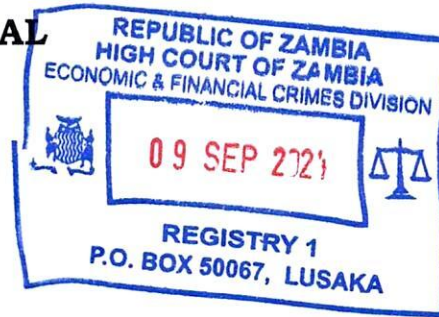


**IN THE HIGH COURT FOR ZAMBIA
AT THE ECONOMIC AND FINANCIAL
CRIMES REGISTRY**

HOLDEN AT LUSAKA
(Civil Jurisdiction)

2024/HPEF/012



**IN THE MATTER OF: SECTIONS 29, 30, 31, AND 71 OF THE
FORFEITURE OF PROCEEDS OF CRIME
ACT NUMBER 19 OF 2010 OF THE
LAWS OF ZAMBIA**

**IN THE MATTER OF: SECTIONS 272, 242, 347 AND 352 OF
THE PENAL CODE, CHAPTER 87 OF
THE LAWS OF ZAMBIA**

**IN THE MATTER OF: SECTION 7 OF ACT NO. 14 OF 2001 OF
THE PROHIBITION AND PREVENTION
OF MONEY LAUNDERING ACT AS READ
WITH ACT NO. 44 OF 2010 OF THE
PROHIBITION AND PREVENTION OF
MONEY LAUNDERING (AMENDMENT)
ACT OF THE LAWS OF ZAMBIA**

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

**IN RE PROPERTY: MERCEDES BENZ REGISTRATION NUMBER
ACP 5128 AND VOLVO REGISTRATION NUMBER ALH 7596.**

PAUL J. MWANZA

1ST INTERESTED PARTY

DAVID PHIRI

2ND INTERESTED PARTY

Before the Honourable Lady Justices S. M. Wanjelani, P. K. Yangailo and A. Malata-Ononuju, on 9th September, 2024

For the Applicant: Mrs. Rhoda Malibata-Jackson, Senior
State Advocate– National
Prosecutions Agency

For the 1st Interested Party: In Person

For the 2nd Interested Party: In Person.

JUDGMENT

A. Malata-Ononuju J., delivered the Judgment of the Court.

Cases referred to:

1. *The Director of Public Prosecutions and Dhiraj Dhumputha 2020/HP/1287;*
2. *The Director of Public Prosecutions and ZMK157,040, USD23,007.14, ZMK50,000.00 and ZMK82,333.83 Held In Different Bank Account 2019/HP/1784;*
3. *Kumarnath Mohunram & Shelgate Investments CC Vs The National Director of Public Prosecutions, BOE Bank Limited & The Law Review Project (as Amicus Curae) CCT 19/06 (2007) ZACC 4;*
4. *National Director of Public Prosecutions Vs RO Cook Properties (PTY) Ltd 2004 (8) BCLR 844 (SCA);*
5. *Zega Limited Vs Zambezi Airlines Limited, Diamond General Dealers Limited S.C.Z. 8/006/2014;*
6. *Assets Recovery Vs Peter Oluwafemi Olawon, Civil Suit No. E002 of 2022;*

7. *The People Vs Austin Chisangu Liato Appeal No. 291/2014 (2015) Z.M.S.C. 26;*
8. *Khalid Mohamed Vs The Attorney (1982) Z.R. 49;*
9. *Wilson Masauso Zulu Vs Avondale Housing Project Limited (1982) Z.R. 172 (S.C.); and*
10. *J.Z. Car Hire Limited and Malvin Chala, Scirocco Enterprises Limited (SCZ Judgment No. 26 of 2002).*

Legislation referred to:

1. *The Forfeiture of Proceeds of Crime Act No. 19 of 2010 of the Laws of Zambia;*
2. *The Penal Code, Chapter 87 of the Laws of Zambia;*
3. *The Prohibition and Prevention of Money Laundering Act No. 14 of 2001 of the Laws of Zambia;*
4. *The Prevention and Prohibition of Money Laundering (Amendment) Act No. 44 of 2010 of the Laws of Zambia; and*
5. *The High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia;*

1. INTRODUCTION

- 1.1 On 3rd April, 2024, the Applicant filed Originating Notice of Motion pursuant to **Sections 29, 30, 31 and 71** of the **Forfeiture of Proceeds of Crimes Act No. 19 of 2010 of the Laws of Zambia**, **Sections 272, 242, 347 and 352** of the **Penal Code, Chapter 87** of the **Laws of Zambia**, and **Section 7** of the **Prohibition and Prevention of Money Laundering Act No. 14 of 2001** as read with **Act No. 44 of**

2010 of the Prohibition and Prevention of Money Laundering (Amendment) Act of the Laws of Zambia.

- 1.2 The Applicant filed for the following reliefs:
- i. *A Non-Conviction Based Forfeiture Order of the above cited tainted property to the State pursuant to Sections 29 and 31 of the Forfeiture of Proceeds of Crime Act by Counsel for the Applicant on grounds set out in the Affidavit filed in support hereof; and*
 - ii. *Any relief the Court may deem fit.*
- 1.3 The Applicant filed an Affidavit in Support of the Originating Notice of Motion accompanied with Skeleton Arguments and List of Authorities on 3rd April, 2024.

2.0 APPLICANT'S AFFIDAVIT IN SUPPORT

- 2.1 The Affidavit in Support was sworn by **HENRY MTONGA**, a Zambian national and Senior Investigations Officer in the employ of the Drug Enforcement Commission (DEC) under the Anti-Money Laundering Investigations Unit, charged with conduct of the case.
- 2.2 It was deposed that on 6th October, 2015, he received a report from World Fish Center to the effect that ZMW650,089.02, that was meant to pay Zambia Revenue Authority (ZRA) for Pay-As-You-Earn (PAYE) for the months of February, 2014, to September, 2014, was not remitted to ZRA, but diverted to a company called Northgold Suppliers.

