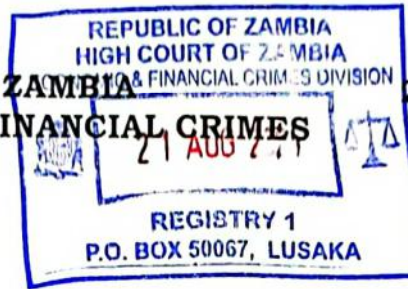


IN THE HIGH COURT FOR ZAMBIA
AT THE ECONOMIC AND FINANCIAL CRIMES
DIVISION REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)



2022/HPEF/12

IN THE MATTER OF:

SECTIONS 29, 31 AND 71 OF THE
FORFEITURE OF PROCEEDS OF CRIME
ACT NUMBER 19 OF 2010

IN THE MATTER OF:

SECTION 309 OF THE PENAL CODE
CHAPTER 87 OF THE LAWS OF ZAMBIA

BETWEEN:

THE ANTI-CORRUPTION COMMISSION
AND

APPLICANT

PITTSCON ZAMBIA LIMITED

1ST INTERESTED PARTY

EMMANUEL SIPANDE MUGALA

2ND INTERESTED PARTY

PETER MALAO

3RD INTERESTED PARTY

EDSON MUGALA

4TH INTERESTED PARTY

LUCKY SIMBEYE

5TH INTERESTED PARTY

PUMULO MALAO

6TH INTERESTED PARTY

ALEXANDER MUMBA SAKALA

7TH INTERESTED PARTY

CHRISTINE KALELEMBA

8TH INTERESTED PARTY

IN RE-PROPERTY:

SUB-DIVISION 'N' OF SUB-DIVISION NO. 16 OF
FARM NO. 916 COMPRISING OF 18 SHOPS, SUB-
DIVISION 'C' OF SUB-DIVISION NO. 16 OF FARM NO.
916 COMPRISING OF 2 RESIDENTIAL UNITS, SUB-
DIVISION 'E' AND 'F' OF SUB-DIVISION No. 26 OF
FARM No. 916 COMPRISING OF 6 RESIDENTIAL
UNITS, SUB-DIVISION 'B' OF SUB-DIVISION NO.16
OF FARM NO. 916 COMPRISING OF 5 RESIDENTIAL
UNITS, SUB-DIVISION 'N' OF FARM NO. 916
COMPRISING OF 4 RESIDENTIAL UNITS, SUB-
DIVISION 'P' OF SUB-DIVISION NO. 16 OF FARM NO.
916 COMPRISING OF 4 RESIDENTIAL UNITS, SUB-
DIVISION 'N' OF LOT No. 15260/M COMPRISING OF

14 SHOPS, UNNUMBERED DOUBLE STOREY
 RESIDENTIAL PROPERTY SITUATE AT LUSAKA,
 UNNUMBERED PROPERTY COMPRISING 4
 RESIDENTIAL UNITS SITUATE AT LUSAKA,
 UNNUMBERED PROPERTY COMPRISING 3
 RESIDENTIAL UNITS SITUATE AT LUSAKA,
 UNNUMBERED PROPERTY COMPRISING 3
 RESIDENTIAL UNITS SITUATE AT LUSAKA, HOWO
 SINO TRUCK - REGISTRATION MARK BBA 1540ZM,
 HOWO SINO TRUCK - REGISTRATION MARK BBA
 1746ZM, MITSUBISHI CANTER-REGISTRATION
 MARK BAP 5480ZM, TOYOTA DYNA-
 REGISTRATION MARK BLA 4813ZM, ISUZU D - MAX-
 REGISTRATION MARK BAR 3068ZM, HINO RANGER
 - REGISTRATION MARK BBA 16392NM, TOYOTA
 HILUX LEXUS 4144ZM, BAP MARK REGISTRATION
 LX570 REGISTRATION MARK BAL 8998ZM,
 SHANTUI GRADER REGISTRATION MARK BBA
 2696ZM AND SHANTUI GRADER REGISTRATION
 MARK BBA 2697ZM, SUB-DIVISION NO. 16 OF FARM
 NO. 916 COMPRISING OF 18 SHOPS SITUATE AT
 LUSAKA, SUB-DIVISION 'C' OF SUB-DIVISION NO. 16
 OF FARM NO. 916 COMPRISING OF 2 RESIDENTIAL
 UNITS SITUATE AT LUSAKA, SUB-DIVISION 'E' AND
 SUB-DIVISION 'F' OF SUB-DIVISION NO. 26 OF FARM
 NO. 916 COMPRISING OF 6 RESIDENTIAL UNITS
 SITUATE AT LUSAKA, SUB-DIVISION 'B' OF SUB
 DIVISION NO. 16 OF FARM NO. 916 COMPRISING OF
 5 RESIDENTIAL UNITS SITUATE AT LUSAKA, SUB-
 DIVISION NO. 17 OF SUB-DIVISION 'N' OF FARM NO.
 916 COMPRISING OF 4 RESIDENTIAL UNITS
 SITUATE AT LUSAKA, SUB-DIVISION 'P' OF SUB-
 DIVISION NO. 16 OF FARM NO. 916 COMPRISING OF
 4 RESIDENTIAL UNITS SITUATE AT LUSAKA, SUB-
 DIVISION NO. 1 OF SUB-DIVISION 'B' OF LOT NO.
 15144/NM COMPRISING 16 FLATS SITUATE AT
 LUSAKA, NAMELY SUB-DIVISION 'N' OF LOT NO.
 15260/M COMPRISING 14 SHOPS SITUATE AT
 LUSAKA, AN UNNUMBERED DOUBLE STOREY
 RESIDENTIAL PROPERTY SITUATE AT LUSAKA, AN
 UNNUMBERED PROPERTY COMPRISING 4
 RESIDENTIAL UNITS SITUATE AT LUSAKA, AN
 UNNUMBERED PROPERTY COMPRISING 8
 RESIDENTIAL UNITS SITUATE AT LUSAKA, AN

