the 1<sup>st</sup> property whose certificate of title is exhibited as **“CL6”**

2.35 The Interested Party averred that she has not built any flats on the 2<sup>nd</sup> Property as alleged by the State and that she verily believes that the depositions by Emmanuel Kondowe in Paragraphs 15 to 17 of his Affidavit alleging that she built 3

flats on the 2<sup>nd</sup> Property are blatantly false, either emanating from poor or incoherent investigation or are a deliberate misrepresentation calculated to create an unsubstantiated and misleading narrative before this Court.

2.36 The Interested Party avowed that the DDP has no legal authority to categorise her captioned property as “*Tainted*” considering the explanation given by herself and without a Court of competent jurisdiction making such a determination. Further that both the 1<sup>st</sup> and 2<sup>nd</sup> Properties are hers and do not form proceeds of crime as they were lawfully purchased with legal and traceable sources of income which have all been disclosed to the investigative wings on numerous occasions.

### **3.0 SKELETON ARGUMENTS**

3.1 In the Skeleton Arguments filed by the Applicant on 4<sup>th</sup> June, 2023, it was submitted that the Court was being approached by way of Notice of Motion for a Non Conviction Based Forfeiture Order pursuant to **Order XXX Rules 15 and 17 of the High Court Act.**

3.2 The Application is anchored on **Sections 29 and 31** of the **FPOCA.**

3.3 The case of **Simon Prophet v The National Director of Public Prosecutions**<sup>1</sup> was adverted to where the Court was called upon to strike an appropriate balance between two constitutional principles, namely that no one should be arbitrarily deprived of property and that the State is under

obligation to protect members of the public from criminal predations.

- 3.4 It was submitted that a Non Conviction Based Forfeiture is meant to demonstrate that crime does not pay, to incapacitate criminal moguls so that the property with which they allegedly committed the crime is taken away from them and by doing so to protect the public from criminal magnates. Further that in many countries, Non Conviction Based Forfeiture has been brandished as unconstitutional, but that however, a plethora of cases world wide have decided that Non Conviction Based Forfeiture is constitutional. Reliance was placed on the case of **DPP v Jessie Bwalya Kapyelata Tapalu<sup>2</sup>** on the constitutionality of Non Conviction Based Forfeiture.
- 3.5 It was posited further that a Non Conviction Based Forfeiture may be brought whether a person has been acquitted, charged or not on the strength of the case of **Director of Public Prosecutions and Dhiraj Dhumputha<sup>3</sup>** and section **31 (4)** of the **FPOCA**.
- 3.6 The case of **Director of Public Prosecutions and ZMK 157,040, USD 23,007.14, ZMK 50,000.00 and ZMK 82,333,82<sup>4</sup> held in different Banks** was also cited where the Court held that a Non Conviction Based Forfeiture provides an effective avenue for confiscation in situations where it is not possible to obtain a criminal conviction whether the defendant is dead, or in cases where the statute of limitations prevents prosecution.

- 3.7. It was submitted that the Notice of Motion for a Non Conviction Based Forfeiture Order against Tainted Property is supported by an Affidavit deposed to by Emmanuel Khondowe which shows that the Properties in issue are proceeds of crime as they are above the net worth of the Interested Party. Further that the Properties which the Interested Party possesses are proceeds of crime whose possession offends **Section 71 of FPOCA**
- 3.8. The Applicant drew our attention to the provisions of the **Prohibition and Prevention of Money Laundering (Amendment) Act number 44 of 2010** as read with the **Prohibition and Prevention of Money Laundering Act No. 14 of 2001** and **FPOCA** on the definition of proceeds of crime in the respective statutes.
- 3.9. Submitting further, the Applicant stated that the Affidavit in Support of the Application shows that the estimated cost for the construction of 3 flats at Property No. LN 79093/1 and 1 high cost house and 4 Chicken Runs at Property L/9390/M for the Interested Party was K2,695.28 and K6,679.543.34 respectively. Further that the Affidavit filed herein shows that the Interested Party had no significant transaction in her Account from the time it was opened on 9<sup>th</sup> December 2016 until 2018 when it was used as a salary account by the Interested Party.
- 3.10 According to the Applicant, the money in the Interested Party's Account as exhibited in the Affidavit does not amount to the estimated cost of construction of the Properties in question and there is evidence that the Interested Party had

no other income generating activities. Further that the evidence proves the fact that the Interested Party was in possession of property suspected to be proceeds of crime as she failed to give proper and sufficient explanation of where the money used to construct the Properties in issue came from. That it was clear from the income and expenditure analysis and the comparison of her known income that she had no capacity to possess and develop the Properties in issue.

- 3.11. The Applicant cited the case of **Director of Assets Recovery Agency v Szepletowsk**<sup>5</sup> on the standard of proof in matters of this kind.
- 3.12. The Applicant referred us to the definitions of tainted property and serious offence as set out in the **FPOCA** and contended that the properties are proceeds of crime in that the Interested Party has not given any sufficient explanation on how the properties were acquired. That they are proceeds of crime and should be forfeited to the State.
- 3.13 The Applicant called in aid the Kenyan case of **Abdulrahman Manhoud Sheikh and 6 Others v Republic and Others**<sup>6</sup> where 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 criminal conduct.”*

- 3.14 In the penultimate argument, our attention was drawn to **Section 31 (1) of FPOCA** for the position that proving that the property is tainted or proceeds of crime is lower than that in criminal matters as it is on the balance of probabilities.
- 3.15 The Applicant concluded its arguments by urging us to adopt the reasoning of Van Heerden AJ in the South African Constitutional Court of **Kumarnath Mohunram & Shelgate Investment CC v The National Director of Public Prosecution, BOE Bank Limited & The Law Review Project (As Amicus Curiae)**<sup>7</sup>. For the position that such orders may be made even if no has been convicted of having used the property or having being guilty of the unlawful activities of which the property is said to be the proceeds.
- 3.16 In the Skeleton Arguments filed by the Interested Party on 6<sup>th</sup> October, 2023, it was submitted in the introduction that Paragraphs 6,7,8,16 to 26, 30 to 33 of the Affidavit of Emmanuel Khondowe were not sworn in the first person and the Paragraph 15,16,17 18,25,29 and 30 of the same Affidavit are not expressed to be from personal knowledge of the deponent thereof and that based on the violation of mandatory rules of Court, the DPP's Application be dismissed for incompetence. Further that should the Court decline to dismiss the DPP's Application, the Interested Party would proceed to deal with the Application substantively. The Court was referred to the case of **African Banking Corporation Zambia Lintied (T/A Atlas Mara) v Mattaniah Investments Limited in Receivership, John Peter Sangwa, Leasing Finance Company, Agri Foods and Allied Industries**

**Limited**<sup>8</sup> where the Supreme Court held that Affidavits containing extraneous matters are expunged from the record.