- 2.3 It was avowed that the Deponent instituted investigations into the matter and recorded a Statement from Mr. Bruce Mushipi, the Regional Finance Manager Africa for World Fish Center, who stated that ZRA wrote to them indicating that the Organisation was owing over ZMW600,000.00 in PAYE arrears.
- 2.4 It was deposed that Mr. Bruce Mushipi also stated that being the Regional Finance Manager, he was sure that the Organisation was up-to-date with the remittance of PAYE to ZRA, hence, he requested for copies of the cheques from Barclays Bank (Now ABSA) which had been raised to pay ZRA during the period in question.
- 2.5 Further that upon receiving the requested copies, he noted that the copies indicated that the cheques were paid to Northgold Suppliers, a company World Fish Center had no dealings with.
- 2.6 It was deposed that Mr. Bruce Mushipi further stated that the person in charge of remitting PAYE to ZRA was the Project Accountant, Paul Mwanza (the 1st Interested Party) who used to submit payment vouchers payable to ZRA in respect of employees at World Fish Center.
- 2.8 It was deposed that the 1st Interested Party would submit receipts purporting to show that World Fish Center had paid ZRA when in fact not. Copies of the purported receipts from ZRA and the Statement were exhibited and marked **"HM1(a)(i)"**, **"HM1(a)(ii)"**, **"HM1(a)(iii)"**, **"HM1(a)(iv)"**, **"HM1(a)(v)"**, and **"HM1(b)(i)"**, **"HM1(b)(ii)"**, **"HM1(b)(iii)"**,

“**HM1(b)(iv)**”, “**HM1(b)(v)**”, “**HM1(b)(vi)**”, and “**HM1(c)**” respectively.

- 2.9 The Deponent averred that his investigations revealed that Northgold Suppliers had an Account Number 0140537874501 held at Stanbic Bank. That on 6th February, 2018, the Deponent recorded a Statement from Pumulo Muyambango, a Team Leader, Customer Services at Stanbic Bank, who confirmed that Northgold Suppliers holds an Account at the Bank. The copies of the Statement from Pumulo Muyambango and the Bank Statement were exhibited and marked “**HM2(a)**” and “**HM2(b)**” respectively.
- 2.10 The Deponent avowed that he obtained from Pumulo Muyambango an Affidavit wherein he deposed that the copy of the Bank Statement marked “**HM2(b)**” with Account Number 0140537874501 were part of the ordinary books of the Bank and that the entries in them were made in the ordinary course of business and that he examined the entries with the original entries and found them to be correct. The copy of the Affidavit deposed to by Pumulo Muyambango was exhibited and marked “**HM3**”.
- 2.11 The Deponent avowed that he analysed the Bank Statement of Northgold Suppliers Account at Stanbic Bank and discovered that indeed the Account received the money in question and that the deposits in the said Account were made by David Phiri, the 2nd Interested Party, a sole signatory to the Account.

- 2.12 Henry Mtonga deposed that he recorded a Statement from Vivian Tendai Machawi, a Banker from Barclays Bank, who confirmed that World Fish Center had Account Number 17-1042577 at Barclays Bank. That a copy of the Statement from Vivian Tendai Machawi and the Bank Statement from Barclays Bank were exhibited and marked “**HM4(a)**” and “**HM4(b)**”.
- 2.13 It was deposed further that the Deponent obtained from Vivian Tendai Machawi an Affidavit where she deposed that the copy of the Bank Statement marked “**HM4(b)**” with Account Number 17-1042577 were part of the ordinary course of business and that she examined the entries with the original entries and found them to be correct. A copy of the Affidavit sworn by Vivian Tendai Machawi was exhibited and marked “**HM5**”.
- 2.14 The Deponent avowed that he analysed the Bank Statement for World Fish Center and discovered that the payments meant for ZRA were indeed deposited in the Northgold Suppliers Account held at Stanbic Bank.
- 2.15 It was avowed that on 19th April, 2016, the Deponent recorded a Statement from Mr. Kennedy Njobvu, a Senior Treasury Officer at ZRA, who in his Statement confirmed that receipt numbers 3130001255637 in the sum of ZMW63,474.00, 3130001220960 in the sum of ZMW81,353.06, 3130001251132 in the sum of ZMW72,144.53, 3140001251133 in the sum of ZMW28,053.08, 3140002584581 in the sum of

ZMW91,249.00, 3140002884696 in the sum of
ZMW93,695.54, 3140003894796 in the sum of
ZMW83,921.32, and 3130001220960 in the sum of
ZMW81,985.74, were not sitting on the ZRA System except
for receipt number 3140002584581 which was on the ZRA
System but with a different amount being ZMW1,738.83,
paid on cheque number 005644 on 30th July, 2014. The
copy of the Statement from Kennedy Njobvu was exhibited
and marked "**HM6**".

2.16 Henry Mtonga deposed that on 1st March, 2016, he
recorded a Statement from Mr. Kamoto Banda, a
Relationship Manager at Barclays Bank Head Office, who
confirmed that World Fish Center had an Account at
Longacres Branch and that the following cheques were
debited from World Fish Center Account and paid to
Northgold Suppliers Account – cheque No. 4972 for
ZMW63,474.00 cleared on 5th March, 2014, cheque No.
5139 for ZMW81,353.06 cleared on 11th April, 2014 or 29th
April, 2014, cheque No. 5422 for ZMW83,921.32 cleared
on 24th June, 2014, cheque No. 5539 for ZMW91,249.14
cleared on 30th June, 2014, cheque No. 5610 for
ZMW93,695.54 cleared on 21st August, 2014, cheque No.
5748 for ZMW72,144.53 cleared on 24th September, 2014,
and cheque No. 5749 for ZMW28,053.08 cleared 24th
September, 2014. Copies of the cheques and a copy of the
Statement were collectively exhibited and marked
"**HM7(a)**" and "**HM7(b)**".

- 2.17 It was deposed that on 9th October, 2015, the Deponent recorded a Statement from Mr. Simbotwe Mwiya, a former Regional Program Manager for World Fish Center, who confirmed being the signatory to the World Fish Center Barclays Bank Account from September, 2013 to February, 2015.
- 2.18 It was deposed that Mr. Simbotwe Mwiya also confirmed the fact that World Fish Center never had any dealings with a supplier by the name of Northgold Suppliers. A copy of the Statement was exhibited and marked "**HMS**".
- 2.19 The Deponent averred that in order to established who had signed on the cheques in question, on 8th October, 2015, he recorded a Statement from Mr. Andrew Fredrick Ward, a Researcher at World Fish Center, who in his Statement confirmed to having signed one of the cheques in question and that he did not know any supplier by the name of Northgold Suppliers. That Mr. Ward stated that he signed on the cheque because they were accompanied by the Payment Voucher. A copy of his Statement was exhibited and marked "**HM9**".
- 2.20 It was avowed that on 22nd October, 2015, the Deponent recorded a Statement from Ms. Catherine Ann Longey, the Regional Science Coordinator for World Fish Center and a signatory to the World Fish Center Account at the Barclays Bank Account, who, upon being shown the cheques payable to Northgold Suppliers, stated that she could not remember signing the said cheques and doubted the

signature purported to be hers. A copy of her Statement was exhibited and marked "**HM10**".

2.21 The Deponent avowed that his investigations revealed that the cheques were deposited in Northgold Suppliers' Account as a result of a Memorandum of Understanding between the 1st Interested Party and the 2nd Interested Party in which it was agreed that the 1st Interested Party would deposit the said cheques from World Fish Center into Northgold Suppliers Account and the 2nd Interested Party would get 5% as commission.

