

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

2024/HPEF/033

(CIVIL JURISDICTION)

IN THE MATTER OF:



**SECTIONS 4 AND 10 OF THE
FORFEITURE OF PROCEEDS OF
CRIME ACT NO. 19 OF 2010**

IN THE MATTER OF:

**SECTION 71 OF THE FORFEITURE
OF PROCEEDS OF CRIME ACT NO.
19 OF 2010**

IN THE MATTER OF:

**SECTION 89 OF THE FOREST ACT
NO. 4 OF 2015**

IN THE MATTER OF:

**SECTION 53(1) OF THE FOREST
ACT NO. 4 OF 2015**

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

IN RE PROPERTY:

**SIXTY-TWO (62) MOPANI COLEOSPERMA LOGS AND
VOLVO TRUCK REGISTRATION NUMBER BLC 2149,
TRAILERS BLC 3539 AND BLC 3538**

BRIAN MUTANGO

1ST INTERESTED PARTY

ROBERTY MUTANGO

2ND INTERESTED PARTY

HUANG XUESHENG

3RD INTERESTED PARTY

JAVAN DAKA

4TH INTERESTED PARTY

BEFORE THE HON. LADY JUSTICES S. M. WANJELANI, P. K. YANGAILO AND A. MALATA-ONONUJU IN CHAMBERS, ON THIS 13TH DAY OF OCTOBER, 2025.

For the Applicant: Ms. Margaret Kapambwe Chitundu,
Mr. Sindiso Zulu, Mr. Ndusha Zulu –
National Prosecution Authority

For the 1st, 2nd and 3rd

Interested Parties: No Appearance

For the 4th Interested Party: Mrs. Jila Mulape, Ms. Jane Jere –
Messrs. Jane Bulaya & Partners.

RULING ON A PRELIMINARY ISSUE ON POINT OF LAW

A. MALATA-ONONUJU J., DELIVERED THE RULING OF THE COURT.

CASES REFERRED TO:

1. *Nachanga Transport Vs Director of Public Prosecutions CAZ Appeal No. 252/2020;*
2. *Leah Tekumwenzu Mpondela Vs The People Appeal No. 091/2020;*
3. *Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Limited [1989] KECA 48 (KLR);*
4. *JCN Holdings Limited Vs Development Bank of Zambia SCZ. Judgment No. 22/2013;*

5. *Competition and Consumer Protection Commission Vs Omnia Fertilizer Zambia Limited and Another Selected Judgment No. 5 of 2017. (2017) Z. R. Vol. 351;*
6. *Director of Public Prosecutions Vs ZMK 157,040, US\$23,007.14, and ZMK 50,000, and ZMK 82,333.83 held in various bank accounts (2019/HP/1784);*
7. *Simon Prophet Vs the National Director of Public Prosecutions CCT 56/05;*
8. *The Director of Public Prosecutions Vs Jessie Bwalya Kapyelata Tapalu 2019/HP/0932; and*
9. *The Director of Public Prosecutions Vs Dhiraj Dhumputha 2020/HP/1287.*

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court of England 1965 (White Book) 1999 Edition;*
2. *The High Court Rules Chapter 27 of the Laws of Zambia;*
3. *The Forfeiture of Proceeds of Crime Act No. 19 of 2010 of the Laws of Zambia; and*
4. *The Narcotics Drugs and Psychotropic Substances Act No. 35 of 2021 of the Laws of Zambia.*

1. INTRODUCTION

- 1.1 The 4th Interested Party, on 21st August, 2025, refiled its Notice of Motion to raise a Preliminary Issue on a point of law made pursuant to **Order 14A** of the **Rules of the Supreme Court of England 1965 (White Book) 1999 Edition**. The same was accompanied with Affidavit in Support and List of Authorities and Skeleton Arguments in Support of the Notice of Motion of even date.

1.2 The 4th Interested Party raised the following issues for determination by this Court:

- i. *Whether the Applicant can bring an application for the Non-Conviction Based Forfeiture of tainted property before the Economic and Financial Crimes Court in the High Court, when a criminal conviction based on the same logs that the Applicant seeks to forfeit, including the Volvo Truck used for transportation, exists before a different Court;*
- ii. *If the answer to the above question is in the negative, then the Applicant's application should be dismissed with costs. If in the affirmative, then the Court should proceed to hear and determine it.*

1.3 The Applicant, in response, filed an Affidavit in Opposition on 4th September, 2025, with Skeleton Arguments and List of Authorities of even date.