3.17. It was submitted that contrary to the assertion by the Applicant that the 1<sup>st</sup> Property together with improvements thereon was valued at K9, 670.543.34 and that 3 flats had been built at the 2<sup>nd</sup> Property at the cost of K2,695,895.28, the Interested Party had filed an Affidavit indicating that the 1<sup>st</sup> Property was acquired already developed at a consideration of ZMK 3,000.000.00 which amount was provided by her parents and that she acquired the 2<sup>nd</sup> Property via a direct lease from the state upon payment of less than ZMK 6,000.00 as consideration and that she has not built 3 flats on the 2<sup>nd</sup> Property as alleged by the Investigator.

3.18. The Interested Party's submission is that the Rules of Court are made to regulate and standardize the procedure as well as to prescribe the format that the Court Documents must adhere to. Further that the reading of **Order VI Rule 2** of the **High Court Rules** entails that it is mandatory that every Originating process ought to be in a prescribed form and parties are not at liberty to design their own forms nor other prescribed forms unnecessarily, especially altering material contents of the prescribed form as had been done by the Applicant herein. That in this regard, the Court was urged to find that the Originating process the DPP filed into Court in this matter is not an Originating Notice of Motion and as such the Court is urged to hold that due to the wrong mode of commencement, the Court has no jurisdiction to deal with

the proceedings before it on the authority of **Joseph Gereta Chikuta v Chipata Rural Council**<sup>9</sup> and **New Plast Industries v Commissioner of Lands and Another**<sup>10</sup>. That should the Court be of the view that the use of the purported Originating Notice of Motion containing mere irregularities, then the Court should order that the Originating process be set aside accordingly.

3.19 It is contended by the Interested Party that the Exhibit marked **"EK10"** in the Affidavit in Support by the Applicant offends **Order V Rule 19 of the High Court Rules** which provides a guide as to how handwritten notes/statements must be accompanied by type written or printed copy thereof certified to be a true and correct copy of the original in addition to the actual handwritten document. That the rules of Court are mandatory and non compliance with the same should be treated as fatal to the enlisted exhibit and the same ought to be expunged from the record and the case of **Twampane Mining Co – Operative Society Limited v E and M Stortti Mining Limited**<sup>11</sup> was cited on the importance of adhering to the rules of Court.

3.20 The Interested Party submitted on the novelty of the Proceedings under the **FPOCA** and the Zambia Jurisprudence. That the Jurisprudence relating to proceedings under **FPOCA** remain novel and at its foundational stage requiring continuous development by this manner unhindered by the doctrine of *stare decisis*. The case of **The People v Austin Chisangu Liato**<sup>12</sup> was cited as one where the Supreme Court referred to **FPOCA** as an Act of

Parliament whose provisions have hitherto remained substantially untested in this jurisdiction.

3.21 A related submission is that in the case of **Jessie Kapyelata Tapalu v The Attorney General and Another**<sup>13</sup>, the Court justified persuasive reliance on foreign jurisprudence after holding, at J34, that it evident there is insufficient jurisprudence on Non Conviction based Forfeiture in Zambia. That in this respect, proceedings of the 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**. The Submission therefore is that in its quest to properly interpret the provisions of **FPOCA**, the Court should not allow itself to be tightly constrained by interpretations that the Court finds to be inconsistent with express provisions of the Statute, but seek true meaning of the provisions presented for interpretation.

3.22. The Interested Party contends that according to **Section 31** of **FPOCA** partly pursuant to which the Application by the Applicant has been made, the DPP should demonstrate, on the balance of probabilities, that the subject property is tainted as envisaged under **Section 2** of **the Act**. That it has not been demonstrated that the Interested Party's property under siege is tainted within the Statutory meaning of tainted property. Further that given the manner in which the Interested Party's properties were acquired, a forfeiture order cannot be made against the properties so as to affect the

Interested Party as doing so would fly in the teeth of the mandatory statutory defence under **Subsection 2 of Section 31 of the FPOCA.**

3.23. It was pointed out that the DPP has also placed reliance on **Section 71** of the **FPOCA** but argued that there is a clear distinction between that particular provision and the provisions of **Sections 29** and **31** of the Act. The argument in this regard is that the Statutory Defences applicable to this matter under **Sections 29** and **31 (2)** are different from the statutory defenses applicable to **Section 71 (2)** proceedings under the same Act. That having highlighted the distinction between the provisions under **Section 71** respectively, the present application is premised on **Sections 29** and **31** and not **Section 71** of the **FPOCA**. That in any case, the submission is that the Court has no jurisdiction to make a Forfeiture under **Section 71** whether under criminal proceedings or civil forfeiture proceedings.

3.24. Buttressing the Interested Party's submission on the issue of jurisdiction, reliance was placed on the cases of **Godfrey Miyanda v The High Court**<sup>14</sup>, the Kenyan case of **Motor Vessel Lillian s" v Caltex Oil (Kenya) Limited**<sup>15</sup>, **JCN Holdings Limited and 2 Others v Development Bank of Zambia**<sup>16</sup> and persuasively the Supreme Court of Kenya case of **Samuel Khan Macharia v Kenya Commercial Bank**<sup>17</sup>. The argument is that without **Section 71** of the **FPOCA** prescribing that the Court has power to order forfeiture of property, the Court cannot arrogate to itself such power as the Learned DPP is inviting it to.

3.25 The Interested Party therefore argued that it is misleading for the DPP to seek to find solace in **Section 71** of **FPOCA** in advancing its Application. That it is only under **Sections 29** and **31** of **FPOCA** that the Court derives prescribed jurisdiction to issue forfeiture Orders. Further that **Sections 29** and **31** as read with **Section 71 of the Act** outlines the elements which the DPP ought to prove on a balance of probabilities in order to secure a Forfeiture Order.

3.26. It is contended by the Interested Party that the **Constitution of the Republic of Zambia in Article 16 (1)** guarantees the right to ownership and enjoyment of property which right cannot be abrogated except in circumstances expressly provided under the Article or an Act of Parliament. Further that **Article 16 (2)** stipulates various circumstances under which an individual's right to enjoyment of ownership can be interfered with. That in this regard, it is argued that in line with **Article 16 (2) (b) of the Constitution**, in order to successfully obtain civil forfeiture orders under **Sections 29** and **31 of FPOCA**, the DPP should have demonstrated to the satisfaction of this Court that the Interested Party breached a particular written law or indeed that the properties subject to the application have been used or are intended to be used in the commission of a prescribed criminal offence and as a result, the Forfeiture Order being sought is a penalty for breach of a specified provision of the law.