2.22 It was deposed that arising from the information above, the Deponent wrote to Zambia Police Forensics Department requesting for examination of the cheques for the purpose of determining whether the cheques were signed by the authorised signatories, namely, Andrew Ward, Elias Madzudzu, Catherine Ann Longey and Simbotwe Mwiya and whether the Memorandum of Understanding between the Interested Parties was signed by the 1st Interested Party.

2.23 It was deposed that on 9th May, 2017, the Deponent received a letter from the Zambia Police Forensic Department in which Mr. Thomas Phiri, a Forensic Handwriting Expert, indicated his findings after conducting examinations of the documents and observed that the signatures alleged to have been by Ms. Catherine Ann Longey and Mr. Simbotwe Mwiya are genuine signatures. That the readable disputed signature

purported to have been signed by the 1st Interested Party on the Memorandum of Understanding is also a genuine signature. That however, the signatures alleged to have been signed by Mr. Andrew Ward and Mr. Elias Madzudzu on the disputed cheques are simulated forgeries. The copy of the letter was exhibited and marked "**HM11**".

2.24 It was deposed that after the Deponent established that ZMW650,089.02, meant to pay ZRA by World Fish Center was diverted to Northgold Suppliers, a company with no business dealings with World Fish Center, on 20th November, 2015, the 2nd Interested Party was warned and cautioned for the offences of Forgery and Uttering of False Documents contrary to **Section 342** as read with **Sections 347** and **352** of the **Penal Code** and Money Laundering contrary to **Section 7** of the **Act No. 14 of 2001** as read with **Act No. 44 of 2010** of the **Laws of Zambia**.

2.25 It was deposed that under Warn and Caution Statement, the 2nd Interested Party confirmed that the money deposited in Northgold Suppliers' Account was as a result of the Memorandum of Understanding which existed between him and the 1st Interested Party in which it was agreed that the 1st Interested Party would use Northgold Suppliers' Account by depositing cheques from World Fish Center, and the 2nd Interested Party would get 5% commission for using the Account. A copy of the Memorandum of Understanding and the Warn and

Caution Statement were exhibited and marked “**HM12(a)**” and “**HM12(b)**” respectively.

2.26 Henry Mtonga deposed that he conducted a search at the 2nd Interested Party’s residence and recovered deposit slips for the cheques which were deposited into Northgold Suppliers’ Account. The copies of the deposit slips were collectively exhibited and marked “**HM13**”.

2.27 It was deposed that on 20th November, 2015, the Deponent seized a Mercedes Benz, Registration Number ACP 5128 from the 2nd Interested Party as it was reasonably suspected to be proceeds of crime. A copy of the Seizure Notice was exhibited and marked “**HM14**”.

2.28 It was deposed that on 19th November, 2015, the 1st Interested Party was Warned and Cautioned for the offences of Forgery and Uttering of False Documents contrary to **Section 342** as read with **Sections 347** and **352**, Theft by Servant contrary to **Section 272** as read with **Section 278** of the **Penal Code**, Money Laundering contrary to **Section 7 of Act No. 14 of 2001** of the **Prohibition and Prevention of Money Laundering Act** as read with **Act No. 44 of 2010**, and Being in Possession of Property Reasonably Suspected of Being Proceeds of Crime contrary to **Section 71** of the **Forfeiture of Proceeds of Crime Act No. 19 of 2010**, all of the **Laws of Zambia**.

2.29 The Deponent averred that the 1st Interested Party denied the allegations levelled against him and elected to remain

silent. That when asked about the motor vehicle he was driving, he responded by saying that it belonged to his friend, Mr. Michelo Hamweetwa. A copy of the 1st Interested Party's Statement was exhibited and marked "**HM15**".

2.30 The Deponent averred that he did record a Statement from Mr. Michelo Hamweetwa who stated that in 2012, in order to facilitate the work (financial accounting) being done by the 1st Interested Party and Excel Global, he gave the 1st Interested Party a motor vehicle namely a Volvo Registration Number ALH 7596. That around 2013, the 1st Interested Party started working at World Fish Center as an Assistant Accountant but continued to use the said motor vehicle. That in 2014, Mr. Michelo Hamweetwa had a project in Livingstone and borrowed money from the 1st Interested Party to use in the operations of the said project. That by the time the project was done, he was owing the 1st Interested Party ZMW30,000.00 and the two agreed to off-set the debt by giving him the motor vehicle as the 1st Interested Party had interest in buying it. It was deposed that Mr. Michelo Hamweetwa stated that he gave the 1st Interested Party the White Book but did not prepare a letter of sale. A copy of the Statement was exhibited and marked "**HM16**".

2.31 Henry Mtonga deposed that he seized the motor vehicle Registration Number ALH 7596 from the 1st Interested Party on 11th December, 2015, as it was reasonably

suspected to be a proceed of crime and the Seizure Notice was exhibited and marked "HM17".

- 2.32 It was deposed that on the advice of Counsel and believing the same to be true and correct, the above cited properties are tainted properties and liable for forfeiture to the State. That the offences under **Sections 342, 347, 352, 272 and 278** of the **Penal Code, Section 7 of Act No. 10 of 2001** of the **Prevention and Prohibition of Money Laundering Act** as read with **Act No. 44 of 2010**, and **Section 71** of the **Forfeiture of Proceeds of Crime Act No 19 of 2010**, all of the **Laws of Zambia**, are serious offences.
- 2.33 In the Skeleton Arguments filed in Support of the Notice of Motion, Counsel begun by establishing the jurisdiction of this Court to hear the Application by quoting from **Order XXX Rule 15 and 17** of the **High Court Act**, and **Sections 29 and 31** of the **Forfeiture of Proceeds of Crime (FPOCA) Act No 19 of 2010** of the **Laws of Zambia**.
- 2.34 Counsel reiterated the facts of the case as shown in the Affidavit in Support above. We will not repeat them here suffice to say we have taken note of them.
- 2.35 Counsel quoted the offended provisions of the **Penal Code**, the **Prohibition and Prevention of Money Laundering Act** and the **FPOCA**, above and contended that the evidence has shown that the actions and omissions of the 1st Interested Party, being an employee of World Fish Center, and those of the 2nd Interested Party, having entered a Memorandum of Understanding with the 1st

Interested Party, offended the above provisions of the law; and further the motor vehicles acquired during the period by the Interested Parties makes the properties tainted property.

2.36 Counsel cited the case of **The Director of Public Prosecutions and Dhiraj Dhumputha** ⁽¹⁾ wherein the Court held that:

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

2.37 Further that **Section 31(4)** of the **FPOCA** provides that:

“...the validity of an order under subsection (1) is not affected by the outcome of the Criminal Proceedings, or an investigation with a view to institute such proceedings in respect of an offence with which the property concerned is in some way associated.”

