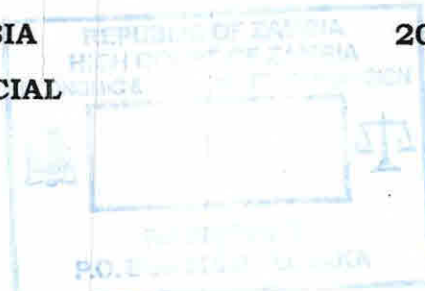


**IN THE HIGH COURT FOR ZAMBIA  
AT THE ECONOMIC AND FINANCIAL  
CRIMES DIVISION  
HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**2023/HPE/F/36**

**IN THE MATTER OF: SECTION 29 & 31 OF THE FORFEITURE OF PROCEEDS OF CRIME ACT NO. 19 OF 2010**

**IN THE MATTER OF: SECTION 7 & 8 OF THE PROHIBITION AND PREVENTION OF MONEY LAUNDERING ACT NO. 14 OF 2001**

**IN THE MATTER OF: SECTION 71 OF THE FORFEITURE OF PROCEEDS OF CRIME ACT NO. 19 OF 2010 AND SECTIONS 347 AND 352 OF THE PENAL CODE CHAPTER 87 OF THE LAWS OF ZAMBIA**

**BETWEEN:**

THE DIRECTOR OF PUBLIC PROSECUTIONS      APPLICANT

AND

ZANACO BANK PLC

1<sup>ST</sup> INTERESTED PARTY

ZACHEUS PHIRI

2<sup>ND</sup> INTERESTED PARTY

HELLEN PHIRI

3<sup>RD</sup> INTERESTED PARTY

**BEFORE THE HONOURABLE JUSTICES P. K. YANGAILO, I. M. MABBOLOBBOLO AND S.V. SILOKA ON 25<sup>TH</sup> APRIL, 2024.**

***For the Applicant:***

*Mrs C. A. Bauleni, State Advocate - National Prosecutions Authority*

*Ms. V. Nsingo, Senior State Advocate - National Prosecutions Authority.*

***For the 1<sup>st</sup> Interested Party:*** Mr. Z. Sampa – Simeza Sangwa & Associates

***For the 2<sup>nd</sup> Interested Party:*** No Appearance.

***For the 3<sup>rd</sup> Interested Party:*** No Appearance.

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**JUDGMENT**

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

**A. CASES REFERRED TO**

1. *The People v Zacchaeus Phiri and Helen Phiri RM/ 88/ 2020.*
2. *Jessie Bwalya Kapyeleta Tapalu v The Attorney General and DPP 2019/HP/0932*
3. *Kumarnath Mohunram & Shelgate Investments v The National Director of Public Prosecutions, BOE Bank Limited & The Law Review Project (As Amicus Curiae) CCT 1906 (2007) ZACC 4.*
4. *National Director of Public Prosecutions v RO Cook Properties (Pty)Ltd 2004 (8) BCLR 844 (SCA)*
5. *Simon Prophet v The National Director of Public Prosecutions CCT 56/06*
6. *Nachanga Transport v Director of Public Prosecutions CAZ Appeal No. 252 of 2020.*
7. *Siogopi (T/A NAM Transport Co. A. Partnership) v Director of Public Prosecutions Appeal No. 196 of 2020*
8. *The Attorney General v Seong San Company Appeal No. 182 of 2010*

**B. LEGISLATION REFERRED TO.**

1. *Forfeiture of Proceeds of Crime Act No. 19 of 2010.*
2. *The Penal Code Chapter 87 of the Laws of Zambia.*
3. *The Prohibition and Prevention of Money Laundering Act No. 14 of 2001 as read together with the Prohibition and Prevention of Money Laundering Act No. 44 of 2010.*

**1.0 INTRODUCTION**

**1.1** This is a Judgment on the Applicant's Notice of Motion for a Non-Conviction based **Forfeiture Order of Tainted Property** pursuant to **Order XXX Rules 15 and 17 of the High Court Rules** as read together with **Sections 29 and 31** of the **Forfeiture of Proceeds of Crimes Act No. 19 of 2010 of the Laws of Zambia.**

**1.2** The Notice of Motion filed at the Kitwe District Registry on 6<sup>th</sup> June, 2023 is supported by an Affidavit and Skeleton

Arguments of even date. The Kitwe High Court subsequently transferred the Matter to the Economic and Financial Crimes Court as the Court of competent jurisdiction hence this determination.

- 1.3 When the Matter first came before this Court on 9<sup>th</sup> November, 2023, for Status Conference, we adjourned the Matter and directed the Applicant to advertise the Application in the Press as by law required.
- 1.4 According to our Records, the Applicant placed a Notice of Hearing in the Zambia Daily Mail on the 27<sup>th</sup> and 28<sup>th</sup> November, 2023 notifying the Interested Parties that the Matter was scheduled for hearing on 29<sup>th</sup> February, 2024 at 09:00 hours.
- 1.5 On the return date referred to in Paragraph 1.4 above, there was no appearance on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties and no reasons were furnished for their absence.

## **2.0 AFFIDAVIT EVIDENCE**

- 2.1 The Applicant's Affidavit in Support of the Application was deposed to by Geoffrey Zyambo, a Detective Chief Inspector by rank under the Zambia Police Service.
- 2.2. The Deponent averred that the 1<sup>st</sup> Interested Party is a Limited Company engaged in the business of Banking and Express Mobile Money services. Further that 2<sup>nd</sup> Interested Party was at the material time a businessman who operated a Zanaco Mobile Express Agency business while the 3<sup>rd</sup> Interested Party is the biological mother of the 2<sup>nd</sup> Interested Party.
- 2.3 Mr. Zyambo stated that this Application relates to K3,161,160.00 held in Account number 5728217000510

domiciled at the Zambia National Commercial Bank PLC, Mukuba Mall Branch in the Kitwe District of the Copperbelt Province of Zambia ("ZANACO").