2. THE 4TH INTERESTED PARTIES APPLICATION TO RAISE PRELIMINARY ISSUE

2.1 The 4th Interested Party filed Affidavit in Support of the Notice of Motion to Raise Preliminary Issue on a point of law, sworn by **JAVAN DAKA**, a Zambian National and the 4th Interested Party herein, therefore competent to depose to this Affidavit.

2.2 The Deponent avowed that he is the legal owner of the Motor Vehicle, Volvo Truck, bearing Registration Number BLC 2149

and Trailers BLC 3538 and BLC 3539, which are the subject of the Applicant's Application for an Order of Forfeiture. A true copy of the White Book was exhibit and marked "**JD1**" as proof of ownership.

- 2.3 It was deposed that the 1st, 2nd, and 3rd Interested Parties herein were facing criminal proceedings before the Siavonga Magistrates Court and were convicted on 3rd October, 2024. A copy of the Ruling delivered by the Siavonga Magistrates Court referring to the conviction of the 1st, 2nd, and 3rd Interested Parties was exhibited and marked "**JD2**".
- 2.4 That further to the above, it was deposed that the Applicant's Affidavit in Support of the Originating Notice of Motion for a Non-Conviction Based Forfeiture Order of tainted property, at paragraph 19 confirms that the 1st to 3rd Interested Parties were convicted of the offence of Illegal Possession of Forestry Produce, and paid a Fine.
- 2.5 The Deponent averred that the conviction was based on the same logs which the Applicant now seeks to have forfeited to the State, including the Motor Vehicle used to transport the said logs.
- 2.6 The Deponent avowed that before he could make an application before the Siavonga Magistrates Court for the release of his Motor Vehicle under a Restitution Order, the Court had already convicted the 1st to 3rd Interested Parties, and he later learnt

that the Applicant had commenced proceedings before this Court for a Non-Conviction Based Forfeiture Order.

- 2.7 The Deponent avowed that having been advised by his Advocates, and verily believing the same to be true, where a conviction has been secured, any application for forfeiture of property related to that conviction must be brought before the same Court that delivered the conviction.
- 2.8 That despite the existence of a conviction before the Siavonga Magistrates Court, the Applicant has opted to commence a Non-Conviction Based Forfeiture Application before this Court.
- 2.9 That having been advised by his Advocates and verily believing the same to be true, in the circumstances, the Applicant ought to have commenced a Conviction Based Forfeiture Order before the Siavonga Magistrates Court, rather than bringing the Application before this Court.
- 2.10 Further that the present Application is improperly before this Court as the Court lacks jurisdiction to entertain the Matter.
- 2.11 The Deponent avowed that it is in the interest of justice that this Court determines this issue of jurisdiction as a preliminary matter before proceeding with the substantive application for forfeiture.
- 2.12 It was averred that in the circumstances, the Applicant's Application should be dismissed as it does not adhere to the

correct procedure for the commencement of Forfeiture Proceedings where conviction has been secured.

2.13 In the Skeleton Arguments filed in Support, Counsel for the 4th Interested Party begun, by way of introduction, by submitting that on 6th November, 2024, the Applicant took out Originating Notice of Motion for an Application for a Non-Conviction Based Forfeiture Order of tainted property, where the State seeks the forfeiture of 62 Mopani Coleosperma logs and Volvo Truck Registration Number BLC 2149, and Trailers BLC 3539 and BLC 3538.

2.14 That the 4th Interested Party's Application in *casu* seeks the determination whether or not it has been properly brought, given the fact that the 1st to 3rd Interested Parties were convicted before the Siavonga Subordinate Court based on the same logs that the Applicant seeks to be forfeited, including the Volvo Truck used for transportation.

2.15 Counsel submitted that the 4th Interested Party's Application is anchored on **Order 14A(1)** of the **Rules of the Supreme Court of England 1965 (White Book) 1999 Edition** which gives this Court Jurisdiction, on an application of a party or on its own motion, to determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings. That the question posed for determination by the 4th Interested Party must be determined before hearing the Applicant's Application in the main.