2.38 Counsel submitted that from the dealings made by the Interested Parties in this Matter, it is shown that they forged the receipts, uttered false documents and were found to be in possession of property suspected to be proceeds of crime.

2.39 Counsel cited the case of **The Director of Public Prosecutions and ZMK157,040, USD23,007.14, ZMK50,000.00 and ZMK82,333.83 Held In Different Bank Account** ⁽²⁾ wherein the Court stated that:

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

- 2.40 Counsel referred us to **Section 2** of the **FPOCA** and the meaning therein of “proceeds of crime” and “serious offence” and contended that the facts of this Matter offend the provisions of **Section 71** of the **FPOCA** as well as the provisions stated above of the **Penal Code** which provide a punishment of five to seven years when offended.
- 2.41 Counsel quoted **Section 31(1)** of the **FPOCA** and submitted that as set out in the said provision, on a balance of probabilities from the evidence set out, it can clearly be seen that the properties in question are proceeds of crime.
- 2.42 Counsel urged this Court to adopt the reasoning of Van Heerden AJ in the persuasive South African case of **Kumarnath Mohunram & Shelgate Investments CC Vs The National Director of Public Prosecutions, BOE Bank Limited & The Law Review Project (as Amicus Curae)** ⁽³⁾ wherein she cited with approval the holding of the Supreme Court in the case of **National Director of Public Prosecutions Vs RO Cook Properties (PTY) Ltd** ⁽⁴⁾ as follows:

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

2.43 It was Counsel’s submission that the Applicant has established on a balance of probabilities that the properties cited above are proceeds of crime. That the Affidavit and the exhibits have placed sufficient evidence to satisfy the Court that the properties stated above are proceeds of crime.

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

3 INTERESTED PARTIES’ SUBMISSIONS IN OPPOSITION TO THE APPLICANT’S NOTICE OF MOTION

3.1 The Interested Parties filed their Joint Affidavit in Opposition to the Applicant’s Affidavit in Support of Notice of Motion on 3rd

June, 2024. The same was accompanied with Skeleton Arguments and List of Authorities.

- 3.2 The Joint Affidavit in Opposition was sworn by **PAUL J. MWANZA**, the 1st Interested Party, and **DAVID PHIRI**, the 2nd Interested Party, both Zambian nationals.
- 3.3 The Deponents avowed that it is disputed that the figure of ZMW650,085.02, meant to pay ZRA for PAYE for the month of February, 2014, to September, 2014, purported not to be remitted to ZRA was not well tabulated and was never diverted to any company called Northgold Suppliers.
- 3.4 It was deposed that the investigation in the matter and the Statement from Mr. Bruce Mushipi, the Regional Finance Manager, who stated that ZRA wrote to them indicating that the Organisation was owing over ZMW600,000.00 PAYE arrears is speculation and not specific.
- 3.5 The Deponents disputed the Applicant's averment that the copies of the cheques sent to Mr. Bruce Mushipi indicated that the cheques were paid to Northgold Suppliers and stated that this was vague.
- 3.6 It was deposed that Paul J. Mwanza, the 1st Interested Party, was never a Project Accountant at World Fish Center and a letter of employment was exhibited and marked "**PJM1**".
- 3.7 The Deponents avowed that the Statement from Pumulo Muyambango, the Team Leader Customer Services at Stanbic Bank, purportedly taken on 6th February, 2018, is misplaced as the actual evidence was recorded on 18th March, 2024 as evidenced by exhibit marked "**HM2(a)**" and "**HM2(b)**" in the

Applicants Affidavit in Support. It was avowed that this was misleading and deceiving as it was taken nine (9) years after the Notice of Seizure was issued.

- 3.8 It was avowed that the Statement recorded from Vivian Tendai Machawi, a Banker from Barclays Bank, was done on 7th March, 2024 at 11:45 hours as can be noted from the exhibits marked **“HM4(a)”** and **“HM5(b)”** of the Affidavit in Support and that it was taken almost nine (9) years after the Notice of Seizure was issued making the whole scenario an afterthought.
- 3.9 It was deposed that the averment by the Deponent of the Affidavit in Support that he analysed the Bank Statements for World Fish Center and discovered that payment meant for ZRA were deposited in the Northgold Suppliers’ Account held at Stanbic were vague.
- 3.10 The Deponents disputed the Statement recorded on 19th April, 2016, from Mr. Kennedy Njobvu, a Senior Treasury Officer at ZRA, and averred that it was incoherent because it only reveals a total of ZMW523,731.68 as not being remitted, which is different from the ZMW650,085.02 earlier claimed in the Applicant’s Affidavit in Support.
- 3.11 It was deposed that the Statement taken from Mr. Kamoto Banda, a Relationship Manager at Barclays Bank Head Office, in the Affidavit in Support is misleading as the purported paid cheques to Northgold Supplier and debited from World Fish Center from an Account held at Longacres only amounted to ZMW513,891.39 contrary to the allegations that ZMW650,089.02 was not remitted to ZRA.

- 3.12 Further that the Applicant has failed to prove *prima facie* that ZMW650,089.02, meant to pay ZRA by World Fish Center, was diverted to Northgold Suppliers.
- 3.13 The Deponents deposed that they disputed the Statement given by Mr. Simbotwe on 9th October, 2015, and submitted that it is a confirmation that Northgold Suppliers has never dealt with World Fish Center, therefore, no cheque or cash payment had ever been made to the aforementioned whatsoever.
- 3.14 That the Statement recorded on 8th October, 2015 from Mr. Andrew Frederick, one of the signatories at World Fish Center, that he did not know any supplier by the name of Northgold Suppliers confirms the Deponent's averments above.
- 3.15 The Deponents avowed that they disputed the Statement recorded on 22nd October, 2015, from Ms. Catherine Ann Longey, the Regional Coordinator for World Fish Center and a signatory to the World Fish Center Account at Barclays Bank, and submitted that it is exaggerated as the aforementioned cannot deliberately forget signing any cheque as a senior official in the Organisation and later on doubt her own signature on the purported cheques payable to Northgold Suppliers.
- 3.16 That the Affidavit in Support affirms that Ms. Catherine Ann Longey knew what she was signing for as her signature was forensically confirmed by Mr. Thomas Phiri, a Forensic Handwriting Expert from Zambia Police Forensic Department, as being genuine contrary to her assertions above.
- 3.17 It was deposed that the Deponent's averments in the Affidavit in Support regarding the Memorandum of Understanding is a

fabricated statement and not clear as it does not disclose properly the terms and conditions of the Memorandum, that is, who is the offeror and the offeree between the 1st Interested Party and the 2nd Interested Party, and where the 5% as suggested commission is calculated from.