- 2.4 According to the Deponent, he did sometime in the month of May, 2020 receive a complaint from ZANACO that they had noticed suspicious transactions on the aforementioned Account. That as he carried out investigations into the complaint, he discovered that on 21<sup>st</sup> February, 2020, Gertrude Chisala Chanda opened Account Number 5728217000510 with ZANACO for Express Money business and that after the Account was opened, it remained dormant as the said Gertrude Chisala Chanda did not have money to use it for the purpose the Account was opened.
- 2.5. It was the Deponent's further evidence that his investigation revealed that the 2<sup>nd</sup> Interested Party requested Gertrude Chisala Chanda to be using the Account she had opened, for his Express Mobile Money business. That Gertrude Chisala Chanda agreed and gave the 2<sup>nd</sup> Interested Party all her credentials relating to the said Account at a consideration fee of K1,000.00 as contained in the Statement marked "**GZ1**".
- 2.6 It was averred by the Deponent that in the month of May, 2020, ZANACO noticed an exceedingly high volume of activities and figures on the subject Account as shown in the Statement by Joseph Katinala Simbeye marked "**GZ2**".
- 2.7. Deponing further, Mr. Zyambo stated that between 7<sup>th</sup> May, 2020 and 13<sup>th</sup> May, 2020, money amounting to K3, 161,160.00 was transferred from Gertrude Chisala Chanda's

Account to the 2<sup>nd</sup> Interested Party's Account Number 0104302892600 held at Standard Chartered Bank in Kitwe as evidenced by a copy of the Bank Statements for Gertrude Chisala Chanda's Account and the 2<sup>nd</sup> Interested Party's Zacheus Phiri's Account marked "**GZ3**".

2.8. The Deponent averred that several transactions were thereafter performed from Gertrude Chisala Chanda's Account to the 2<sup>nd</sup> Interested Party's Account on diverse dates as indicated below:

- a) on 8<sup>th</sup> May, 2020 an amount of K516,000.00
- b) on 13<sup>th</sup> May, 2020, amounts of K314,200.00 and K300,000.00.
- c) on 12<sup>th</sup> May, 2020, amounts of K319,000.00 and K388,700.00.

2.9 According to the Deponent, when Gertrude Chisala Chanda was contacted on the high volume of activities on her Account, she referred all queries to the 2<sup>nd</sup> Interested Party as the person who was using the Account at the time. That when the 2<sup>nd</sup> Interested Party was contacted and asked to state the source of money, his response was that he got the money from his mother, the 3<sup>rd</sup> Interested Party, who had sold land in Mfuwe District of the Eastern Province of the Republic of Zambia and a house in Kitwe.

2.10. The Deponent averred that the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties were asked to show proof of the sale of land in Mfuwe District and the house in Kitwe following which they presented a Contract of Sale and a Police Report as proof of the source of money as exhibited in "**GZ4**" and "**GZ5**" respectively. That

the Contract of Sale was accompanied with a Police Report where there was a date stamp and signature from His Royal Highness Chief Jumbe of the Mambwe District of the Eastern Province of the Republic of Zambia and a date stamp and signature from Mfuwe Police Station purporting to show that the Chief and the Police had witnessed the sale of the alleged land and the Contract of Sale.

2.11 It was the Deponent's evidence that he recorded Statements from Wadson Phiri, the Chief Retainer for His Royal Highness Chief Jumbe and Efford Chambe, the Officer in Charge of Mfuwe Police Post, who was alleged by the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties to have witnessed the signing on the Police Report but both denied having witnessed the sale of the land and that neither did they issue the said documents, stating that the documents were a forgery. Their Statements are marked as **"GZ6"**.

2.12. According to the investigation and physical comparisons made by the Deponent at the Chief's Palace, the original date stamp from Chief Jumbe's Palace has the words, **"KALONGO OWN ROYAL PALACE"** as opposed to **KALONGA OWN ROYAL PALACE"** which is appearing on the Police Report which came with the contract of sale. Further that the box number on the date stamp for Mfuwe Police Post is 18 as apposed to 48 which is appearing on the forged Police Report. Further still that the name of the Police establishment is **"MFUWE POLICE POST"** and not **"MFUWE POLICE STATION"** which is appearing on the Police Report and that

the date stamp for Mfuwe Police does not have a Police logo while the one on the Police Report herein has two Police logos.

2.13. The Deponent averred that from the forgeries highlighted above, it is clear that the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties failed to account for how they came in possession of the money in issue. That on 23<sup>rd</sup> May, 2020, the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties were charged and arrested for Two Counts of the offence of **Forgery** relating to the Contract of Sale and the Police Report, respectively, One Count of the offence of **Uttering a False Document** and One Count of the offence of being in **Possession of Property suspected to be Proceeds of Crime**.

2.14. The Deponent stated that later, the money amounting to K3, 161,160.00 which had been transferred to Gertrude Chisala Chanda's Account to the 2<sup>nd</sup> Interested Party's Account at Standard Chartered Bank between 7<sup>th</sup> May, 2020 was reversed to Gertrude Chisala Chanda's Account at ZANACO and only reflected in the said Account on 9<sup>th</sup> June, 2020.

2.15. It was deponed that on 18<sup>th</sup> November, 2020, the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties herein appeared and took Plea before the Subordinate Court at Kitwe for the charges proffered where they denied all the charges and the Matter proceeded to trial on the charges as indicated in the Charge Sheet marked "**G7**". That on 9<sup>th</sup> March, 2022, Judgment was rendered and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties were acquitted of the charges in Counts 1 and 4 but convicted in Counts 2 and 3 relating to

the Police Report as indicated in the Judgment marked **“GZ8”**.

- 2.16. The Deponent averred that he is reliably informed that a Non-Conviction based Forfeiture Application against tainted property may be made even after a person had been acquitted because the application is against property and not a person. That the tainted property in issue can still be forfeited because the standard of proof is different in civil matters, which is on a balance of probabilities as opposed to proof beyond all reasonable doubt required in Criminal matters.
- 2.17. The 1<sup>st</sup> Interested Party filed an Affidavit in Opposition sworn by Temba Monde who is the Head, Compliance and Financial Crimes for the 1<sup>st</sup> Interested Party.
- 2.18. According to the 1<sup>st</sup> Interested Party's Deponent, some time in May, 2020, the 1<sup>st</sup> Interested Party noticed some unusual transactions on Account No. 5728217000510 held at Mukuba Mall Branch in Kitwe belonging to Gertrude Chisala Chanda. That the Account had uncharacteristically amassed a sum of ZMW 3, 941.00 between 26<sup>th</sup> April 2020 and 14<sup>th</sup> May, 2020. Further that following this, the 1<sup>st</sup> Interested Party through its Agency Banking Co-ordinator, Joseph Katinala Simbeye, contacted Gertrude Chisala Chanda to clarify the source of the unusually large sums of money sitting in her Account. That Gertrude Chisala Chanda informed Joseph Katinala Simbeye that the Account was being used by the 2<sup>nd</sup> Interested Party, who was also a ZANACO Express Agent.