- 2.16 Counsel drew this Court's attention to **Sections 4 and 10** of the **Forfeiture of Proceeds of Crime Act No. 19 of 2010** (herein after referred to as **the FPOCA**) and submitted that the said provisions mandate that where a conviction has been secured, the forfeiture application must be made before the convicting Court.
- 2.17 Counsel contended that there is therefore a distinction between an application for forfeiture of tainted property made under **Sections 4 and 10** (Conviction Based) and one made under the provisions of **Sections 29, 30 and 31** (Non-Conviction Based) of **the FPOCA**. That this was addressed in the case of **Nachanga Transport Vs The Director of Public Prosecutions** ⁽¹⁾ where the Appellant appealed to the Court of Appeal against a Ruling in which the High Court Ordered the forfeiture to the State of a Fuso Truck Registration Number ALV 9176 and one hundred (100) logs of Mukula Tree.
- 2.18 It was submitted that the Court of Appeal in delivering its Judgment in the above case made a distinction between an application made under **Section 4 and 10** of the **FPOCA** and **Section 29** of the same **Act**, and held as follows:

"An application made under section 10 is one where a person has been convicted of an offence. This means, a trial would have been conducted resulting in a conviction and the consequent application will be

made under that criminal matter. However, a reading of section 29, which is a stand-alone provision, shows that the application to be made to the court, is not premised on a conviction. Being a stand-alone provision, it can be inferred that the application is further not premised on any previous or present proceedings, be they civil or criminal.” (Emphasis theirs)

2.19 Counsel further drew the Court’s attention to the case of **Leah Tekumwenzu Mpondela Vs The People** ⁽²⁾, in which the public prosecutor, following the Conviction of the Appellant’s boyfriend, made an application pursuant to **Sections 4(a) and 10** of the **FPOCA**, to have the motor vehicle that was used to commit the offence forfeited to the State. In the said case, the Court of Appeal, in answering the question whether it can grant an Order of Forfeiture, stated that:

“It is clear under the Narcotic Drugs and Psychotropic Substances Act, it is a convicting Court that Orders forfeiture and not an Appellant Court. An Appellant Court can only Order forfeiture where an application was made in the trial Court, but declined and there is an appeal against refusal.

The position is the same under the Forfeiture of Proceeds of Crime Act. It is the convicting Court that Orders forfeiture. The High Court can only make a

forfeiture Order if it is the convicting Court or whether there is an appeal against the Subordinate Court declining to make such Order after a trial before it.” (Emphasis theirs)

2.20 Counsel submitted that the Court of Appeal went further to state that:

“Under the Narcotic Drugs and Psychotropic Substances Act and the Forfeiture of Proceeds of Crime Act, where trial takes place in the Subordinate Court and no application for forfeiture is made in that Court, an application cannot be launched in the High Court which is sitting as an appellate Court.”

2.21 It was submitted that upon making the above finding, the Court of Appeal went on to hold as follows:

“We set aside the Forfeiture Order issued by the High Court on account of that Court not having the jurisdiction to make it.”

2.22 Counsel argued that what is clear from the above provisions and the well-established case law is that the **FPOCA** provides for two distinct forfeiture processes, that is a Conviction Based Forfeiture, which follows a conviction in a criminal trial, and a Non-Conviction Based Forfeiture which applies where no conviction has been secured.

2.23 Counsel contended that **Sections 4 and 10** of the **FPOCA** mandates that where a conviction has been secured, the forfeiture process must be commenced in the same Court that convicted the accused.

2.24 That in the instant case, the 1st to 3rd Interested Parties were convicted before the Siavonga Subordinate Court, whose conviction was based on the same Mopani Logs which the Applicant now seeks to have forfeited to the State, including the Motor Vehicle used to transport the Logs. That therefore, the Siavonga Magistrates' Court is the appropriate forum for the Forfeiture Application and not the Economic and Financial Crimes Court of the High Court.