3.27 Flowing from the above argument, it was submitted that if this Court finds that **Sections 29** and **31** or indeed **71** or any other provisions of **FPOCA** provides for forfeiture without the

need for proving on the balance of probabilities that a particular prescribed offence was committed or that the property was being used or about to be used to commit an offence, this Court should declare such provision *ultra vires* **Article 16 (2) (b) of the Constitution**. It was submitted further in this respect that on a careful reading of **Sections 29 and 31** of the **FPOCA**, both provisions are Constitutional if they are interpreted to reflect the true intention of the Legislature, which is that, it is a mandatory requirement that when making an application, a Public Prosecutor must lead evidence to show that the property they are applying to be forfeited is tainted within the Statutory definitions of tainted property as envisaged under **Section 34 of FOPCA**. Further that Court of competent jurisdiction has to declare that a particular property is tainted first and only thereafter can the DPP or any other law enforcement institution make a discretionary application for a Forfeiture Order relating to such property. That in the circumstances the submission is that neither the DPP nor any investigation officer has the legal authority or jurisdiction to declare any property, tainted at its discretion or pre- emptively.

3.28. The Interested Party submitted that it would appear that the present matter presents this Court with the first opportunity in our jurisdiction to consider the nexus between **Sections 29, 31** together with **Section 2** definition of “*Tainted Property*” and “*relevant offence*” of the **FPOCA** which clearly demonstrate that a property can only be declared tainted upon the relevant offence being demonstrated to the Court

with evidence and the balance of probabilities being the standard for proving.

3.29 It was argued that what is running through all the elements of tainted property is that there should be commission of an offence or that the subject property should be connected to that particular offence. That under **Section 2** of **FPOCA**, it is cardinal that the grounds upon which the DPP claims that the property is tainted are stated and proved by evidence being either that the property has already been used in the commission of an offence, or in connection with the commission of the offence, or alternatively the DPP must demonstrate by way of evidence that there is an intention on the part of the Interested Party to use the besieged properties in connection with, the commission of the offence. Further that in the event that the DPP makes no reference to a specific offence, as is the case in the present proceedings, then **Section 2** of **FPOCA** directs this Court to deem that it means tainted property in relation to a serious offence according to **Section 2** for which the maximum period prescribed by law is death or punishment for not less than twelve months.

3.30. The related submission is that the record will show that the DPP in making this application has not disclosed or led any evidence to show that the Properties sought to be forfeited were used in the commission of any offence and that the DPP had lamentably failed to show this Court by way of credible evidence that the property is about to be used to commit any offence under the laws of Zambia, thereby inviting this Court to speculatively find that the property is "*tainted*". The case

of **Rosemary Chibwe v Austin Chibwe**<sup>18</sup> was cited for the position that it is a cardinal principle that the Court's conclusions must be based on facts on the record. The case of **Attorney General v Roy Clarke**<sup>19</sup> and **Simon Prophet v The Director of Public Prosecutions**<sup>1</sup> and **Kumanarth Mohunram and Another v The Director of Public Prosecutions**<sup>20</sup> were adverted to for the proposition.

3.31. Contextualizing the South African Legal Framework for making Civil Forfeiture Orders and the cited case, the Interested Party briefly analyzed and distinguished the cases of **Simon Prophet v The Nation Director of Public Prosecutions**<sup>1</sup> and **Kumanarth Mohunram and Another v The Director of Public OF Public Prosecutions**<sup>20</sup> from the matter presently before this Court and argued that the DPP had cited them out of context.

3.32 The consequent submission was that in both cases the Court was able to refer to properties the National Director of Public Prosecution (NDPP) sought to be forfeited as instruments of crime because the said properties were specifically connected to a particular defined offence. Further that in the DPP's Application before this Honorable Court, there has been no demonstration as to how the Properties sought to be forfeited are connected to any crime. It was 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 particular crime and the standard of proof is the balance of probabilities.

- 3.33 The Interested Party referring to the DPP's Skeleton Arguments and Affidavit in Support of Notice of Motion 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 that the property is tainted. Further that there is no law in this country prescribing that if a person has a property whose value is above the net worth of a person in so far as is known to the law enforcement officer, then such property turns into proceeds of crime or tainted property.
- 3.34. In respect of the Statutory Defence, it was submitted that in the unlikely event that the Court finds that there was anything tainted about the Properties prior to the Interested Party purchasing the same, then by virtue of **Subsection 2 of Section 31** of the **FOPCA**, this Court should hold that it cannot order forfeiture of the Properties herein and placed reliance on the case of **Regina Chiluba v The People**<sup>21</sup> where the Court held that once the evidence shows that the Prosecution knows the origin of the thing, then there is no suspicion,
- 3.35. It was submitted that the Interested Party in her Affidavit in Opposition had deponed that she had and still has no reasonable basis for believing that any of her properties is tainted within the meaning of the Act and that she has expressly stated that her parents gave her money to buy the 1<sup>st</sup> Property. Further that she has no reasonable grounds or evidence to believe that the money given to her by her parents

was tainted. Further that the Interested Party had told the Investigations Officers the source of the money thereby extinguishing suspicion if at all there was any.

- 3.36 Replying to the case of **Jessie Bwalya Kapyelata Tapalu v the DPP<sup>2</sup>** cited by the DPP on the constitutionality of **Sections 29** and **31 of FPOCA** it was argued that this can only be so if the said Sections are properly interpreted to mean that for the Court to Order an Order for forfeiture there is need to prove that the subject property is tainted by being connected to a crime. That in other words, should this 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 the interpretation will 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 a penalty for breach of law, whether under civil process or after conviction of an offence.

#### **4.0 THE HEARING**

- 4.1 At the hearing held on 20<sup>th</sup> February, 2024, the Applicant's Advocates informed Court that they would be relying on the Affidavit in Support of Motion and briefly augmented.
- 4.2 Ms. Margaret Kapambwe Chitundu on behalf of the Applicant submitted that in Non-Conviction Based Forfeiture applications, once the State alleges that property is tainted or proceeds of crime, it is now upon any person who has an interest in the subject property to clearly demonstrate that

the said property is not tainted or proceeds of crime. The case of **The People v Austin Liato**<sup>12</sup> was cited.