2.19 The Deponent averred that at a Meeting held sometime in May, 2020, the 2<sup>nd</sup> Interested Party informed Joseph Katalala Simbeye that he was the one using the Account and was also using Account No. 5634114000385 under the name of Graside Enterprises. That the 2<sup>nd</sup> Interested Party stated that the high volume transactions on the Account were sourced from the sale of land in Mfuwe, Mambwe District and a house in Kitwe, both belonging to 3<sup>rd</sup> Interested Party. Further that the 2<sup>nd</sup> Interested Party subsequently produced a Police Report purportedly witnessed by a Police Officer from Mfuwe Police Post and a Chief Retainer for His Royal Highness Chief Jumbe of the Kalonga Royal Palace and a Contract of Sale between the 3<sup>rd</sup> Interested Party and a Mary Musonda as evidence of the source of the large deposits as evidenced in exhibits marked “**TN1**” and “**TN2**” respectively.

2.20. The Deponent stated that investigations were carried out by the Zambia Police Service who determined that the Police Report and Contract of Sale produced by the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties were forgeries and that the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties had failed to account for the source of the suspicious deposits on the Account. That the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties were subsequently prosecuted on Two Counts of Forgery, One Count of Uttering a False Document and one count of being in Possession of Property suspected to be proceeds of crime, under an action titled **The People v Zacchaeus Phiri and Helen Phiri**<sup>1</sup>.

2.21. It was the Deponent's further averment that sometime in February, 2021, the 1<sup>st</sup> Interested Party, through its

Compliance Department, conducted an independent review of suspected cash out transactions which had been duplicated and redeemed at multiple Express Agents through the 1<sup>st</sup> Interested Party's V- Remit Account No. 5614504200196, which Account is used by ZANACO Express Agents to redeem cash out requests from ZANACO Account holders. That the investigation revealed that while the Originating Customer Accounts were debited only once, the 1<sup>st</sup> Interested Party's V – Remit Account was debited twice based on the same transaction and General Retrieval Reference Number (“RRN”) as evidenced by a copy of the Cash out Transaction map marked “**TN3**”. Further that the cash outs were duplicated at the point of redemption as the Express Agent took advantage of the weakness in the validation controls and cashed out on a single transaction using the same RRN at two points of service (“POS”) terminals simultaneously within the same minute, thereby duplicating the cash outs redeemed from the 1<sup>st</sup> Interested Party's V-Remit Account to the two Accounts.

2.22. The Deponent averred that between 26<sup>th</sup> April, 2020 and 14<sup>th</sup> May, 2020, the 2<sup>nd</sup> Interested Party redeemed 1984 duplicate cash out transactions using the same RRN on the Gertrude Chisala Chanda Account No. 572821000510 through Pos Terminal ID No. X5728218 and Grasite Enterprises Account No. 5634114000385 through POS Terminal ID No. X5634117 simultaneously as evidenced by a copy marked “**TN4**” of the consolidated schedule showing suplicated cash outs on both Accounts using one Generation Retrieval Reference Number.

2.23. It was deposed that the investigations determined that the 2<sup>nd</sup> Interested Party had multiple Bank Accounts with the 1<sup>st</sup> Interested Party under the name Zacchaeus Phiri linked to various phone numbers, which he used to facilitate the duplication of cash out transactions. The exhibit marked **"TN5"** shows a list of the said Accounts, correlating phone numbers and number of duplicated cash-out transactions executed by each number.

2.24. The Deponent stated that as a result of the duplicated cash-out transactions, the 1<sup>st</sup> Interested Party paid out the collective and cumulative sum of ZMW7, 883,928.00 to both the Accounts of Gertrude Chisala Chanda and Graside Enterprises between 26<sup>th</sup> April, 2020 and 14<sup>th</sup> May, 2020 as evidenced in the Statement of Account for both marked **"TN6"**. That the said payments were made from the 1<sup>st</sup> Interested Party's V-Remit Account to both the Accounts of Gertrude Chisala Chanda and Graside Enterprises as is shown in **"TN7"** which is a copy of the Statement of Account of the V-Remit Account evidencing the cash out transactions redeemed by the two Accounts traceable using the V-Remit transaction key.

2.25. The Deponent averred that between 26<sup>th</sup> April, 2020 and 14<sup>th</sup> May, 2020, the Account amassed a cumulative sum of ZMW 3, 942, 964.00 from the duplicated cash-out transactions referred to above, which were facilitated through the POS Terminal ID No. USX5728218 registered to Account No. 5728217000510. That between 7<sup>th</sup> May, 2020 and 13<sup>th</sup> May, 2020, the sum of ZMW 3, 161,160.00 was transferred from

the Account of Gertrude Chisala Chanda to a Bank Account in the name of the 2<sup>nd</sup> Interested Party held at Standard Chartered Bank under Account No. 0104302892600 in Kitwe as shown in exhibit marked **“TN8”**. Further that on 14<sup>th</sup> May, 2020, the 1<sup>st</sup> Interested Party recalled the various transactions amounting to ZMW3, 161,160.00 from the 2<sup>nd</sup> Interested Party Standard Chattered Account pending investigations as to the source of the said funds and the criminal prosecutions.

2.26. It was deposed that by a Judgment dated 9<sup>th</sup> March, 2022, the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties were convicted on the second Count of Forgery and One Count of Uttering a False Document and acquitted with respect to the first Count of Forgery and the fourth Count of being in Possession of Property suspected to be proceeds of crime as is shown in the Judgment marked **“TN9.”**

2.27. The Deponent ended by averring that the investigations carried out by the 1<sup>st</sup> Interested Party as indicated above, established that ZMW 3,161,160.00 held in Account which is subject of the Application for Forfeiture forms part of the sum of ZMW 3,941,964.00 which the 2<sup>nd</sup> Interested Party surreptitiously redeemed from the 1<sup>st</sup> Interested Party's V-Remit Account through numerous duplicated cash out transactions and therefore ought not to be forfeited to the State.

2.28. The 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties have not filed any Affidavits in Opposition to the to the Application by the Applicant.

### **3.0. SKELETON ARGUMENTS**

- 3.1. In its Skeleton Arguments, the Applicant submitted that criminal activities present a danger to public order, safety and economic stability. It was noted that traditional laws have somewhat failed to adequately deal with criminal activities and keep pace with international measures aimed at dealing effectively with such activities and that the **Forfeiture of Proceeds of Crime Act Number 19 of 2010 (FPOCA)** therefore seeks to ensure that no person benefits from fruits of crime or illgotten gains. That Non Conviction based Forfeiture also known as civil forfeiture rests on the legal fiction that the property and not the owner has contravened the law.
- 3.2 It was submitted that the evidence as shown in the Affidavit in Support of the Application indicates that the 2<sup>nd</sup> Interested Party herein partnered with ZANACO Bank PLC as a ZANACO Express Agent. However, that in order to effect, the said partnership it was a requirement of the Bank that any prospective agent be a holder of a ZANACO Bank Account which the 2<sup>nd</sup> Interested Party was not. That in his bid to become a ZANACO Express Agent, the 2<sup>nd</sup> Interested Party approached Gertrude Chisala Chanda, an acquaintance of his who is holder of Account Number 5728217000510 domiciled at ZANACO PLC to allow him use the Account for purposes of establishing this ZANACO Express partnership with the Bank.
- 3.3. The Applicant submitted that the 2<sup>nd</sup> Interested Party paid Gertrude Chisala Chanda a one off ZMW1,000.00 as

consideration for the use of that Bank Account and all formalities were met and for all intents purposes, the Agency was commenced between ZANACO PLC and Gertrude Chisala Chanda though the business was run and managed by the 2<sup>nd</sup> Interested Party according to the Statement given by Gertrude Chisala Chanda.