3.18 Further to the above, it was avowed that the said Memorandum of Understanding, sitting on the official headed paper for Northgold Suppliers, does not disclose the full details of the agreement as stated above and moreover, only one signature of the 1st Interested Party was subjected to forensic findings leaving out the 2nd Interested Party's signature which incident must be looked at with suspicion as the document might have been doctored and sneaked in by the Applicant. That therefore, the said document must be rendered and treated as forged as well as a fake document.

3.19 It was avowed that the 1st Interested Party further disputes having knowledge of and signing the said alien Memorandum of Understanding as it can be shown that only one signature is officially used in all documents and is the one on the National Registration Card exhibited and marked "**PJM2**".

3.20 Further to the above, it was avowed that the 1st Interested Party contends that he has no knowledge of the so called doctored, highly suspected forged and fake Memorandum of Understanding and denies having signed the same.

3.21 The Deponents avowed that they dispute the averment by the Applicant in their Affidavit in Support that a search was conducted at the 2nd Interested Party's residence and that

deposit slips for the cheques which were deposited into Northgold Suppliers were recovered.

3.22 The Interested Parties avowed that they dispute that the seized Mercedes Benz Registration Number 5128 from the 2nd Interested Party on 20th November, 2015 as being reasonably suspected to be proceeds of crime was not done in good faith as the said motor vehicle was bought as a non-runner in December 2014 from Mr. Kasota of Solwezi.

3.23 It was deposed that the White Book, the letter of sale and a copy of the National Registration Card for the seller is still in the custody of the Applicant.

3.24 It was further avowed that it is worth noting that the 2nd Interested Party was employed by CHAZ Churches Association of Zambia as shown by exhibit marked "**DPI**" being a copy of the Contract of Employment.

3.25 It was deposed that the 1st Interested Party maintains that the motor vehicle he was driving belonged to Mr. Michelo Hamweetwa and this is not disputed. A copy of the White Book was exhibited and marked "**PJM3**".

3.26 Further, it was deposed that it is not disputed that the 1st Interested Party was called by Mr. Michelo Hamweetwa and asked to help him with financial accounting at Excel Global in 2012, and that Mr. Michelo Hamweetwa gave the 1st Interested Party a motor vehicle in 2012 namely, a Volvo Registration Number ALH 7596 to ensure his mobility in the operation of the business.

- 3.27 It was avowed that the 1st Interested Party started working as Finance Officer not as an Assistant Accountant for World Fish Center around 2013, and he continued using the vehicle he was given by Mr. Michelo Hamweetwa.
- 3.28 With regards to the Applicant's affirmation in the Affidavit in Support that Mr. Michelo Hamweetwa had a project in Livingstone and borrowed money from the 1st Interested Party which he used to carry out the operation of the business, it was deposed that the information contained thereof was a gentleman's agreement and is inconsequential to the investigation and this Application before Court.
- 3.29 That further, the issues surrounding the amount of ZMW30,000.00 alluded to by the Applicant is also inconsequential to the investigation and has nothing to do with it as the allegor has failed to state that the 1st Interested Party was on a good salary as shown by exhibit marked "**PJM4**" which is the source of a salaried income.
- 3.30 It was avowed that the Deponents did not dispute the contents of Mr. Michelo Hamweetwa's Statement exhibited as "**HM16**" and avowed that the averment by the Applicant that Mr. Michelo Hamweetwa gave the 1st Interested Party the White Book and did not prepare a letter of sale due to the relationship they had is very true.
- 3.31 The Deponent avowed that the 1st Interested Party challenges the Seizure Notice owing to the fact that the Applicant has failed to prove *prima facie* evidence linking the said motor vehicle, Volvo Registration Number ALH 7596, to the purported crime.

That, therefore, the motor vehicle is not reasonably suspected to be proceeds of crime. Further, it was avowed that the cited properties are not tainted properties and liable to forfeiture to the State.

- 3.32 With regards to the offences in **Sections 342, 347, 352, 272** and **278** of the **Penal Code, Section 7 of Act No. 10 of 2001** as read with **Act No. 44 of 2010** of the **Prohibition and Prevention of Money Laundering Act** and **Section 71** of the **FPOCA** all of the **Laws of Zambia**, it was deposed that these alleged offences do not apply to the Interested Parties.
- 3.33 It was deposed that the Deponents crave the indulgence of this Court to lift the Notice of Seizure and give back the seized properties to the Interested Parties as the Applicant has not established *prima facie* evidence to warrant an Application for forfeiture to the State as doing so will not cause any injustice to the Applicant.
- 3.34 The Interested Parties filed Skeleton Arguments in Opposition to the Originating Notice of Motion on 3rd June, 2024.
- 3.35 Counsel for the Interested Parties submitted that the question that falls for the Court to determine is whether this is a proper case to warrant an Order for forfeiture of property to the State in favour of the Applicant. Counsel contended that it was not and premised his position on **Sections 71(2)** and **78** of the **FPOCA**.
- 3.36 It was submitted that based on the provisions of the law above, the Interested Parties were within their rights to oppose the Notice of Motion and that this Court may or may not grant the

said Application if it is or is not satisfied that the requirements have been met.

3.37 Counsel argued that the figure claimed of ZMW650,085.02 does not collate with the figures exhibited in the Applicant's Affidavit in Support. That the 1st Interested Party has never been a Project Manager at World Fish Center and that the Statements recorded from Pumulo Muyambango and Vivian Tendai Machawi were recorded nine (9) years after the alleged arrest, making them an afterthought.

3.38 It was contended that the Memorandum of Understanding relied upon is fabricated as it does not properly disclose the terms and conditions detailed above and where the 5% as suggested commission is calculated from and that the same is not clear.

3.39 Counsel submitted that the Memorandum of Understanding sitting on Northgold Suppliers letter head is further highly challenged as the signatures of the 1st Interested Party was the only one subjected to forensic examination and verification leaving out the 2nd Interested Party's signature. That this looked suspicious and Counsel argued that the document is doctored, sneaked in as well as fraudulent, therefore, rendering the whole Application to be a nullity.

3.40 Counsel drew this Court's attention to the case of **Zega Limited Vs Zambezi Airlines Limited, Diamond General Dealers Limited** ⁽⁵⁾ which held as follows:

“The discretion of the Court should not be exercised to deny the valuable right of a Defendant to contest the claim against him.”

3.41 Counsel contended that based on the foregoing, this is not a proper case to grant an Application for forfeiture of property.

3.42 Counsel submitted that the Interested Parties have filed an Opposition in form of a Defence as this matter took long to be before a competent court and this is not a proper case for this Court to exercise its discretion and enter an Order for forfeiture of property to the State for the Applicant.