2.25 It was Counsel's submission that this Honourable Court consequently does not have the jurisdiction to hear and determine the Applicant's Application. Counsel was guided by the principle that jurisdiction is everything as emphasized in the Kenyan case of **Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Limited** ⁽³⁾, where the Court held that:

"Jurisdiction is everything. Without it, a Court has no power to make one more step."

2.26 That this was echoed in the case of **JCN Holdings Limited Vs Development Bank of Zambia** ⁽⁴⁾, where the Supreme Court of Zambia stated:

“If a Court has no Jurisdiction to hear and determine a matter, it cannot make any lawful Orders or grant any remedies sought by a party to that matter”.

2.27 Counsel submitted further to the above that in the case of **Competition and Consumer Protection Commission Vs Omnia Fertilizer Zambia Limited and Another** ⁽⁵⁾ the Supreme Court held that where a matter is wrongly before a Court including a tribunal, that Court or tribunal has no jurisdiction to make any lawful Order or grant any remedy.

2.28 In conclusion, Counsel submitted that it is clear that procedural Rules must be adhered to. That in the instant case, there is absolutely no reason why this Honourable Court should proceed and hear the Applicant's Application which was supposed to have been made in the Siavonga Magistrates' Court which is the trial Court, as there is a conviction secured against the 1st to 3rd Interested Parties herein based on the same Logs and Volvo Truck and Trailer subject of the Forfeiture Application. Counsel contended that this Honourable Court, therefore, lacks jurisdiction to hear and determine the Applicant's Application in the main.

3. APPLICANT'S RESPONSE IN OPPOSITION

3.1 The Applicant filed Affidavit in Opposition on 4th September, 2025, and the same was deposed to by **NIXON SHAKANTU**, an Investigations Officer employed by the Department of National

Park and Wildlife in Chirundu District, investigating the matter subject of the Application.

- 3.2 The Deponent avowed that having perused the Affidavit in Support of Summons to Raise Preliminary Issue on a point of Law (Affidavit in Support) filed on 21st August, 2025, and having been advised by Counsel and verily believing the same to be true, the purported 4th Interested Party has neither complied with the provisions of **Section 12 (1) and (5)** nor **Section 31(2) and (5)** of the **FPOCA**.
- 3.3 The Deponent avowed that having been advised by Counsel and verily believing the same to be true, Conviction Based Forfeiture Applications must be filed before a convicting Court, but however, Non-Conviction Based Forfeiture Applications for tainted property need not be before a convicting Court.
- 3.4 It was further deposed that the Non-Conviction Based Forfeiture Application for tainted property is properly before the Court and that the Honourable Court is clothed with the jurisdiction to hear the substantive Matter.
- 3.5 The Deponent averred that the Application by the 4th Interested Party is not in the interest of Justice as it lacks merit and having been advised by Counsel and verily believing the same to be true, the Applicant's Application in the main should not be dismissed as the correct procedure for commencement has been complied with.

- 3.6 In the Skeleton Arguments filed in support of the Affidavit in Opposition, Counsel begun by giving a background as submitted by the 4th Interested Party above at 2.13, save to add that following this Court's Ruling dated 12th May, 2025, in relation to the 4th Interested Parties initial Preliminary Issue raised, the 4th Interested Party filed an Affidavit in Opposition to the Originating Notice of Motion and Skeleton Arguments and that it is against this background that the 4th Interested Party has made the Application in *casu* to raise a Preliminary Issue on a point of law pursuant to **Order 14A(1)** of the **Rules of the Supreme Court of England 1965 (White Book) 1999 Edition**.
- 3.7 Counsel submitted that there is no provision in the **FPOCA** that prohibits the making of an application for a Non-Conviction Based Forfeiture Order in the High Court, despite there being a conviction in the Subordinate Court.
- 3.8 Counsel stated that the Applicant, being unable to make a Conviction Based Forfeiture Application at the time of conviction, opted to make the Application before this Honourable Court pursuant to **Sections 29** and **31** of the **FPOCA** which provides for Non-Conviction Based Forfeiture Applications and that the law does not preclude the Applicant from doing so.
- 3.9 Counsel quoted **Section 29** of the **FPOCA** and submitted that this Section authorises a Public Prosecutor to apply to the Court for the forfeiture of tainted property to the State, and that a

Court is defined under **Section 2** of the **FPOCA** as “***a High Court or a Subordinate Court***”.