- 3.4. It was submitted that business at the ZANACO Express Agency commenced and everything operated above board until the 29<sup>th</sup> May, 2020 when Joseph Katinala Simbeye, an employee at ZANACO Bank PLC noticed suspicious transactions that were not in line with the customer profile of the holder of the Account in question. That irregular transactions were made on the ZANACO Express Agency Account operated by the 2<sup>nd</sup> Interested Party which by June, 2020 had accumulated to ZMW 3, 162,160.00. That the Statements of Account for Gertrude Chisala Chanda's Account number domiciled at the Zambia National Commercial Bank, Mukuba Mall in Kitwe and the 2<sup>nd</sup> Interested Party's Account Number 0104302892600 held at Standard Chartered Bank in Kitwe show and confirm the said transactions.
- 3.5. The argument by the Applicant is that when the 2<sup>nd</sup> Interested Party was questioned about the source of the money behind the transactions, he stated that the money belonged to his mother, Hellen Phiri, the 3<sup>rd</sup> Interested Party herein who the 2<sup>nd</sup> Interested Party claimed came into possession of the said money after selling a tract of land in Mfuwe and a house in Kitwe.

- 3.6. The Related submission is that as proof of the said transactions, the 2<sup>nd</sup> Interested Party provided the Bank with a Contract of Sale for the land in Mfuwe as well as a Police Report because in Mfuwe, Police Reports are allegedly a requirement in any transaction for sale of land. That these documents were subsequently found to have had forged signatures of the people who allegedly witnessed the conveyances.
- 3.7. It was submitted that on 23<sup>rd</sup> May, 2020, both the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties were arrested and charged with Two Counts of the offence of **Forgery contrary to Section 347 of the Penal Code**, One Count of the **offence of Uttering a False Document contrary to Section 352 of the Penal Code**, One Count of the offence of being in **Possession of Property suspected to be proceeds of Crime**. That on 7<sup>th</sup> March, 2022, Judgment was rendered by the Subordinate Court and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties were acquitted of the charges of forging a Contract of the Sale of land and for being in Possession of Property suspected to be Proceeds of Crime. That the Trial Court subsequently ordered that the money, whose source the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties had dismally failed to explain, be transferred to the said Interested Parties through their lawyers on 9<sup>th</sup> December 2022. That however the said Order was reversed by the High Court on 29<sup>th</sup> December, 2022.
- 3.8. The submission by the Applicant given the facts as stated above is that the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties had forged and uttered false documents to ZANACO in an attempt to conceal

the true source of the funds in ZANACO Express Account and had they succeeded, they would ultimately have laundered the said funds. **Sections 347 and 352 of the Penal Code** were adverted to by the Applicant for their full effect.

3.9. The Applicant referred us to **Sections 7 and 8 of the Prohibition and Prevention of Money Laundering Act No. 14 of 2001** as read with the **Prohibition and Prevention of Money Laundering (Amendment) Act No. 44 of 2010** on what amounts to money laundering and property which is a proceed of crime as defined under this Act.

3.10. Our attention was also drawn to the definition of crime, tainted property and serious crime under **FPOCA**. The contention by the Applicant is that the money which is the subject of this Application is tainted property because the same was realised through the commission of serious offences. That this Application is made pursuant to **Sections 29 and 31 of FPOCA** as read together with **Order 30 Rules 15 and 17 of the High Court Act**. The case of **Nchanga Transport and Director of Public Prosecutions<sup>2</sup>** was cited as evidencing the State's practice of commencing Non-Conviction based Forfeiture applications using the said provisions.

3.11. The case of **Jessie Bwalya Kapyeleta Tapalu v The Attorney General and DPP<sup>2</sup>** was cited for the position that Non-Conviction based Forfeitures under **FPOCA** are Constitutional. The submission therefore was that on the balance of probability it can clearly be seen that the property

in question is tainted property or a proceed of crime. That the property subject of this Application is tainted because the cash is a proceed of offences as set out in the definition of tainted property and that the offences in **Section 7 of the Prohibition and Prevention of Money Laundering Act, Section 347 of the Penal Code** and **Section 352 of the Penal Code** are serious offences because the maximum sentences prescribed are terms of imprisonment exceeding twelve months.

3.12. The Applicant urged the Court to adopt the reasoning of Van Heerden A.J. in the South African Constitutional Court case of **Kumarnath Mohunram & Shelgate Investments v The National Director of Public Prosecutions, BOE Bank Limited and The Law Review Project (As Amicus Curiae)**<sup>3</sup> wherein she cited with approval the holding of the Supreme Court in the case of **National Director of Public Prosecutions v RO Cook Properties (Pty)Ltd**<sup>4</sup> for the position that orders for forfeiture may be made even if no one had been convicted of having used the property or having been guilty of the unlawful activities of which the property is said to be the proceeds.

3.13. The Applicant also adverted to the case of **Simon Prophet v The National Director of Public Prosecutions**<sup>5</sup> for striking an appropriate balance between two constitutional principles, one being that no one should be arbitrarily deprived of property and the other being that the State is under obligation to protect members of the public from criminal predations.

- 3.14. The Applicant submitted that it has established on a balance of probabilities that the property herein is tainted property as may be gleaned from the Affidavit evidence including exhibits which are sufficient to satisfy Court that the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties infringed the provisions of **Sections 7 and 8 of the Prohibition and Prevention of Money Laundering Act** and the **Penal Code** and that these infringements constitute serious offences as provided under **FPOCA**.
- 3.15. Further that **Section 27 of FPOCA** provides for a restraining order for tainted property, which property in respect of which a Forfeiture Order may be made pursuant to **Section 31 of FPOCA**. That additionally **Section 28 of FPOCA** provides that where an application for a Restraining Order is made, the Court may order that persons are prohibited from disposing of or dealing with the property in issue and that the Court may order that the Attorney General takes custody of the said property in accordance with **Section 28 (1) (b) of FPOCA**.
- 3.16. In the Skeleton Arguments filed on behalf of the 1<sup>st</sup> Interested Party, the background tracing the genesis of the Application by the Applicant was given and the relevant provisions of **FPOCA** cited notably **Section 29** and **Section 2**.
- 3.17. It was submitted that where a person claims an interest in the property subject of the forfeiture application, the Act allows such an interested party upon production of proof that he has an unadulterated equitable or legal interest in the property to recover the same provided the evidence adduced satisfies the

statutory burden in civil matters namely on a balance of probabilities.