3.43 In conclusion, Counsel prayed that the Applicant’s Application to enter an Order for forfeiture of property to the State be dismissed with costs in favour of the Interested Parties.

4 APPLICANT’S RESPONSE TO THE INTERESTED PARTIES’ SUBMISSIONS IN OPPOSITION

4.1 The Applicant filed Affidavit in Reply in Response to the Joint Affidavit in Opposition to the Affidavit in Support of the Notice of Motion on 7th June, 2024. The Same was accompanied with List of Authorities and Skeleton Arguments in Support.

4.2 The Affidavit in Reply sworn by **HENRY MTONGA**, was largely a reiteration and confirmation of the Applicant’s Affidavit in Support above, and disputed the contents of the Interested Parties’ Affidavit in Opposition by rehashing the affirmations made in the Applicant’s Affidavit in Support. We have taken note of the same and will not belabour to repeat them here.

- 4.3 In the List of Authorities and Skeleton Arguments filed, it was submitted that in Non-Conviction Based Forfeiture proceedings, the legal process is instituted against the property itself, rather than against a specific individual and that these proceedings do not necessitate a prior criminal conviction or even a criminal charge against the property owner. It was Counsel's submission that this highlights a distinct separation from traditional criminal proceedings. That the action can be initiated even if a person has merely been charged but not prosecuted.
- 4.4 Counsel submitted that **Section 34** of the **FPOCA** clearly places the onus of proof on the Applicant and does not shift this burden. Counsel quoted the said Section and submitted that it is crucial to understand that this burden of proof remains with the Applicant throughout the proceedings, and should not be misconstrued as shifting the burden to the Interested Party.
- 4.5 Counsel referred the Court to the case of **Assets Recovery Vs Peter Oluwafemi Olawon** ⁽⁶⁾ wherein the Court clarified the process as follows:

“In civil forfeiture proceedings, the burden of proof initially lies with the Applicant, who must establish that the properties in question are likely to be proceeds of crime. Once this is established, the evidentiary burden shifts to the Respondent, who must demonstrate and justify that the properties are legitimate and not acquired through illicit means. The Respondent must provide a practical and sufficient explanation to satisfy the court regarding

the source of the properties. The Applicant's role is to raise doubt by presenting evidence suggesting that the property may have been acquired through criminal or dubious means.

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

- 4.6 Counsel submitted that this principle aligns with jurisprudence established by the Supreme Court of Zambia in the case of **The People Vs Austin Chisangu Liato** ⁽⁷⁾.
- 4.7 In establishing ownership and provenance, Counsel submitted that in legal proceedings such as this one, the Interested Parties bear the onus of proving that the motor vehicles in question are not derived from criminal activities; that a mere assertion by the Interested Parties that they purchased the vehicle with their salary is woefully insufficient. It was contended that instead, they must provide a comprehensive, truthful and corroborated explanation, backed by credible evidence, to establish the legitimacy of the vehicle's purchase beyond any doubt.

- 4.8 On the issue raised of insufficient disclosure and burden of proof, Counsel submitted that the explanation by the 2nd Interested Party fails to address critical questions, leaving doubts about the source of funds used for the vehicle's purchase. Counsel argued that consequently, they have not met the required burden of proof. That their evidence lacks conviction and fails to persuade the Court.
- 4.9 Counsel raised the issue of disputed ownership and lack of evidence and submitted that the 1st Interested Party disputes ownership of the vehicle, attributing it to another individual. That however, evidence suggests otherwise, with a Mr. Michelo Hamweetwa, the seller, confirming otherwise. Counsel argued that the 1st Interested Party's failure to provide supporting evidence, as mandated by law, further undermines this claim.
- 4.10 On the validity of the Memorandum of Understanding, Counsel submitted that the said Memorandum between the Interested Parties is integral to the case. Counsel argued that contrary to claims of it being a fabrication, it outlines a clear agreement. That notably, the 2nd Interested Party's purchase of the vehicle coincides with the period of cheques deposits by the 1st Interested Party, indicating the use of these funds for the purchase, thereby, tainting the property.
- 4.11 Lastly, on the issue raised of standard of proof and evidentiary requirements, Counsel submitted that in non-conviction based forfeiture proceedings, balance of probabilities standard is used; that this means that the evidence should tilt slightly in favour of one side. It was submitted that the Applicant must

provide convincing evidence, while the Interested Parties need to counter it effectively. It was argued that however, in *casu*, the Interested Parties have failed to convincingly prove that the vehicles are not tainted or proceeds of crime. That in contrast, the Applicant has shown reasonable suspicions of their criminal origins.

4.12 It was Counsel's prayer that given the foregoing, the Applicant respectfully urges this Court to declare the properties tainted and order their forfeiture to the State.

5 HEARING

5.1 The Hearing of the Originating Notice of Motion was held on 4th June, 2024, and present were Counsel for the Applicant as well as the Interested Parties who appeared in person.

5.2 Neither Parties augmented their submissions *viva voce*, and it was agreed by the Parties that this Court would render Judgment based on the written submissions filed by the Parties.

6 CONSIDERATION AND DECISION OF THE COURT

6.1 We are grateful for the submissions from all the Parties.

6.2 Counsel for the Applicant correctly established the jurisdiction of this Court to hear the Application filed by citing **Order XXX Rule 15** and **16** of the **High Court Rules** as well as **Sections 29** and **31** of the **FPOCA**.

6.3 The Applicant's Application is anchored on **Sections 29, 30, 31** and **71** of the **FPOCA**. **Section 29** reads as follows:

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

6.4 The Applicant filed Originating Notice of Motion for an Application for a Non-Conviction Based Forfeiture Order for tainted property being a Mercedes Benz Registration Number ACP 5128 and a Volvo Registration Number ALH 7596 belonging to the 1st and 2nd Interested Parties respectively.

6.5 **Section 2** of the **FPOCA** defines tainted property as follows:

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

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

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

c) proceeds of the offence;

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

6.6 The Applicant contends that the properties above are tainted property as they are proceeds of crime or of an offence and are therefore liable to be forfeited to the State as a consequence.

6.7 Proceeds of crime is defined in **Section 2** of the **FPOCA** as follows;

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

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

6.8 **Section 2** further defines a serious offence as follows:

“serious offence ” means an offence for which the maximum penalty prescribed by law is death, or imprisonment for not less than twelve months;”

6.9 The Applicant in *casu*, has brought this Application by way of **Section 31** of the **FPOCA**, *inter alia*, which is the Non-Conviction Based route for the forfeiture of tainted property, as opposed to **Section 10**, which provides for a forfeiture order on conviction.