- 4.3. It was stated that in the present case, the Interested Party has very casually responded by simply saying that the Property was given to her by her father. The submission is that there was need for the Interested Party to '*walk*' the money if indeed it was the money given, that is to say, how was this money given to her? where was it given to her? what is the evidence that this money was given to her? where there any bank statements which were given to her by her father? Further that there was absolutely nothing on record.
- 4.4 A related submission is that the Interested Party had an obligation to show the source of the money from the father in addition to demonstrating the capacity of the father to buy her that property such as, was it from the father's salary or did the father have other business ventures because failure to show the source of money could well be that the very source was itself tainted and to quote Counsel's words, "that the fruit of a poisonous tree is also poisonous." That therefore there was need in this case to clearly demonstrate to this Court that the source of the money was clean and that the giver had capacity to give such a gift and also show the Court through evidence how such gift was given.
- 4.5 It was further contended that if indeed, as alleged the father gave the Interested Party the money, there is nowhere on record where there is a statement or an affidavit or anything of the sort to prove that he was the source and also that his source of the money as well was clean.

- 4.6. The Applicant submitted that from the evidence before Court, the State has shown that the Interested Party has got no capacity at all and that she has failed to demonstrate to this Court through verifiable means, a clean source of the Property she owns.
- 4.7. The final submission by Ms. Chitundu is that the subject property is tainted property which should be forfeited to the State to send a clear and strong signal to members of the public and would be offenders that crime does not pay and that ill gotten gains will be taken away and given back to the State for implementation of social services and dispensation of justice that benefits Zambians and not just a select few.
- 4.8. Mr. I. Simbeye on behalf of the Interested Party submitted that, the Interested Party opposes the Application and would rely on the Affidavit in Opposition to the Application and Skeleton Arguments filed into Court on 6<sup>th</sup> October, 2023, in addition to oral augmentation.
- 4.9 It was submitted that **Sections 29, 30 and 31 of FPOCA** pursuant to which the Application has been brought to Court, indeed give the Director of Public Prosecutions discretionary power to bring the present Application and that in doing so, the State has to demonstrate through evidence that the property they are seeking to forfeit to the State is indeed tainted as defined by law. That from the Affidavit of the Interested Party, she has pointed to her father as the source of the money used to purchase the Property L/9390/M.

- 4.10. Responding to the State's submission on when, where and how the money was given to the Interested Party, it was submitted that the explanation given by the Interested Party was sufficient within the meaning of the law and the case of **Regina Chifunda Chiluba v The People**<sup>21</sup> was reiterated to the effect that a panel of 3 Judges therein stated that when the offence is based on reasonable suspicion, the moment the accused mentioned that the money used to purchase the property came from Chiluba, it was for the State to follow Mr. Chiluba.
- 4.11. The Interested Party proceeded to submit that in any case, should this Court find that the source remains disputed up to now, then the Court should come to the conclusion that the Applicant cannot be awarded the relief being sought in that these proceedings are based on Affidavit evidence and the Court will have no means of resolving the disputed facts which in fact go to the root of the matter. For this principle we were referred to, two South African cases of **Plascon Evans Paints Limited v Vanriebeeck (PVT) LTD**<sup>22</sup> and **National Director of Public Prosecutions v Zuma**<sup>23</sup>. Further that if the evidence as placed before this Court by the Interested Party is rejected or raises a dispute, then on that basis alone, the Applicant's Application is bound to fail.
- 4.12. In respect of the submission by the Applicant that the Interested Party should have gone even further to demonstrate that even the very source of money was clean, it was submitted by Interested Party that the argument was a misdirected one in the sense that the Statute itself under

which the Court has been moved does accord the Interested Party a Statutory defence that if the Interested Party informs Court that there was no reasonable grounds on which she could have known that the money itself was tainted then that would afford her a defence. That it is was stretching the law to argue that the Interested Party in addition to stating the source should also have established that the source was clean.

4.13. The Court was urged to only rely on the Paragraphs in the Affidavit in Support which speak to facts within the rules for preparing affidavits and that any extraneous matter such as arguments or opinions should not grace the Court's record as amounting to evidence.

4.14. The Interested Party beseeched the Court to find that it was at a very early stage of investigations when the Interested Party disclosed the source of money and it was up to the State or DPP to follow that source to which the Interested Party had directed them.

4.15. In respect of Property LUSAK/LN-79093/1 which in the Application has been stated to have 3 flats, it was submitted that the Interested Party had explained with documentary evidence from the Ministry of Lands that she only needed less than K5,000.00 to own that Property which she applied for under the normal process and paid requisite consideration. That the Interested Party has equally denied that anything has been built on the Property contrary to the allegations by DPP. Further that the Court should find that to suspect a Practicing Advocate of the High Court for Zambia for owing a

property for which the Interested Party had to pay less than K5,000.00 is an unreasonable suspicion if at all there is any.

4.16 The Interested Party urged the Court to take notice of the Evaluation Report with the figures therein versus the actual price for the 1<sup>st</sup> Property and find that K3,000.000.00 was sufficient for the Interested Party to buy the 1<sup>st</sup> Property. Further that if the Evaluator found the value to be different at the time of evaluation and investigation, it was up to the State to investigate further by contacting such sources as the vendor as well as ZRA but they did not do that.

4.17. The final submission by the Interested Party was to the effect that she had purchased the 1<sup>st</sup> Property as an already developed property as can be evidenced from not only her evidence, but also the State which has exhibited in its voluminous Affidavit form DR 53 which speaks to improvements on the property. Further that the State had an opportunity at the stage of investigating to dispel what the Interested Party told them the property was already developed.

4.18. In reply Ms Rhoda Malibata Jackson submitted that a closer look at the said Form DR 53 will show that it does not itemize or state the actual properties on the subject property and as such it is very difficult for this Court to note the development at the time of purchase. That the burden of proof as earlier indicated rests with the Interested Party to clearly show this Court that at the time of purchase, the properties which were there were not tainted property.

4.19. Replying further, it was submitted that the Interested Party has a burden by providing evidence in documentary form e.g certificate of title which has not been done in this case. The case of **Asset Recovery Agency v Peter Oluwafemi Olaiwon**<sup>24</sup> was adverted to for the provision that clearly shows that the Respondent has to demonstrate and justify that the properties in question are legitimate and were not acquired through proceeds of crime and that this has to be done through documentary evidence such as Wills and Bank Statements. That therefore, the assertion by the Mr. Simbeye that the DPP had an obligation to follow the Interested Party and bring out documents from ZRA does not hold water at this point as it is upon the Interested Party to bring all pieces of evidence that will help with her case to show that the properties are not tainted.

4.20. With respect to the Paragraphs in the Applicant's Application alleged to offend the provisions of the Law and Rules for drafting, it was prayed that the said Paragraphs are properly before Court and the Court is allowed to accept a defective affidavit as it is curable. The case of the **DPP v Beauty Chama and Others**<sup>25</sup> was cited for this proposition.