3.18. **Section 31 (1) and (2) of FPOCA** was adverted to for the position that where a person claiming an interest in an application by a Public Prosecutor satisfies Court that the person has an interest not acquired as a result of any serious offence or had an interest before any serious offence occurred, the Court shall order that the interest shall not be affected by the forfeiture order and the Court shall declare the nature and extent of the interest in question. To buttress the point the cases of **Nachanga Transport v Director of Public Prosecutions<sup>6</sup>** and **Siogopi (T/A NAM Transport Co. A. Partnership) v Director of Public Prosecutions<sup>7</sup>** were cited.

3.19. It was submitted on behalf of the 1<sup>st</sup> Interested Party that the matters underpinning the money in the Account began with the suspicious transactions noticed on the Account by the 1<sup>st</sup> Interested Party between 26<sup>th</sup> April, 2020 and 14<sup>th</sup> May, 2020. That the evidence on record shows that during the said period, the Account was under the control of the 2<sup>nd</sup> Interested Party who when asked by the 1<sup>st</sup> Interested Party to justify the source of funds, stated that the money came from the sale of a house in Kitwe and land in Mfuwe both belonging to his mother, the 3<sup>rd</sup> Interested Party. Further that when asked to prove the said sale of land, the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties produced a Contract of Sale and a Police Report which were discovered to be false documents by the Zambia Police Service, culminating into criminal prosecution of both the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties.

- 3.20. The submission is that from the above alone, the Court will note that the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties had failed to justify the source of the funds and could not prove that the same were sourced from the sale of any properties as they claimed. That on the other hand, the 1<sup>st</sup> Interested Party's claim in the said money lies in the fact that between 26<sup>th</sup> April, 2020 and 14<sup>th</sup> May, 2020, the 2<sup>nd</sup> Interested Party, a ZANACO Express Agent, took advantage of a flaw in its ZANACO Express Cash out system, which allowed him to make duplicated cash out withdrawals.
- 3.21. A further related Submission is that the said withdrawals were facilitated by using a single cash out transaction reference number, on two POS machines, that is, POS Terminal ID No. X5634117 in the name of Grasite Enterprises Limited and POS Terminal ID No. X572818 in the name of Gertrude Chisala Chanda both of which were under the sole control of the 2<sup>nd</sup> Interested Party.
- 3.22. Our attention was drawn to exhibit marked **"TN4"** being the consolidated record of all the cash out transactions made by the 2<sup>nd</sup> Interested Party and to note upon perusal of the same that from 26<sup>th</sup> April, 2020 to 14<sup>th</sup> May, 2020, both Grasite Enterprises Limited under Account No. 5634114000385 and Gertrude Chisala Chanda under Account No. 5728217000501, processed the same cash out requests from the same phone numbers using the same General Retrieval Reference Number (**"RRN"**) resulting in duplicated cash outs from the 1<sup>st</sup> Interested Party's V – Remit Account. The submission is that this was done contrary to the proper operation of the cash out

redemption system illustrated by the exhibit marked **“TN3”** in the 1<sup>st</sup> Interested Party’s Affidavit in Opposition.

3.23. The 1<sup>st</sup> Interested Party contended that the effects of the above was that instead of paying out a single amount on a single cash out transaction, the system credited both the Grasite Enterprises Account and the Gertrude Chisala Chanda Account on the same cash-out transaction. That these repeated transactions resulted in the cash out system paying a duplicated sum of ZMW 3, 941, 964.00 to one ZANACO Express Agent Account. That this is corroborated by the transactions on the Statements of Account for both Grasite Enterprises Account and the Gertrude Chisala Chanda Account exhibited as **“TN6”** and **“TN7”** and that a study of the two Statements shows that all the sums credited to the Grasite Account, carry the same reference number as those credited to the Gertrude Chisala Chanda Account showing a clear case of duplicated credits albeit from two different POS Terminals.

3.24. It is contended that evidently the simultaneous cash out transactions facilitated by the 2<sup>nd</sup> Interest Party resulted in a double or duplicated redemption from the 1<sup>st</sup> Interested Party’s V – Remit Account effectively crediting the Grasite Enterprise Account and Gertrude Chisala Chanda Account in a single transaction. The submission is that the evidence shows that the above resulted in the 1<sup>st</sup> Interested Party losing cash out redemptions credited into the Account as a result of the actions of the 2<sup>nd</sup> Interested Party.

- 3.25. The 1<sup>st</sup> Interested Party went as far as saying that the actions of the 2<sup>nd</sup> Interested Party as chronicled above were tantamount to theft which is described under **Section 265 of the Penal Code**. Further that having illustrated how the said funds were fraudulently taken from the 1<sup>st</sup> Interested Party, it is submitted that the said funds ought to be returned to the 1<sup>st</sup> Interested Party as the rightful owner and whose interest in the money was never extinguished. The case of **Attorney General v Seong San Company**<sup>8</sup> was cited for the position that the law of equity would allow an aggrieved party to recover his property from any person whose hands it can be traced to.
- 3.26. The penultimate submission on behalf of the Interested Party is that it has sufficiently established its unadulterated interest in the money held on the Account, as the said money was generated by fraudulently duplicated cash out transactions resulting in the 1<sup>st</sup> Interested Party unintentionally paying out from its V- Remit Account the sum of ZMW 3, 941,964.00 on the Account.
- 3.27. The final submission by way of conclusion is that the 1<sup>st</sup> Interested Party has satisfied the requirements of **Section 31 (1) and (2) of FPOCA** and that the said money being only part of the money unscrupulously redeemed from 1<sup>st</sup> Interested Party's V- Remit Account, be returned to the 1<sup>st</sup> Interested Party as the rightful owner, per the guidance of the Supreme Court in the case of the **Attorney General v Seong San Company**<sup>8</sup>.