6.10 **Section 31** reads as follows:

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

6.11 **Sub-section 1** of **Section 31** provides that an application by the public prosecutor, the Applicant herein, must contain sufficient evidence to satisfy the court on a balance of probabilities that the property is tainted property and liable to

forfeiture to the State. This is further emphasised by **Section 34** of the **FPOCA** which states that:

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

6.12 It must be noted here that the burden of proof is on a balance of probabilities, a standard of proof used in civil law including cases involving forfeiture, as opposed to the standard of proof in criminal matters which is beyond a reasonable doubt. This means that the evidence presented must show that it is more likely than not that the claim made by the applicant is true. This is a lower standard than “beyond a reasonable doubt,” which is used in criminal cases.

6.13 This has been well noted in the persuasive case of **Assets Recovery Vs Peter Oluwafemi Olawon** ⁽⁶⁾ as quoted by Counsel for the Applicant above and we are guided further by **Section 33** of the **FPOCA** which states as follows:

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

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

a) the rules of construction applicable only in relation to criminal law do not apply in the interpretation of this Act;

and

b) the rules of evidence applicable in civil proceedings apply, and those applicable only in criminal proceedings do not apply, to proceedings under this Act.”

6.14 A further reading of **Section 31** of the **FPOCA** states as follows:

“(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; and

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

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.”

6.15 Once the applicant has through its application provided evidence that the property in question is tainted property and therefore, liable to forfeiture to the State, **Section 31(2)** shifts the onus onto an interested party to firstly prove that he/she has interest in the property, and secondly that he/she did not acquire the interest in the property as a result of serious offence carried out by the person.

6.16 **Section 71(2)** of the **FPOCA** reiterates the defence stated above and available to an interested party as follows:

“(2) It is a defence under this section, if a person satisfies the court that the person had no reasonable

grounds for suspecting that the property referred to in the charge was derived or realised, directly or indirectly, from any unlawful activity.”

6.17 The position stated in **Sections 31(2)** and **71(2)** has been well established and interpreted in the celebrated case of **The People Vs Austin Chisangu Liato** ⁽⁷⁾ as follows:

“Our understanding of section 71 (2) is that it does not impose any duty on the accused person to prove any ingredient of the offence under section 71 (1). Where the prosecution proves its case against the accused under section 71 (1), it behoves such accused person, if desirous of defending himself, to show that he had no reasonable grounds for suspecting that the property to which the charge under section 71 (1) related, was derived from criminal activity. While we agree with the High Court that section 71(2) does not impose any obligation on the accused person to prove any ingredient of the offence under section 71 (1), it does afford the accused an opportunity to explain the absence of reasonable grounds on his part, for suspecting that the property he was found in possession of under section 71(1) was proceeds of crime.” (Emphasis ours)

6.18 In *casu*, the Applicant have anchored their Application *inter alia* on **Section 71(1)** of the **FPOCA** and must prove their case accordingly against the Interested Parties. The Interested

Parties conversely, must defend themselves as prescribed by **Section 71(2)** of the **FPOCA**.

6.19 The standard of proof is stated in **Section 78** of the **FPOCA** as follows:

“Save as otherwise provided in 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.” (Emphasis ours)

6.20 A perusal of the Applicant’s evidence as contained in the documents submitted in support of their Application alleges that the Interested Parties have committed serious offences and it is from the proceeds of these serious offences that they acquired properties, being the motor vehicles, which are tainted property liable for forfeiture to the State

6.21 The Applicant’s Affidavit in Support and in Reply as well as the accompanying Skeleton Arguments condensed above outline clearly with exhibits the evidence found and submitted in support of the Application.

6.22 The evidence submitted shows that ZRA alerted World Fish Center of their failure to remit PAYE for its employees amounting to ZMW650,089.02 for the period February, 2014 to September, 2014.

6.23 That Barclays Bank, where World Fish Center held an Account, submitted copies of the cheques which had been raised by World Fish Center to pay ZRA. That perusal of the said cheques showed that they were paid to Northgold Suppliers, a company

which World Fish Center and its officers had no knowledge of or dealings with.

- 6.24 That the 1st Interested Party was identified as the World Fish Center employee who submitted payable vouchers to ZRA in respect of employees at World Fish Center. Investigations revealed that the 1st Interested Party would submit receipts purportedly showing that World Fish Center had paid ZRA. Investigations made at ZRA confirmed that the said receipts were not sitting on the ZRA System, save for one for an amount of ZMW1,738.83.
- 6.25 It was submitted that the 1st Interested Party would raise payment vouchers which cheques for payment of PAYE that were signed by signatories of World Fish Center. That following a forensic examination of the said signature, it was established that some of the signatures were genuine and others were forged.
- 6.26 That officers from Barclays Bank which held the World Fish Center Account confirmed through Statements and Affidavits sworn that cheques meant for ZRA were debited from the World Fish Center Account and paid to Northgold Suppliers Account held at Stanbic Bank.
- 6.27 That Officers from Stanbic Bank where Northgold Suppliers held its Account, through Statements and Affidavits sworn confirmed that the Account was credited with the money in question and that the deposits were being made by the 2nd Interested Party who was the Director and sole signatory to the Account held by Northgold Suppliers.

- 6.28 It was submitted that investigations revealed a Memorandum of Understanding between the Interested Parties and signed by both of them which suggests that the cheques would be deposited into Northgold Suppliers' Account and that the 2nd Interested Party would get a commission of 5%. To buttress this suggestion, a search of the 2nd Interested Party's residence resulted in the recovery of deposit slips for the said cheques.
- 6.29 As a result of the above, motor vehicles belonging to the Interested Parties were seized as they were suspected to be proceeds of crime as they were purchased or acquired within the period in question. Further, the Interested Parties were warned and cautioned for the above-mentioned offences.
- 6.30 The Interested Parties anchored their opposition to the Applicant's Application on **Section 71(2)** of the **FPOCA**.
- 6.31 In response, the Interested Parties submitted that the figure claimed of ZMW650,085.02 meant to pay ZRA for PAYE was not well tabulated, speculative and not specific; and that the figure was never diverted to any company called Northgold Suppliers.
- 6.32 The Interested Parties also disputed all the Statements made by Officers from both Barclays Bank and Stanbic Bank as well as World Fish Center and ZRA and described them as being vague, misleading, deceiving, afterthoughts and incoherent.
- 6.33 The Interested Parties further submitted that the fact that the Statements made by Officers of World Fish Center that Northgold Suppliers has never dealt with World Fish Center and was not known to World Fish Center shows that no cheque or cash payment had ever been made to Northgold Suppliers. That

therefore, the Applicant had failed to prove *prima facie* that ZMW650,089.02 meant to pay ZRA was diverted to Northgold Suppliers.