4.21. On the Interested Party's submission that the Application before Court is based on affidavit evidence and as such must be dismissed, it was submitted that the Courts can accept affidavit evidence even if there is no oral evidence as affidavit evidence is just the same as oral evidence as held in the case of **New Plast Industries v Attorney General**<sup>10</sup>.

- 4.22. Regarding the submission by the Interested Party that the State first of all has to show that the property is tainted before bringing the Application, Ms. Malibata Jackson submitted that tainted property includes proceeds of crime and in this case, the property is subject to this application as a proceed of crime and as such it falls within the meaning of tainted property.
- 4.23. Ms Chitundu in her reply, submitted on the plethora of cases in South Africa and in particular the **Cook** case which says that **FPOCA** is a unique **Act** that seeks to address crime in a different way from how it has been addressed in the past. Further that it requires a paradigm shift and that pure criminal law principles do not apply in Non Conviction based Forfeitures because it is civil rules that apply.
- 4.24. Regarding the Submission by Mr. Simbeye on behalf of the Interested Party that the State must have followed the direction to which she had pointed to investigate further, Ms. Chitundu submitted that what Non Conviction based applications require the State to do is to show on the balance of probabilities that the property is tainted. That at that point the evidential burden shifts to the Interested Party to show that it is not tainted property and that it is that which the State was saying the Interested Party has failed to do.
- 4.25. In concluding, Ms. Chitundu, submitted that had the Interested Party deemed it fit to demonstrate to this Court as they ought to have done to show the source of the money as her father, she would have called for affidavit evidence or after seeking the Court's discretionary leave would have

called for oral evidence to discharge the evidentiary burden that had shifted to the Interested Party to show that the source of the money and the Properties were not tainted. That other than a bare reference to her father as the source for the money, the evidentiary burden was not and could not have been discharged because it is indeed tainted property.

## **5.0 CONSIDERATION AND DECISION OF THE COURT**

- 5.1 We have critically addressed our minds to the Originating Notice of Motion for Non-Conviction based Forfeiture Order, the Parties' respective Affidavits, Skeleton Arguments and the passionate and spirited oral Submissions at the hearing. We are indebted for the industry by Counsel.
- 5.2 It is common cause that there are two properties namely Stand No. L/9390 and Plot No. LUSAK/ LN-79093/1 situate in State Lodge that are subject of these proceedings.
- 5.3 The germane issue central to determinative of this Application, as we see it, is whether or not the Properties are liable to forfeiture to the State as envisaged by the **FPOCA**. The Parties have canvassed other mundane issues which we will necessarily deal with in the course of our Judgment.
- 5.4 The Applicant contends that the Drug Enforcement Commission received information in May, 2022 from a reliable source to the effect that there was real property on Stand L/9390 and LUSAK LN/79093/1 valued at K9, 375,438.62 situate in State Lodge reasonably suspected to be proceeds of crime. The Interested Party, on the other hand concedes that she indeed bought Plot No. 9390/M with

already developed structures at a consideration of ZMW 3,000,000.00 using money given to her by her parents Edgar and Esther Lungu and that she acquired Property No. LUSAK/LN-79093/1 from the Ministry of Lands, Natural Resources and Environmental Protection upon payment of the sum of ZMW 5, 638.68 and that there are no structures on this Property.

- 5.5 The Interested Party has challenged the use of United States Dollar currency by the Applicant to interpolate the cost of the properties which the Interested Party states were purchased in Kwacha and not in Dollars. The Applicant has not addressed this aspect as far as we can discern both from the documents on Record and the oral submissions at the hearing.
- 5.6 While we understand that the point by the Applicant was to demonstrate the value of the Properties at the estimated time of construction being from 2020 to 2022 and from 2016 to 2021 respectively, we are inclined to agree with the Interested Party that the conversion to dollar should not really come into play given that there is no basis for such treatment when it has not been alleged anywhere that the Properties were purchased and /or constructed using dollars.
- 5.7 In any case, the basis for the Forfeiture Order sought by the Applicant is that there is a reasonable basis to suspect that the properties in question are proceeds of crime whose value exceeds the Interested Party's known sources of income while the Interested Party disputes this assertion by pointing to her parents as the source of funds for the first 1<sup>st</sup>Property and

not her own sources of income. There appears to us that there is no dispute that the value of the 1<sup>st</sup> Property exceeds the Interested Party's known sources of income of K2,143,184.41 from her Bank Accounts as exhibited in "EK6", "EK7" and "EK8". We shall return to deal with the 2<sup>nd</sup> Property later in the course of our Judgment.

5.8 We proceed to set out the relevant provisions as they relate to the matter before us. Section 29 of the FPOCA provides that:

*"A Public Prosecutor may apply to a Court for an order forfeiting to the State all or any property that is tainted property."*

5.9 Section 31 (1) of the Act provides that:

*"Subject subsection (2), where a Public Prosecutor applies to the Court for an Order under this section and the Court is satisfied on a balance of probabilities that the property is tainted property, the Court may order that the Property, or such of the property as is specified by the Court in the order, be forfeited to the State."*

5.10 According to Section 2 of the Act, tainted property is defined as follows:

*"Tainted property in relation to a serious offence or foreign 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 an offence.*

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

5.11 A serious offence under the same Section is defined as:

***“an offence for which the maximum penalty prescribed by law is death or imprisonment for not less than twelve months.”***

5.12 Under **the Act**, ‘*proceeds of crime*’ have been stated as:

***“Proceeds of crime in relation to an offence or a foreign serious offence means property benefits that is;***

- (a) Wholly or partly derived or realized directly or indirectly, by any person from the commission of a serious offence or foreign serious offence.***
- (b) Wholly or partly derived or realized from disposal or other dealing with proceeds of a serious offence or foreign serious offence***
- (c) Wholly or partly acquired proceeds of a serious offence or a foreign serious offence; and includes, on a proportional basis, property into which any property derived or realised directly from the serious offence or foreign serious offence is latter converted, transformed or intermingled, and any income, capital or other economic gains derived or realised from the property at any time after the offence or,***
- (d) Any property that is derived or realised, directly or indirectly, by any person from any act or omission that occurred outside Zambia and would, if the act or omission had occurred in Zambia, have constituted a serious offence.***

- 5.13 In the Applicant's Skeleton Arguments, it has been contended that the Properties which the Interested Party possesses are proceeds of crime whose possession offends **Section 71** of **FPOCA**. The Interested Party has argued that the present Application is premised on **Sections 29** and **31** and not **Section 71** of **FPOCA** because the Court has no jurisdiction to make a forfeiture order under **Section 71** whether under criminal proceedings or civil forfeiture proceedings.
- 5.14 The view we take is that this argument by the Interested Party is neither here nor there. We say so because it is trite that statutory provisions can not be read in isolation where the context so permits or requires. **Section 71** though admittedly not providing for forfeiture, does indicate the offences, penalties and the defence in addition to making it clear that the offence under the Section is not predicated on proof of commission of a serious offence or foreign serious offence. The fact that **Section 71** was adverted to by the Applicant does not take away the fact that the Application was made pursuant to **Sections 29** and **31**. For avoidance of doubt, we see no contradiction, but complementarity.
- 5.15 Regarding the arguments by the Interested Party that Paragraphs 6,7,8,16 to 26 and 30 to 33 were not sworn in the first person, and that Paragraphs, 15, 16, 17, 18, 25, 29 and 30 of the Affidavit in Support are not expressed to be from personal knowledge of the deponent, the Applicant has cited the case of **DPP V Beauty Chama and Others**<sup>25</sup> for the position that the Court is allowed to accept defective Affidavits.