#### **4.0. THE HEARING.**

- 4.1. At the hearing held on 29<sup>th</sup> February, 2024, the Applicant indicated that she would be relying on the process that was filed in Kitwe on 6<sup>th</sup> June, 2023 and would briefly augment. Mr. Z. Sampa on behalf of the 1<sup>st</sup> Interested Party also indicated that he would be relying on the Affidavit in Opposition to the Applicant's Affidavit in Support of Motion filed on 25<sup>th</sup> September, 2023, supported by Skeleton Arguments and a Notice of Counter Orders both of even date and also briefly augment.
- 4.2. We note that the augmentation by both Mrs. Bauleni and Mr. Sampa on behalf of their respective clients were largely a rehash of what is outlined in the Skeleton Arguments. To avoid repetition, we will not reproduce the augmentations as they are on Record.
- 4.3. There was no appearance on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties at the hearing.

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

- 5.1. We have given due consideration to the Notice of Motion, Affidavit in Support and Skeleton Argument. We have done the same for 1<sup>st</sup> Interested Party's Notice of Counter Orders for a Non-Conviction based Forfeiture Application, Affidavit in Opposition to the Notice of Motion for a Non Conviction based Forfeiture Application and Skeleton Arguments. We hasten to indicate that notwithstanding the fact that the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties have not opposed the Application, we are under a judicial obligation to interrogate every aspect of the

Application and claim by the 1<sup>st</sup> Interested Party in arriving at our reasoned decision.

- 5.2. There is a plethora of instructive authorities regarding our role as adjudicators and one such is the Supreme Court case of **Khalid Mohamed v The Attorney General**<sup>10</sup> where Ngulube DCJ (as he then was) stated that:

*“A Plaintiff cannot automatically succeed when a defence has failed.*

*An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so, the mere failure of the opponent’s defence does not entitle him to judgment.”*

- 5.3 We now turn to the relevant provisions of **FPOCA** pursuant to which the Application before us has been made. By **Section 29** of the **FPOCA**,

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

- 5.4. According to **Section 2** of the **FPOCA**, tainted property is defined as follows:

***“Tainted property in relation to a serious offence and 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.***

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

5.6. By **Section 2 of FPOCA**, ‘Proceeds of Crime’ have been stated:

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

- a) wholly or partly derived or realised directly or indirectly, by any person from the commission of a serious offence or a foreign serious offence;*
- b) wholly or partly derived or realised from disposal or other dealing with proceeds of a serious offence or foreign serious offence*
- c) wholly or partly acquired proceeds of a serious offence or a foreign serious offence; and includes, on a proportional basis, property into which any property derived or realised directly from the serious offence, or foreign offence is later converted, transformed or intermingled, and any income. Capital or other economic gains derived or realised from the property at any time the 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.*

5.7. It has also been argued by the Applicant that the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties engaged in forging and uttering false documents. The offence of Forgery is provided for in **Section 347 of the Penal Code** while that of Uttering of False Documents is under **Section 352 of the Penal Code**.

**“Section 347**

*Any person who forges any document is guilty of an offence which, unless otherwise stated, is a felony and*

*he is liable, unless owing to the circumstances the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years”.*

**“Section 353**

*Any person who knowingly and fraudulently utters a false document is guilty of an offence of the same kind and is liable to the same punishment, as if he had forged the thing in question.”*

5.8. The Applicant has further alluded to the offence of **Money Laundering** which is provided for in **Sections 7** and **8** of the **Prohibition and Prevention of Money Laundering Act** as follows:

**“Section 7**

*Any person who, after commencement of this Act engages in Money Laundering, shall be guilty of an offence and shall be liable, upon conviction to a fine not exceeding one hundred and seventy thousand penalty units or to imprisonment for a term not exceeding ten years or both”*

**“Section 8**

*Where an offence under the provisions of this Act is committed by a body of person whether, corporate or unincorporated (a) the body of persons shall be guilty of an offence and liable upon conviction to a fine not exceeding for hundred thousand penalty units and (b) every person, who at the time of the offence, acted in an official capacity for or on behalf of such body persons, whether as a Director, Manager, Secretary or*

*other similar capacity or was purporting to act in such capacity and who was involved in the commission of that offence, and shall be liable, upon conviction to a fine not exceeding one hundred and seventy thousand penalty units or imprisonment for a term not exceeding ten years or both”.*

5.9. According to the **Prohibition and Prevention of Money Laundering Act No. 14 of 2001** as read with the **Money Laundering Act (Amendment) Act No. 44 of 2010**, Money Laundering has been defined in the following terms”

*“Money Laundering means where a reasonable inference may be drawn, having regard to the objective factual circumstances, any activity by a person,*

- (a) who knows or has reason to believe the property is proceeds of crime, or*
- (b) without reasonable excuse, fails to take reasonable steps to ascertain whether or not the property is proceeds of a crime;*
- (c) engages directly or indirectly in a transaction that involves proceeds of crime,*
- (d) acquires, receives, possesses, disguises, transfers. Converts, exchanges, carries, disposes, uses, removes from or brings into Zambia proceeds of crime,*
- (e) conceals, disguises or impedes the establishment of the time nature, origin location, movement, disposition, title or, rights with respect to, or ownership of, proceeds of crime”.*

5.10. Property which is a proceed of crime by the **Prohibition and Prevention of Money Laundering (Amendment) Act No. 44 of 2010** in the following terms:

*“Property includes any real or personal property, money, things in action or other intangible or incorporeal property whether located in Zambia or elsewhere and includes*

***property of corresponding value in the absence of the original illegally acquired property whose property has been determined.”***

5.11. As we delve into our analysis, it soon becomes clear from the Statements recorded by the Police that the Account at the centre stage of this Application was opened by Gertrude Chisala Chanda as Account No. 572821700510 with Phone Number 0962 472404. This is according to the Statement of Joseph Katalala Simbeye an employee of ZANAZO who is an Agency Banking Coordinator. According to Mr. Simbeye, the Account was working/serviced normally until about May, 2020 when a he noticed that the volumes of transactions had increased within a short period of time. We have indeed gleaned the voluminous **CASA** Statement of Account and confirmed this fact.

5.12. There is no dispute from what we are able to glean that although the Account was opened by Gertrude Chisala Chanda, the same was operated by the 2<sup>nd</sup> Interested Party, Zacheaus Phiri, who when queried about the surge in the volume of transactions responded that this was because of the money that had come into his mother's possession after she had sold a piece of land in Mfuwe and a house in Kitwe.

5.13 In a bid to provide proof of the conveyances, the 2<sup>nd</sup> Interested Party provided ZANACO with a Contract for Sale and Police Report relating to Farm No. 1608 Mfuwe in the Mambwe District of the Eastern Province of the Republic of Zambia. It is purportedly a requirement in Mfuwe that Police Reports are furnished in any sell of land. As fate would have it, the

documents were found to have been forged leading to the Prosecution of the 2<sup>nd</sup> Interested Party and his mother, the 3<sup>rd</sup> Interested Party for the offences of **Forgery** and **Uttering False Documents**. Quite clearly these are serious offences within the meaning defined under **Section 2 of FPOCA**.