3.10 It was Counsel’s contention that the above provisions enable Prosecutors to proactively seek the forfeiture of assets that are instrumental to or represent the proceeds of crime by making applications for Non-Conviction Based Forfeiture Orders before the High Court or Subordinate Court, notwithstanding a conviction in the Subordinate Court. Counsel cited **Section 31(1)** of the **FPOCA** to buttress his contention as follows:

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

3.11 Counsel argued that together, **Sections 29** and **31** of **FPOCA** clearly demonstrate that a public prosecutor is not precluded from making a Non-Conviction Based Forfeiture Application and if the Court is satisfied that the Applicant has proved its case on a balance of probabilities, it shall Order that the property subject of that Application be forfeited to the State.

3.12 Counsel submitted that the case of **Leah Tekumwenzu Mpondela Vs The People** ⁽²⁾ cited by the 4th Interested Party is

distinguishable and not applicable to the case in *casu*. That in that case, the Court held that it is the convicting Court and not the High Court that was supposed to Order forfeiture because the Appellant in that matter made a Conviction Based Forfeiture application in the High Court because the value of the motor vehicle was beyond the jurisdiction of the convicting Court. That the legal principle in the cited case is that the convicting Court has jurisdiction to grant a Conviction Based Forfeiture Order regardless of the value.

- 3.13 Counsel contended that in *casu*, the Applicant has made a Non-Conviction Based Forfeiture Application before this Honourable Court and it is this Court that has jurisdiction to deal with the Matter as it has both original and appellant jurisdiction to deal with the Matter.
- 3.14 Counsel submitted that Non-Conviction Based Forfeiture Applications are critical to Zambia's legal arsenal against corruption, organised crime, and financial misconduct, ensuring that offenders do not retain the benefits of their illegal actions while upholding fairness and accountability in the forfeiture process notwithstanding the existence of a conviction.
- 3.15 Counsel further submitted in addition that Non-Conviction Based Forfeiture operates on the principle that the property itself, rather than its owner, is presumed to have been used in the commission of a crime; and notably, it does not require a

criminal conviction or even formal charges to be brought against the owner.

3.16 Counsel submitted that this principle was clearly articulated in the case of **Director of Public Prosecutions Vs ZMK 157,040, US\$23,007.14, and ZMK 50,000, and ZMK 82,333.83 held in various Bank Accounts** ⁽⁶⁾, where the High Court held that property associated with unlawful activities may be forfeited regardless of the criminal conviction status of its owner.

3.17 Counsel submitted that his position is further strengthened by the Ruling in the South African Constitutional Court case of **Simon Prophet Vs the National Director of Public Prosecutions** ⁽⁷⁾, where the Constitutional Court was tasked with establishing an appropriate balance between two constitutional principles; the first principle asserts that no individual should be arbitrarily deprived of their property, while the second emphasises the State's duty to safeguard the public from criminal predation.

3.18 It was Counsel's submission that a Non-Conviction Based Forfeiture is therefore designed to convey a clear message that crime is ultimately unprofitable. That its purpose is to incapacitate criminal enterprises by seizing the assets employed in unlawful activities, thereby protecting society from the influence of criminal magnates.

3.19 Counsel further submitted on the constitutionality of Non-Conviction Based Forfeiture by referring the Court to the firmly established Zambian High Court case of **The Director of Public Prosecutions Vs Jessie Bwalya Kapyelata Tapalu** ⁽⁸⁾, where the Court affirmed that such forfeiture is consistent with constitutional tenets.

3.20 Counsel gave a further supporting position in the Ruling of the High Court in the case of **The Director of Public Prosecutions Vs Dhiraj Dhumputha** ⁽⁹⁾ wherein the Court determined as follows:

“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.”

(Emphasis theirs)

3.21 Counsel additionally referred the Court to the Court of Appeal decision in the case of **Nachanga Transport Vs The Director of Public Prosecutions** ⁽¹⁾ as follows:

“...a reading of Section 29, which is a stand-alone provision, shows that the application to be made to the Court, is not premised on a conviction. Being a stand-alone provision, it can be inferred that the application is further not premised on any previous or present proceedings, be they Civil or Criminal.”