- 6.34 It was submitted that Ms. Catherine Ann Longey, the Regional Coordinator, signatory and senior official for World Fish Center cannot purport to forget signing and doubt her own signature on the cheques payable to Northgold Suppliers more so after a Forensic Handwriting Expert from Zambia Police Forensic Department, confirmed her signature as being genuine.
- 6.35 The Interested Parties claim that the Memorandum of Understanding sitting on Northgold Suppliers' headed paper is a fake and forged document which fails to disclose crucial details of the agreement; that only the 1st Interested Party's signature was subjected to forensic examination and verified but not the 2nd Interested Party's signature. Therefore, the document must be viewed with suspicion as it is doctored, sneaked in as well as fraudulent and renders the Applicant's Application a nullity.
- 6.36 When it came to the motor vehicles seized, it was submitted that the seizure of the Mercedes Benz from the 2nd Interested Party was not done in good faith as it was bought as a non-runner in December, 2014 and that the 2nd Interested Party was employed by CHAZ Churches.
- 6.37 With regards to the Volvo Registration Number ALH 7596 it was submitted that the vehicle belonged to Mr. Michelo Hamweetwa, as shown by the Road Transport and Safety Agency Vehicle Test Certificate, and was given to the 1st Interested Party to use.

- 6.38 That the issues surrounding the exchange of the said motor vehicle as Mr. Michelo Hamweetwa owed the 1st Interested Party ZMW30,000.00 was inconsequential to the Applicant's investigations as it was a gentleman's agreement. Further that the 1st Interested Party was a salaried employee therefore, had a source of income.
- 6.39 It was contended that based on the above, the Applicant had failed to prove *prima facie* evidence linking the motor vehicles to the purported crime and therefore, they are not suspected proceeds of crime and not tainted and liable to forfeiture to the State.
- 6.40 As regards the offences stated above, the Interested Parties averred and submitted that they do not apply to them.
- 6.41 It was submitted that based on the foregoing, this was not a proper case for this Court to exercise its discretion and enter an Order for forfeiture of property to the State.
- 6.42 It is a cardinal principle of the law of procedure that he who alleges must prove. He must adduce clear and unambiguous evidence which points to the veracity of his claims. In the case of **Khalid Mohamed Vs The Attorney** ⁽⁸⁾ the Supreme Court did hold to the effect that, the unqualified proposition that a claimant should succeed automatically whenever a defence has failed is unacceptable as a claimant 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.
- 6.43 Ngulube J., as he was then, in the case of **Wilson Masauso Zulu Vs Avondale Housing Project Limited** ⁽⁹⁾ stated as follows:

“I think that it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed any other case where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent’s case.”

6.44 Further in the Supreme Court case of **J.Z. Car Hire Limited and Malvin Chala, Scirocco Enterprises Limited** ⁽¹⁰⁾ it was stated that:

“In the present case, the court was not assisted by the appellant with any evidence at all. The evidence of carrying on car hire business was not enough to persuade the court to make any meaningful intelligent assessment of damages.”

6.45 Based on the above cases, and bearing in mind the onus and standard of proof applicable to matters anchored on the **FPOCA** we stated above, the Applicant in *casu* must adduce sufficient evidence to show that on a balance of probability, the vehicles subject to a Forfeiture Order are indeed proceeds of crime, tainted and must be forfeited to the State. The Interested Parties must equally defend their position and adduce sufficient evidence on a balance of probability that the vehicles were legitimately acquired.

6.46 We have carefully read through and scrutinized the Applicant’s submissions both in their Affidavit in Support and Affidavit in Reply and the accompanying Skeleton Arguments. There is no

doubt in our minds that the Applicant have adduced sufficient evidence to show that the 1st Interested Party, being an employee of World Fish Center did indeed raise cheques for the payment of PAYE to ZRA and that the same cheques were made out to Northgold Suppliers and illegally paid into its Account held at Stanbic Bank. That the 2nd Interested Party, through a Memorandum of Understanding, did agree to receive the said cheques and pay the amounts into Northgold Supplier's Account and in return receive a 5% commission and that deposit slips for the said cheques were found at his residence.

- 6.47 That during the period in question, the Interested Parties did acquire the motor vehicles which can arguably be considered proceeds of crime, tainted within the meaning stated in the **FPOCA**, and therefore, liable to forfeiture to the State.
- 6.48 The Interested Parties, on the other hand, have failed to adduce sufficient evidence in their defence. As rightly submitted by the Applicant in their Affidavit in Reply to the Affidavit in Opposition, and the accompanying Skeleton Arguments, mere assertions are woefully insufficient; the Interested Parties must provide a comprehensive, truthful and corroborated explanation, backed by credible evidence to establish the legitimacy of the vehicle's purchase.
- 6.49 It is our considered view that the Interested Parties have failed to address critical questions surrounding the offences they were warned and cautioned for, the very genesis of the Matter. They have failed to provide sufficient evidence and acceptable proof in the form of payslips from their employment, bank statements

showing their financial buoyancy, and money transfer records to back up their assertions with regards to the purchase of the said motor vehicles.

6.50 The 1st Interested Party's assertion that the exchange of the motor vehicle between himself and Mr. Michelo Hamweetwa came about as a gentlemen's agreement and is inconsequential to the Applicant's investigations and the Application before this Court cannot stand.

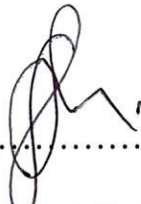
6.51 Both Interested Parties have produced letters of employment with the 1st Interested Party providing an Appendix with the 2014 estimated gross annual compensation package for his employment as Finance Officer. However, this does not take into consideration the day to day living expenses. The 2nd Interested Party's Contract of Employment is devoid of proof of actual compensation. It leaves this Court with more questions as to how, based on the evidence tendered, the Interested Parties came to afford and acquire the motor vehicles.

6.52 The Interested Parties' evidence has left this Court devoid of any means to make any meaningful intelligent assessment that would reduce the doubt raised by the Applicant herein. They have failed to fully embrace the opportunity to explain the absence of reasonable grounds for suspecting that the property in question was not acquired through criminal means.

7 CONCLUSION

- 7.1 Based on the foregoing facts and authorities and for the avoidance of doubt, we find that the Applicant has proved its case on a balance of probabilities that the properties are tainted.
- 7.2 The Applicant's Application for a Non-Conviction Based Forfeiture Order of Tainted Goods succeeds.
- 7.3 The motor vehicles being, Mercedes Benz Registration Number ACP 5128 and Volvo Registration Number ALH 7596 are hereby forfeited to the State.
- 7.4 Costs for and incidental to this Application are for the Applicant to be taxed in default of agreement.

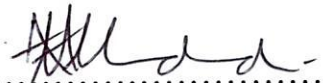
Delivered at Lusaka this 9th day of September, 2024.



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S.M. WANJELANI
HIGH COURT JUDGE



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P. K. YANGAILO
HIGH COURT JUDGE



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A. MALATA-ONONUJU
HIGH COURT JUDGE