5.14. Our analysis has also taken us to review the ideal *vis-a-vis* unideal scenarios as illustrated in exhibit **"TN3"** on what was happening to the subject Account. Under the ideal situation, the Customer's Account is initially debited and when this happens the V – Remit Account for ZANACO is credited with the same amount. The V – Remit Account is then debited and the Terminal (ATM/Agent) Account is credited **once** with the same amount.

5.15. In the unideal process, the Customer's Account is debited and the V- Remit Account for ZANACO is credited with the same amount. The V – Remit Account is then debited **twice** and the Terminal (ATM|Agent) Account is debited **twice**. It is under the unideal scenario that the duplication of transactions result. This is precisely what happened between 26<sup>th</sup> April, 2020 and 14<sup>th</sup> May, 2020 when the 2<sup>nd</sup> Interested Party redeemed 1984 duplicate cash out transactions simultaneously using the same RRN on Gertrude Chisala Chanda's Account No. 5728217000510 through POS ID No. X572818 and Grasite Enterprises Account No. 564114000385 through POS Terminal ID No. X5634117 as may be gleaned from the exhibit marked **"TN4"** in the 1<sup>st</sup> Interested Party's Affidavit in Opposition.

5.16. It appears obvious to us and we therefore make a finding that the two Accounts of Gertrude Chisala Chanda and Grasite Enterprises were used by 2<sup>nd</sup> Interested Party as conduits or instrumentalities to make possible the fraudulent transactions by taking advantage of the weakness in the 1<sup>st</sup> Interested Party's system. The Accounts were integral or pivotal to the commission of the fraudulent transactions by the 2<sup>nd</sup> Interested Party. We would have no hesitation in adopting the reasoning of **Van Heerdeem Mohunram & Shelgate Investments CC v The National Director of Public Prosecutions, BOE Bank Limited & the Law Review Project (As Amicus Curiae)**<sup>4</sup> where she stated at pages 26- 27 as follows.

*"In considering the meaning of the phrase "an instrumentality of an offence in schedule 1", this Court adopted the interpretation accepted by the Supreme Court of Appeal in a trilogy of cases. In the first of those cases, Cook Properties, Mpati DD and Camenon JA said "it is clear that in adopting this definition, the legislature sought to give the phrase a very wide meaning. They held however that in order to ensure that the application of forfeiture does not constitute arbitrary deprivation of property in violation of section 25 (1) of the constitution:*

*.... the words concerned in the commission of an offence..... must be interpreted to the link between the crime committed and the property is reasonably direct and that the employment of the property must be functional to the commission of crime. By this we mean that the property must play a reasonably direct role in the commission of the offence. In a real or substantial sense, the property must*

*facilitate or make possible the commission of the offence. As the term 'instrumentality' itself suggests, ..... the property must be instrumental in and not merely incidental to, the commission of the offence". (emphasis ours)*

5.17. Further in applying the case, **Van Heerden AJ<sup>4</sup>** in the appeal before her opined as follows:

*"It follows that the use or allowing the use of the property was a necessary part of the offences the Applicants had committed. It was not possible to commit the offences without using the property. In the language of Cook, the property was "employed to make possible or facilitate the commission of the offence". Thus the causal connection between the offences was certainly a direct one. The offences themselves pivoted on the use of the property for gambling purposes. It is common cause that neither the applicant had the requisite licence. That was, however, not the essence of their crimes. The essence was that the applicants used the property or allowed it to be used as an illegal casino. The property was thus integral to the commission of the relevant offence." (emphasis ours)*

5.18. It is evident from the foregoing that the Applicant has a sound basis to reasonably suspect that the funds in the sum of K3, 161,160.00 held in Account No. 5728217000510 at ZANACO PLC, Mukuba Mall are proceeds of crime. Therefore, the property reasonably suspected to be proceeds of crime amounts to tainted property within the meaning of **section 2 of FPOCA** and would be liable for forfeiture in the event that the Interested Parties fail to adequately demonstrate a legitimate interest in the property.

5.19. The standard of proof required in Non conviction based applications is prescribed in **Section 31 of FPOCA** as below:

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

5.20. This then leads us to the second issue which we ought to interrogate, that is to say, whether the Interested Parties have demonstrated that they have a legitimate interest. **Section 31 (2) of FPOCA** sets out the issues that an Interested person must adequately address to satisfy Court that they have a legitimate interest in the tainted property. These issues are:

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

It is quite clear that at this point, the evidentiary burden of proving the interest in the property on a balance of probabilities shifts to the Interested Parties.

5.21. The 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties have not filed any Affidavit in Opposition to the Application for a Non Conviction based Forfeiture Order made by the Applicant. Neither have they filed any Skeleton Argument nor did they appear at the hearing. We have also satisfied ourselves that the Applicant advertised the Notice of Hearing in the Zambia Daily Mail on

27<sup>th</sup> and 28<sup>th</sup> November, 2023 notifying the Interested Parties. What this means is that they have not demonstrated at all that they have a legitimate interest in the tainted property.

5.22. The 1<sup>st</sup> Interested Party, on the other hand, has filed a Notice of Counter Orders pursuant to **Order 15 Rule of the Rules of the Supreme Court, 1965** accompanied by an Affidavit in opposition and Skeleton Arguments. We have reviewed the voluminous Affidavit in Opposition on behalf of the 1<sup>st</sup> Interested Party sworn by the Head of Compliance and Financial Crimes.

5.23. In our quest to enhance Jurisprudence in our jurisdiction on Non Conviction based Forfeiture Applications, we feel duty bound to provide guidance to the 1<sup>st</sup> Interested Party which placed reliance on **Order 15 Rule 3 of the Rules of the Supreme Court** for Counter Orders in seeking to claim an interest in the funds subject of the Application by the Applicant. The guidance, in our view, is that there is no need to place reliance in **Order 15 RSC** when our own **Forfeiture of Proceeds of Crime Act** is self-contained and makes provision for such applications. For avoidance of doubt **Section 12 of FPOCA** is couched in the following terms.