(Emphasis theirs)

3.22 It was Counsel's contention that regardless of whether a criminal prosecution or conviction occurs, it does not impede the recovery of assets reasonably believed to be proceeds of crime. That a Non-Conviction Based Forfeiture Application can effectively proceed despite their being a conviction.

3.23 In furtherance of his submissions above, Counsel cited **Section 31(4)** of the **FPOCA** as follows:

“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.”

3.24 It was further submitted that this Court is clothed with the requisite jurisdiction to hear the Application in the main pursuant to **Sections 29** and **31** of the **FPOCA**.

3.25 In conclusion, Counsel urged this Honourable Court to dismiss the Application to raise a Preliminary Issue with costs as it is unfounded and lacks merit and to proceed to hear the substantive Matter.

4. HEARING

4.1 The Hearing of the Matter in the main was scheduled for 30th September, 2025, however the Court noted not only the 4th Interested Parties Notice of Motion to raise Preliminary Issue on point of law, but an *Ex-Parte* Summons for an Order for Leave

to withdraw as Advocates filed on 30th September, 2025, by the 4th Interested Party's Advocates, Messrs Mosha & Company, as well as a Notice of Appointment as Advocates filed on behalf of the 4th Interested Party by Messrs Jane Bulaya & Partners on 29th September, 2025.

- 4.2 After hearing submissions from the newly appointed Advocates for the 4th Interested Party requesting time within which to familiarise themselves with the Record following their appointment, and Counsel for the Applicant insisting on proceeding with the Application in *casu*, this Court Ordered that as this Court is a fast track Court, and as both Parties had filed submissions in Support and in Opposition, the 4th Interested Party's Application to raise Preliminary Issue would proceed as prayed by the Applicant.
- 4.3 Counsel for the 4th Interested Party submitted that they would rely on the documents filed into Court.
- 4.4 Counsel for the Applicant rehashed their submissions in their Affidavit in Opposition as well as their Skeleton Arguments above, which we have taken note of but will not repeat them here.

5. ISSUES FOR DETERMINATION

- 5.1 It is our considered view that the following are the issues to be determined by this Court:

- i. *Whether this Court has jurisdiction to hear and determine the 4th Interested Party's Notice of Motion to raise Preliminary Issue;*
- ii. *Whether the Applicant can bring an application for the Non-Conviction Based Forfeiture of tainted property before this Court, when a criminal conviction based on the same logs that the Applicant seeks to forfeit, including the Volvo Truck used for transportation, exists before a different Court.*

6. CONSIDERATION AND DETERMINATION OF THE COURT

- 6.1 We are grateful to Counsel for the 4th Interested Party and the Applicant for their spirited submissions and authorities therein in Support and in Opposition.
- 6.2 We shall proceed to consider the above issues identified for determination in *seriatim*.
- 6.3 ***Whether this Court has jurisdiction to hear and determine the 4th Interested Party's Notice of Motion to raise Preliminary Issue.***
- 6.4 Following the finding of this Court in its Ruling dated 12th May, 2025, the 4th Interested Party, on 9th July, 2025, proceeded to file Notice of Motion for an Order of Declaration of interest over property subject of an Application for a Non-Conviction Based Forfeiture Order of tainted property made pursuant to **Order 3 Rule 2** of the **High Court Rules** as read together with **Sections**

12 and **31** of the **FPOCA**. The same was accompanied with an Affidavit in Response and Skeleton Arguments to the Applicant's Originating Notice of Motion.

6.4.1 Having shown their intention to defend, as required by **Order 14A/2/3** of the **Rules of the Supreme Court of England**, which provides the requirements for bringing an application for the disposal of a case on point of law under **Order 14A/1**, as follows:

“Requirements of Order 14A – The requirements for employing the procedure under this Order are the following:

a) the defendant must give notice of intention to defend;” (Emphasis ours)

The 4th Interested Party then filed Notice of Motion to raise Preliminary Issue made pursuant to **Order 14A(1)** of the **Rules of the Supreme Court of England**, which states as follows:

“(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that-

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein. (Emphasis ours)

6.4.2 The above cited provisions not only guide a party on the requirements for employing the procedure under **Order 14A(1)** of the **Rules of the Supreme Court of England**, which the 4th Interested Party complied with, but also confers a party with the right to make an application and this Court the jurisdiction to hear and determine, on such application and on its own motion, a question of law at any stage of the proceedings.