5.16 In the case of **DPP v Beauty Chama and Others** cited by the Applicant, we stated, among others, that:

*“Notwithstanding the defect or default, we are fortified by Order 4/5/3 of the White Book which permits such Affidavits to be admitted even though they have defects. This is because the non – disclosure goes to the weight to be attached to the averments rather than its admissibility”.*

5.17. We have perused the Court Record and established that the Interested Party made no Interlocutory Application for objection of the same in accordance with law to assail any portions of the Affidavit in Support of Application. Be that as it may, our understanding is that in addition to the many cases that have been decided on the rules regulating affidavits, **Section 47 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia** sheds some insightful light on the practical consequences of defects in form on one hand and in substance on the other in the following terms:

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

5.18 The significance of the above Section is that if the defect in an instrument or document is in form, it is not a fundamental defect or irregularity. Consequently, Courts are authorized to receive affidavits despite irregularities in form pursuant to

very clear provisions of **Order V Rule 13 of the High Court Rules** couched as:

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

5.19 The other issue raised by the Interested Party is in respect of the alleged failure by the Applicant to use the prescribed form of the Originating Notice of Motion as envisaged by **Order VI Rule 2 of the High Court Rules**. The Applicant does not, from our perusal of the arguments appear to have addressed the assertion by the Interested Party. The view we take on the matter is that the omission of the words *“Republic of Zambia”* and the note at the bottom of the Prescribed Form 11 to the Respondent or the Interested Party is not fatal and does not warrant dismissing the matter for the Court not having been moved correctly as argued by the Interested Party.

5.20 The Interested Party has in the Skeleton Argument alluded to the novelty of proceedings under the **FPOCA** of the Zambia jurisprudence as the Court held in the case of **Jessie Kapyelata Tapalu v the Attorney General**<sup>13</sup> in justifying persuasive reliance on foreign jurisprudence. We agree entirely with the Interested Party’s submission. It is very true that although the **FPOCA** has been part of our Statute books since 2010, it is only in the last couple of years that life appears to have been breathed into the Statute. It is no wonder that as a Court we have painstakingly addressed all applications that have come before us in the hope that the

more decisions we make on the varied arguments emanating from the Act, both the Bar and the Bench will come to a near common understanding on the issues connected with or incidental to the provisions of **the Act** as we give effect to the intention of the Legislature as expressed in the words used.

5.21 This brings us to the gravamen of the matter. The Applicant's position is that the Properties subject of this Application are tainted Properties and proceeds of crime which are liable for forfeiture to the State. The Interested Party's position on the other hand is that the **Constitution of the Republic of Zambia** in **Article 16 (1)** guarantees the right to ownership and enjoyment of property which right cannot be abrogated except in circumstances expressly permitted and that the DPP should have demonstrated to the satisfaction of Court that the Interested Party had breached a particular written law or that the Properties have been used or are intended to be used in the commission of a prescribed criminal offence.

5.22 In our analysis of the Applicant's Affidavit evidence, we find that the basis of the Applicant's suspicion that the subject properties are reasonably suspected to be tainted is because their value exceeds the Interested Party's known and verifiable sources of income as indicated in the exhibits marked **EK6, EK7** and **EK8** which has not been challenged. This, in our view formed a sufficient basis for the Applicant to reasonably suspect that the Properties may be proceeds of crime. Consequently, the property reasonably suspected to be proceeds of crime would amount to tainted property that would be liable for forfeiture only in the event that the

Interested Party fails to demonstrate to the satisfaction of Court a legitimate interest in the property. In other words, it behoves the Interested Party to show that the Properties were legitimately acquired.

5.23 We take comfort in the words of Malila, JS (as he then was) in the case of **The People v Liato**<sup>12</sup> where he stated that:

*“... whether grounds for suspicion actually existed at the time the suspicion is formed is to be tested objectively. Consequently, a suspicion may be reasonable even though subjectively it was based on unreasonable grounds. In our considered view, proof of reasonable suspicion never involves certainty of the truth. Where it does, it ceases to be suspicion and becomes fact.”*

5.24 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.

5.25 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**.

5.26 We respectfully agree and are guided by the words of Malila, JS in the case of **The People v Liato**<sup>12</sup> where he said;

*“The passage of the Forfeiture of Proceeds of Crime Act in 2010 was therefore a deliberate act of the State, sequel to international clamor in this regard, to restate the burden and standard of proof in proceedings relating to Forfeiture of Proceeds of Crime Act. The framing of section 71 (1) changed the standard of proof and the evidentiary burden of proof. Section 78 of the Act which we quoted earlier makes the intention of the legislature quite obvious”.*

5.27 We are also fortified by the provision of **Section 31 (4)** of the **Forfeiture of Proceeds of Crime Act** which makes it clear that the validity of an order under **Subsection (1)** is not affected by the outcome of proceedings, or an investigation with a view to institute proceedings in respect with which the property is in some way associated. This provision was in fact given effect, in the case of **Director of Public Prosecutions v Dhiraj Dhumputha**<sup>3</sup> where it was 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.”*

5.28. Further comfort is to be found in the case of **Director of Assets Recovery Agency v Szepletowsk**<sup>5</sup> where More Bic held at Paragraph 106 that:

*“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.” (emphasis ours).*

And at Paragraph 107:

*“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 offence, in the sense of proving that a particular person committed a particular offence on a particular occasion.” (emphasis ours).*

5.29 Having found that the Applicant has reasonable basis for the suspicion, the next and related issue we necessarily ought to interrogate is whether the Interested Party has demonstrated, to the Court’s satisfaction, that she has a legitimately acquired interest in the Properties. **Section 31 (2)** of the **FPOCA** sets out the issues that the Interested Party ought to adequately address to satisfy the Court that she has a legitimate interest in the alleged tainted properties. These are;

1. That the Interested Party did not acquire the interest in the property as a result of any serious offence carried out by that person.