*“ 12 (1) Where an application is made for a Forfeiture Order against any property, a person who claims an interest in the property may apply to Court before the Forfeiture Order is made, for an Order under Subsection (2).*

*(2) Where a person applies to the Court for an order under this Subsection in respect of the person’s interest in any property and the Court is satisfied that-*

- (a) the Applicant has an interest in the property;*
- (b) the Applicant was not in any way involved in the commission of the offence in respect of or for the forfeiture of the property is sought, or for the Forfeiture Order against the property was made; and*
- (c) the Applicant-*
  - (i) had interest before the serious offence occurred*
  - (ii) acquired the interest before the commission of the offence, bonafide and for fair value, and did not know or could not reasonably have known at the time of the acquisition that the property was tainted property;*

*the Court may make an Order declaring the nature, extent and value, as at the time when the Order is made of the Applicant's interest".*

5.24. In our estimation and analysis, the 1<sup>st</sup> Interested Party's claim in the money we have found to be tainted stems from the fact that between 26<sup>th</sup> April, 2020 and 14<sup>th</sup> May, 2020, the 2<sup>nd</sup> Interested Party who was a ZANACO Express Agent somehow managed to take advantage of a flaw in the ZANACO cash out system which enabled him to make duplicated cash out withdrawals.

5.25. The above is borne out from the consolidated record of all the cash out transactions made by the 2<sup>nd</sup> Interested Party between 26<sup>th</sup> April, 2020 to 14<sup>th</sup> May, 2020 from the exhibit marked "**TN4**". A scrupulous perusal of the same reveals that both Graside Enterprises Account No. 563411400038 and Gertrude Chisala Chanda Account No. 5728217000510 processed exactly the same cash out requests from the same

phone numbers, using the same Generation Retrieval Reference Number ("**RRN**"). This resulted in duplicated cash outs from the 1<sup>st</sup> Interested Party's V-Remit Account which clearly is not the ideal operation of the cash out redemption system. The repeated transactions resultantly led to the cash out system paying a duplicated sum of ZMW 7, 883, 928.00 instead of only paying ZMW 3,941,964.00 to one ZANACO Express Agent Account. The import of this is that the 1<sup>st</sup> Interested Party ended up losing the sum of ZMW 3,941,964.00 from unauthorized cash out redemptions credited into Account No. 5728217000510 as a result of the fraudulent actions of the 2<sup>nd</sup> Interested Party.

5.26. Given the position above, we necessarily have to revisit **Section 31 (1) and (2)** couched as below:

***"31(1) subject to subsection (2), where a Public Prosecutor applies to the Court for an Order under this section and the Court is satisfied on a balance of probabilities that the property is tainted property. The Court may order that the property, or such of the property as is specified by the Court in the order, be forfeited to the State.***

***2) Where a person claiming an interest in property to which an application relates satisfies the Court that the person***

***(a) has an interest in the property***

***(b) did not acquire the interest in the property as a result of any serious offence carried out by the person and-***

***(i) had the interest before any serious offence occurred; or***

***(ii) acquired the interest for fair value after the serious offence occurred and did not know at the***

*time of the acquisition that the property was tainted property;*

*the Court shall Order that the interest shall not be affected by the Forfeiture Order, and the Court shall declare the nature and extent of the interest in question”.*

5.27. Putting the above provisions into effect, the Interested Party usefully cited the case of **Nachanga Transport v Director of Public Prosecutions**<sup>2</sup> where the Court of Appeal held as follows:

*“In our view, the issue of sufficient interest is the most important issue for consideration. This is because if satisfied, only then can a Court order that the interest shall not be affected by the forfeiture order and declare the nature and extent of the interest in question”.*

5.28. We were also referred to the case of **Siogopi (T/A NAM Transport Co. A. Partnership) v Director of Public Prosecutions**<sup>7</sup> where the Court of Appeal stated that:

*“We however, pick out one feature common to both sections; that is the need for the Court to be satisfied that an Applicant has an interest in the property which is the subject of an application for a forfeiture order.....*

*First and foremost, we think the Learned Judge proceeded on the wrong premise on the burden of proof as neither section 12 (2) nor 31 (2) impose the burden of proof on the Applicant. As earlier indicated, the Applicant is only required to satisfy the Court as to the Applicant’s interest in the property.*

*Most importantly however, once the Applicant satisfies the Court of its interest in the property, having not acquired the interest from any serious offence and that the interest accrued before the commission of the offence in question, unless the claimant is the one who committed the offence issue, the question of knowledge does not arise. (emphasis theirs)*

*Having found that the documents proving the Appellant's interest in the tainted property did not require authenticating, we hold that the Learned Judge erroneously rejected the said documents.*

*9.2. In view of the above, we hold that the Appellant adequately established its interest in the tainted property. We accordingly set aside the Order for Forfeiture issued by the Court below.*

*9.3. We subsequently Order that the Properties subject of the Forfeiture Order namely, Truck Registration No T673AXK and Trailer Registration No. 452 BVZ be released to the Appellant forthwith."*

5.29. From our analysis in the present case and based on the cases cited above, we would have no hesitation in finding and holding that the 1<sup>st</sup> Interested Party has demonstrated an interest in the tainted property, that the said interest was acquired before the property was tainted or connected to any serious offence and that the 1<sup>st</sup> Interested Party had no role to play in the execution of the serious offence tainting the property. This indeed satisfies the requirements of **Sections 12 and 31 of FPOCA** which have very similar provisions. The view we have taken also resonates with the position taken by the Applicant at the hearing where it was categorically stated that the Applicant does not object to the 1<sup>st</sup> Interested Party being recognized as having an interest in the funds held in the subject Account.

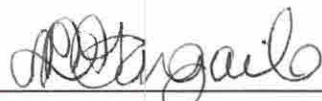
## **6.0. CONCLUSION**

6.1. Based on the evidence and the law as discussed, we are satisfied that the Applicant has successfully made out a case warranting an Order for Non Conviction based Forfeiture of tainted property on a balance of probabilities

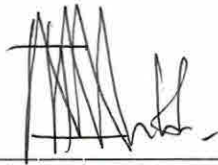
to the extent that the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties have not claimed a legitimate interest in the tainted property.

- 6.2 We also have no hesitation in finding and holding that the 1<sup>st</sup> Interested Party has proved to the Court's satisfaction that it is the rightful owner of the funds amounting to K3,161,160.00 held in Account No. 3728217000510 at ZANACO Bank PLC Mukuba Mall Branch in the Kitwe District of the Copperbelt Province of the Republic of Zambia. The 1<sup>st</sup> Interested Party's interest shall therefore not be affected by the Forfeiture Order in 6.1 above.
- 6.3. The 1<sup>st</sup> Interested Party is Ordered to reimburse the Applicant for the costs incurred in the prosecution of this Matter.

**DELIVERED AT LUSAKA THIS 25<sup>TH</sup> DAY OF APRIL, 2024.**



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



**I. M. MABBOLOBBOLO  
HIGH COURT JUDGE**



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