6.4.3 Therefore, this Court has jurisdiction to hear and determine the 4th Interested Party's Notice of Motion to raise Preliminary Issue in *casu*.

6.5 ***Whether the Applicant can bring an application for the Non-Conviction Based Forfeiture of tainted property before this Court, when a criminal conviction based on the same logs that the Applicant seeks to forfeit, including the Volvo Truck used for transportation, exists before a different Court.***

6.5.1 The 4th Interested Party questions this Court's jurisdiction to hear and determine the Applicant's Application in the main, being a Non-Conviction

Based Forfeiture Order for tainted property, following the Siavonga Subordinate Court's Judgment convicting the 1st to 3rd Interested Parties based on the same Properties, including the Volvo Truck and Trailers.

- 6.5.2 It is contended that the Applicant's substantive Application should be dismissed as it does not adhere to the correct procedure for the commencement of Forfeiture Proceedings where a conviction has been secured in the Lower Court. That such Forfeiture Proceedings should be commenced in the same Lower Court that convicted the 1st to 3rd Interested Parties over the same Properties.
- 6.5.3 Counsel for the Applicant agrees that Conviction Based Forfeiture Applications must be filed before a convicting Court, as is the Siavonga Subordinate Court, but however, and on the other hand, Non-Conviction Based Forfeiture Applications for tainted property, as is the Applicant's Application in the main, need not be before a convicting Court.
- 6.5.4 That therefore, the Application in the main is properly before this Court as this Court has the jurisdiction to hear and determine the substantive Matter.
- 6.5.5 It is not in dispute that the 1st to 3rd Interested Parties were convicted in the Siavonga Subordinate Court

and the Properties, being logs and a Volvo Truck and Trailers, were subject of the conviction.

- 6.5.6 It is not in dispute that the 4th Interested Party was not a Party to the matter in the Subordinate Court.
- 6.5.7 It is not in dispute that the 4th Interested Party alleges an interest in the Property subject of the Applicant's Originating Notice of Motion for Non-Conviction Based Forfeiture Order for tainted property before this Court following the conviction of the 1st to 3rd Interested Parties in the Lower Court.
- 6.5.8 Perusal of the **FPOCA** reveals that a Public Prosecutor, such as the Applicant herein, can make an application following the conviction of a person or persons, such as the 1st to 3rd Interested Parties, under **Section 4** as follows:

“(1) Subject to subsection (2), where a person is convicted of a serious offence committed after the coming into force of this Act, a public prosecutor may apply to the court for one or both of the following orders:

(a) a forfeiture order against property that is tainted property in respect of the offence;” (Emphasis ours)

- 6.5.9 It is our considered view that it is clear from the wording of the above provision that it is not mandatory for the Public Prosecutor to apply to the

Court for a Forfeiture Order following a conviction, though such an application would be both desirable and logical.

6.5.10 Further and following our finding, should a Public Prosecutor choose to apply for a Forfeiture Order following a conviction, it is our considered view that such an application must be made in the Court that convicted the person or persons. This allows the person or persons whose property is subject to a Forfeiture Order, or the Public Prosecutor denied a Forfeiture Order, clear recourse to appeal the decision of the Lower Court to this Court. It guarantees orderly and sequential conduct of matters.

6.5.11 We are guided by the finding of the Court of Appeal in the case of **Nachanga Transport Vs Director of Public Prosecutions** ⁽¹⁾ wherein it was stated as follows:

“An application made under section 10 is one where a person has been convicted of an offence. This means, a trial would have been conducted resulting in a conviction and the consequent application will be made under that criminal matter.”

(Emphasis ours)

6.5.12 Therefore, following a conviction, an Application for Conviction Based Forfeiture Order of tainted property must be made in the convicting Court.

6.5.13 The question that remains is whether the Applicant can, under the circumstances in *casu*, commence Non-Conviction Based Forfeiture Proceedings with regard to the cited Properties in this Court.