2. That the Interested Party had the interest before any serious offence occurred.

3. That the Interested Party acquired the interest for fair value after the serious offence occurred and did not know or could not reasonably have known at the time of acquisition that the property was tainted.

5.30 Quiet clearly, at this stage, the evidentiary burden of proving the legitimate interest in the property on the balance of probabilities shifts to the Interested Party. We shall return to this point later.

5.31 To demonstrate that the Interested Party has a legitimate interest in the Properties, she in her Affidavit in Opposition to the Affidavit in Support of the Notice of Motion stated that the 1<sup>st</sup> Property was bought for her by her parents Edgar and Esther Lungu as an already developed property and that she acquired the 2<sup>nd</sup> Property from the Ministry of Lands and that there are no developments on it. Zeroing in on the 2<sup>nd</sup> Property, the Interested Party has submitted that she paid less than K6,000.00 at the Ministry of Lands for its acquisition. Further that it would be unreasonable to suggest or suspect that the Interested Party who is a Legal Practitioner and earns a salary could not afford that. In our view, the point that should not be lost sight of is that it is the developments on the Land that are in issue and not its purchase as the Interested Party would want to make us believe

5.32 We are disinclined to believe the Interested Party that there are no developments on the 2<sup>nd</sup> Property. Our reason for this

is that the Applicant would not have obtained priced Bill of quantities as indicated in exhibit marked “EK4” in the Affidavit in Support on the said property if there were no developments as claimed by the Interested Party. Our understanding is that the priced Bills of Quantities are estimates of the cost of construction of the existing structures on Property No. LUSAK/LN-79093/1.

5.33 The Interested Party has argued that if the Interested Party’s evidence is rejected or raises a dispute, then on that basis alone, the Applicant’s Application is bound to fail based on the principle in two South African cases of **Plascon Evans Paints Limited v Vanriebeeck (PVT)**<sup>22</sup> and **National Director of Public Prosecution v Zuma**<sup>23</sup> that such a matter can not be determined on affidavit evidence.

5.34 We have had occasion to scrupulously acquaint ourselves with the decisions cited by Counsel in Paragraph 5.33 above. It would appear to us that Counsel for the Interested Party has infact misapprehended the principle in the cases. In the Supreme Court case of **Plascon Evans Paints Limited, Corbett, JA** stated that:

*“In such a case, the general rule was stated by **VEN WYK J in Stellenbosch Farmers Winery Ltd v Stellanvale Winery**<sup>26</sup> to be:*

*“.....where there is a dispute as to facts, a final interdict should only be granted in Notice of Motion proceedings if the facts as stated by the Respondent with the admitted facts in the Applicant’s affidavit justify such an order though not formally admitted. Where it is clear that the facts though*

not formally admitted, cannot be denied, they must be regarded as admitted.” (emphasis ours)

5.35. **Corbett J**, went on to state that:

*“This rule has been referred to several times by this Court..... it seems to me, however, that this formulation of a general rule, and particularly the second sentence thereof, requires some clarification and perhaps, qualification. It is correct that where in proceedings on Notice of Motion disputes of facts have arisen on the affidavits, a final order whether it be on interdict or some other form of relief, may be granted if these facts averred in the applicant’s affidavit which have been admitted by the Respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it, is, however, not confined to such a situation. In certain instances, the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bonafide dispute of fact.”* (emphasis ours).

5.36 It is evident that in the circumstances of this case, the above South African authorities which are persuasive would not, on a correct reading and understanding, proscribe us from believing the testimony of the Applicant and making a determination of the matter based on affidavit evidence. Even the case of **New Plast Industries**<sup>10</sup> in our jurisdiction is instructive on this point. We are also fortified by **Section 78 of the FPOCA** which states that:

*“Save as otherwise provided this Act, any question of fact to be decided by the Court in proceedings under this Act is to be decided on the balance of probabilities.”*

- 5.37 As we indicated earlier, the Applicant has posited that in Non Conviction based Forfeiture Applications, once the State alleges that the property is tainted, it is now up to any person who has an interest in the subject property to demonstrate that the property is not tainted or proceeds of crime.
- 5.38. It has been argued by the Applicant that in this case, the Interested Party has very casually responded by simply stating that the Property was given to her by her father and has not provided any evidence that the money indeed came from the father or that it was legitimate and clean. The Interested Party has on the other hand argued, that the Statute under which the Court has been moved does accord a Statutory Defence that if the Interested Party informs Court that there was no reasonable basis on which she could have known that the money was tainted she is then afforded a defence. Further that it is stretching the law to argue that the Interested Party should also have established that the source of the money was clean.
- 5.39 From our analysis of the evidence before us we, find that the Interested Party has not provided evidence that the money used to procure and/or develop the Properties was given to her by her parents. While we agree with the Interested Party that there is no law that states that a person cannot own property that is above their known income, our point of departure is that once a person is, on reasonable and articulable suspicion called upon to discharge their evidential burden on the legitimacy of their claim or interest

in any property, this must be done with proof to the satisfaction of Court.

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 **Regina Chiluba v The People**<sup>21</sup> cited by the Interested Party. The view we take is that the **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.

5.43 In our estimation from the foregoing, the **Chiluba** case is very distinguishable from the present one where the Interested Party has not provided an iota of evidence to show that the money used to acquire and develop the Properties was given to her by her parents **Edgar and Esther Lungu** as she has indicated in her Affidavit in Opposition and Skeleton Arguments in Opposition to the Application. 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.

5.44 We yet again are in agreement and are guided by the words of Malila JS (as he then was) in the case of **The People v Liato**<sup>12</sup>:

*"We feel inclined to give the background, albeit briefly, to the enactment of proceeds of crime laws to the extent that this is relevant to understanding the intention of the Legislature in passing the Forfeiture of Proceeds of Crime Act.*

*Forfeiture legislation was prompted in large measure by the desire to circumvent the difficulties in proving and dealing with serious offences such as money laundering and drug trafficking. Writing in the Journal of Money Laundering, Justice Antony Smellie QC, Chief Justice of Caymen made the following pertinent observations."*

*“The worldwide adoption of Laws which enable the confiscation of the proceeds of crime reflects the acknowledged importance of depriving the criminal of his profits. These laws recognize that organized criminals use their proceeds of crime to insulate themselves by the use of intermediaries from detection and arrest. They acknowledge that the more profitable the crime, the more difficult it becomes for law enforcement to link the criminal to it. The proceeds of crime become the very means by which the bastions of organized crime can be treated and sustained.”*

5.45 Malila, JS (as he then was) proceeded to state that:

*“This statement captures succinctly the thinking which quickly permeated international debate on the subject of proceeds of suspected crime. Various Conventions were made to provide flexible standards on the burden of proof.”*

*In many jurisdictions, it is now common occurrence for the burden of proof to shift, or to be lowered during confiscation or forfeiture of property reasonably suspected to be proceeds of crime. In the case of **Mc Intosh v Lord Advocate**<sup>27</sup>, Lord Hope of the Privy Council stated as follows:*

***‘The essence of drug trafficking is dealing or trading in drugs. People engage in the activity to make money, and it is notorious that they hide what they are doing. Direct proof of proceeds is often difficult, if not impossible. The nature of the activity and the harm it does to the community provide a sufficient basis for***

*making of these assumptions. They serve the legitimate aim in the public interest of combating that activity. They do so in a way that is proportionate. They relate to matters that ought to be within the accused's knowledge, and they are rebuttable by him at a hearing before a Judge on a balance of probabilities. In my opinion, a fair balance is struck between the legitimate aim and the rights of the accused' (emphasis ours).*

5.46 In giving effect to the intention of the Legislature when the Forfeiture of Proceeds of Crime Act was promulgated, the burden of proof is at the onset on the Applicant to establish a *prima facie* case that the property or assets subject of a forfeiture application are likely to be proceeds of money laundering or for the use in the promotion or commission of crime. We have already stated that we are satisfied that the Applicant has discharged its burden in this regard. All that the Applicant has to do is to create doubt by providing some *prima facie* evidence on a balance of probability.

5.47. Thereafter the evidentiary burden then shifts to the Interested Party to demonstrate to the Court's satisfaction that the assets in question are legitimate and were acquired through legitimate means. The Interested Party is expected to proffer evidence to support her explanation. The explanation and evidence tendered must be solid, honest, beyond peradventure, beyond guesswork or misinformation. It must also be clear, logical consistent believable and convincing. The required proof in many circumstances being in the form of pay-slips, bank statements, money transfer records, business records, employment letters, official

records, testamentary wills etc. These requirements of proof were set out in the Kenyan case of **Assets Recovery Agency v Peter Oluwafemi Olaiwon**<sup>28</sup>.

5.48 We adopt the above requirements of proof as though they are our own on the strength of **Jessie Kapyelata Tapalu v the Attorney General**<sup>13</sup> where the Court justified persuasive reliance on foreign jurisprudence after holding that it is evident that there is insufficient jurisprudence on Non Conviction Based Forfeiture in Zambia. The upshot of our discourse in the immediate preceding paragraphs is that we reaffirm that we are not satisfied that the Interested Party has discharged her evidentiary burden of proving that the money used to acquire the asset (s) was given to her by her parents. We however, take judicial notice of her father's rich resume' of having been an Advocate for many years, Deputy Minister, Member of Parliament, Cabinet Minister and eventually, albeit former, President of the Republic of Zambia.

5.49 We hasten to indicate that we agree with the Interested Party that there is absolutely nothing wrong with a father genuinely feeling duty bound and moved to gift his offspring with properties. What is of significance in Applications of this kind is that the recipient when called upon, should satisfy Court with evidence that the property was indeed given or acquired by the benevolent father without any shadow of doubt. Without an iota of evidence by the Interested Party that the funds used to purchase and/or develop the Properties were given by her parents, it would not comport with common

sense and good Judgment for us to hold that the subject Properties are free from being tainted.

5.50. We are not about to create a dangerous precedent where people will obtain all manner of property or assets in unscrupulous or illegitimate ways and when they are called upon to account for the same, they merely point to their fathers or indeed any other benevolent persons or benefactors as the source(s) of money for acquisition of the property without clear, logical, consistent, believable and convincing evidence.

5.51. The matter does not end there. The Applicant has contended that the Interested Party should have also established the source of the money used by the Interested Party allegedly from her father. The Interested Party has argued that this would be stretching the law. We are inclined to agree with the Interested Party, but for different reasons.

5.52. The view we take is that the argument should be taken in a staged approach. Since we have stated and found that we are not satisfied that the money used to acquire or develop the Properties was given to the Interested Party by her father on grounds that no evidence whatsoever has been furnished, we cannot proceed to interrogate the source of the money for the father. We cannot in one breath be saying that there is no evidence before us that the money came from the Interested Party's father and in the very next breath state that we want to know if the money from the father for the purchase of the Properties was legitimately acquired. That would, in our view, be a serious contradiction.

5.53. The Applicant has quoted to us an adage that the fruit from a poisonous tree is also poisonous. While this may be true, we elect to qualify the same by stating that it may only be true to the extent that it is established for certain that the alleged poisonous fruit is indeed plucked from the poisonous tree that bore the fruit. Beyond that, the rest would be conjecture.

5.54. In any event, we are not, as adjudicators, entitled to pontificate or be judgmental especially about those who have not been called upon to defend themselves. Our function is to adjudicate the issues between the Parties to litigation and not extraneous issues.

## **6.0. CONCLUSION**

6.1. Based on our discourse, we are of the view that the Director of Public Prosecutions has successfully made out its case for Non Conviction based Forfeiture of tainted property. All that the Applicant required to do was to create doubt by providing some initial *prima facie* evidence that the Properties may have been acquired illegitimately by the Interested Party.

6.2 The moment that a *prima facie* case was made out, the evidentiary burden which had shifted to the Interested Party was not discharged to the satisfaction of this Court as required by the **Forfeiture of Proceeds of Crime Act**. The Interested Party failed to provide evidence which ought to have been clear, logical consistent and convincing.

6.3. The required proof to the Court's satisfaction should have been in the form of payslips, bank statements, money

transfer records, business records or official records, or testamentary wills and such other relevant documents. In her Affidavit in Opposition to the Application, the Interested Party failed to demonstrate all these other than making a bare statement pointing to her parents as the source of the money.

6.4. We accordingly Order that Property No. 9390/M and LUSAK/LN – 79093/1 be forfeited to the State to be applied as the Director of Public Prosecutions deems fit within the confines of the law.

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

6.6. Leave to appeal is granted.

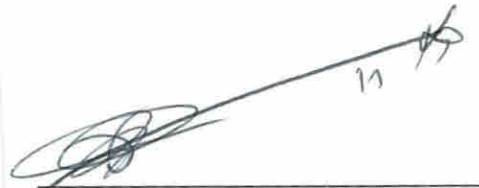
**DELIVERED AT LUSAKA THIS 16<sup>TH</sup> DAY OF APRIL, 2024.**



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



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



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