6.5.14 It is trite that a public prosecutor, such as the Applicant in *casu*, can commence an Application for Non-Conviction Based Forfeiture Order for tainted property. This is provided for under **Section 29** of the **FPOCA** 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.”

6.5.15 Pertinent to the issues herein is **Section 31(4)** of the **FPOCA** which for emphasis we shall repeat here as follows:

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

6.1.16 Clearly, a Non-Conviction Based Forfeiture Order made under **Section 29** and **31** of the **FPOCA**, as is

the Applicant's Application in the main, is not affected by the outcome of the criminal proceedings in the Siavonga Subordinate Court.

6.1.17 We are buttressed in our finding by the case of **Nachanga Transport Vs Director of Public Prosecutions** ⁽¹⁾ where the Court of Appeal, in distinguishing an application under **Section 29** (Non-Conviction Based) and an application made under **Section 10** (Conviction Based) of the **FPOCA**, further stated as follows:

"However, a reading of section 29, which is an application to be made to the court, is not premised on a conviction. Being a stand-alone provision, it can be inferred that the application is further not premised on any previous or present proceedings, be they civil or criminal."

6.1.18 Further in the case of **The Director of Public Prosecutions Vs Dhiraj Dhumputha** ⁽⁹⁾ as quoted by Counsel for the Applicant above, the unseated finding of the Court stated as follows:

"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.”

(Emphasis ours)

- 6.1.19 From the above authorities, an application for a Non-Conviction Based Forfeiture Order made under **Section 29** of the **FPOCA**, being a stand-alone provision of **the Act**, can be commenced by a Public Prosecutor at will, as such an application is not premised on a conviction and can run alongside criminal proceedings.
- 6.1.20 In the **Leah Tekumwenzu Mpondela Vs The People** ⁽²⁾, the Court of Appeal dealt with two issues. Firstly, whether an application for forfeiture made under **Sections 4(a)** and **10** of the **FPOCA** (Conviction Based Forfeiture Application) can be launched where the conviction has been appealed; and secondly, whether an Appellate Court can Order forfeiture.
- 6.1.21 The Court of Appeal found that having examined **the FPOCA**, there is no provision that stops a trial Magistrate from hearing an application for forfeiture on the ground that the conviction has been appealed. The Court found that the trial Magistrate erred when she declined to hear the application for forfeiture on the ground that the conviction had been appealed.
- 6.1.22 After scrutiny of **Section 34** of the **Narcotics Drugs and Psychotropic Substances Act**, the Court of Appeal held that it is a convicting Court that orders

forfeiture and not the Appellate Court; that an Appellate Court can only order forfeiture where an application was made in the trial Court, but declined and there is an appeal against that refusal. The position is the same under **the FPOCA**.

6.1.23 In *casu*, there is no such application in the Subordinate Court. We therefore agree with Counsel for the Applicant that this Court has the jurisdiction to hear and determine its Originating Notice of Motion for a Non-Conviction Based Forfeiture Application of tainted property made pursuant to **Section 29** and **31** of the **FPOCA** in spite of the conviction of the 1st to 3rd Interested Parties in the Lower Court, and there being no application made for a Forfeiture Order in that Court.

7. CONCLUSION

7.1 For the avoidance of doubt, we find as follows:

7.1.1 The 4th Interested Party's Notice of Motion to raise Preliminary Issue on point of law fails.

7.1.2 The Applicant can bring an application for Non-Conviction Based Forfeiture of tainted property before the Economic and Financial Crimes Court in the High Court, pursuant to **Sections 29, 30** and **31** of **the FPOCA**, even when a criminal conviction based on the same logs that the Applicant seeks to

forfeit, including the Motor Vehicle, Volvo Truck, bearing Registration Number BLC 2149 and Trailers BLC 3538 and BLC 3539 used for transportation, exists before a different Court, and wherein there has been no application made for a Forfeiture Order;

7.1.3 Having found as above, this Court shall proceed to hear and determine the Applicant's substantive Application, and the same shall be heard on **18th November, 2025, at 09:00.**

7.1.4 Costs are for the Applicant to be taxed in default of agreement.

**SIGNED AND DELIVERED AT LUSAKA THIS 13TH DAY OF
OCTOBER, 2025.**



.....
S. M. WANJELANI
HIGH COURT JUDGE



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



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