UNNUMBERED PROPERTY COMPRISING 3
RESIDENTIAL UNITS SITUATE AT LUSAKA, AN
UNNUMBERED DOUBLE STOREY RESIDENTIAL
PROPERTY SITUATE AT CHILANGA, AN
UNNUMBERED PROPERTY COMPRISING 4
RESIDENTIAL UNITS SITUATE AT CHILANGA, AN
UNNUMBERED PROPERTY COMPRISING 6
RESIDENTIAL UNITS SITUATE AT CHILANGA, AN
UNNUMBERED PROPERTY COMPRISING 8
RESIDENTIAL UNITS SITUATE AT CHILANGA, A
DWELLING HOUSE COMPRISING FOUR (4)
BEDROOMS SITUATE AT LUSAKA, SUB-DIVISION 'S'
OF SUB-DIVISION NO. 1 OF FARM 916 COMPRISING
FOUR (4) RESIDENTIAL UNITS SITUATE AT
LUSAKA, RESIDENTIAL PROPERTY COMPRISING
EIGHT (8) RESIDENTIAL UNITS SITUATE AT
LUSAKA.

**BEFORE THE HONOURABLE JUSTICES P. K. YANGAILO, A. MALATA-
ONONUJU AND S. V. SILOKA ON THIS 21ST DAY OF AUGUST, 2024.**

For the Applicant:

*Ms. G. M. Muyunda, Director Legal –
Anti-Corruption Commission; Mr. D.
Ngwira, Senior Legal & Prosecutions
Officer – Anti-Corruption Commission*

*For the 1st – 5th Interested Parties: Mr. I. Simbeye – Messrs. Malisa &
Partners Legal Practitioners*

*For the 6th – 8th Interested Parties: Mr. L. C. Lembe – Messrs. Mulungushi
Chambers; J. Tembo – Messrs. Linus
Eya & Partners*

J U D G M E N T

Siloka S. V., J. delivered the Judgment of the Court.

CASES REFERRED TO:

1. *National Crime Agency Vs Mrs. A (2018) E WHC 2534.*

2. *Ethics and Anti-Corruption Commission Vs Patrick Ochieno Abachi and 6 Others* (2021) eKLR.
3. *National Director of Public Prosecutions Vs Cook Properties and 37 Others* (2004) (2) SACR 208 (SCA).
4. *The Director of Public Prosecutions Vs Lillian Namiye Munalula, Sydney Mwiya Mayamba and Bank of Zambia* (2022/HP/0045).
5. *The Director of Public Prosecutions and Tasila Lungu* (2023/HPEF/25).
6. *Sydney Mwansa Vs The People (CCZ) Appeal No. 276 of 2021.*
7. *The People Vs Liato* (No. 291/2014).
8. *Director of Public Prosecutions Vs Dhiraj Dhumputha* (2020/HP/1287).
9. *Director of Assets Recovery Agency Vs Szepletowsk* (2007) EWCA CIV 755.
10. *Stanbic Vs Bently Khumalo and 29 Others (SCZ) Appeal No. 132 of 2014.*
11. *Teckla Nandjila Lameck Vs President of Namibia* (2012) 1 NR 255 (HC).
12. *Assets Recovery Agency Vs Joseph Wanjahi and Others* (2020) eKLR.

LEGISLATIONS REFERRED TO:

1. *Section 309 of the Penal Code Chapter 87 of the Laws of Zambia.*
2. *Sections 29, 31 and 71 of the Forfeiture of Proceeds of Crime Act Number 19 of 2010 of the Laws of Zambia.*

1.0 INTRODUCTION

- 1.1 By an Originating Notice of Motion filed pursuant to **Sections 29, 31 and 71 of the Forfeiture of Proceeds of Crime Act Number 19 of 2010** of the **Laws of Zambia**, and **Section 309** of the **Penal Code Chapter 87** of the **Laws of Zambia** as read together with **Order XXX Rules 15 and 17** of the **High Court Rules**, the Applicant filed an Application for a Non-Conviction Based Forfeiture Order of Tainted Property.

2.0 APPLICANT'S AFFIDAVIT EVIDENCE IN SUPPORT OF THE APPLICATION

- 2.1 In support of the Application, Mulenga Mulenga, an Investigations Officer with the Anti-Corruption, deposed that on the 23rd November, 2021, the Anti-Corruption Commission received a complaint alleging that the Interested Party was in possession of properties reasonably suspected of being proceeds of crime.
- 2.2 The Deponent averred that following receipt of the complaint, he started his investigations covering the period between March 2018 to April 2022, in which period the Interested Parties acquired and constructed several moveable and immovable properties.
- 2.3 It was deposed that during his investigations he discovered that the 1st Interested Party owned numerous vehicles as per **"MM (1a) – (j)"** altogether valued at **ZMW7,000,000.00**.
- 2.4 The Deponent also deposed that in his further investigations he discovered that the 2nd Interested Party possessed twenty-one (21) residential properties as per **"MM2"** valued at

ZMW1,400,000.00, "MM3" valued at ZMW3,400,000.00, "MM4" valued at ZMW3,400,00.00, "MM5" valued at ZMW1,700,000.00 and "MM6" valued at ZMW2,600,000.00.

- 2.5 It was stated by the Deponent that during his investigations he also established that the 2nd Interested Party possessed fourteen (14) shops as per **"MM7"** valued at **ZMW5,900,000.00**, eighteen (18) shops valued at **ZMW7,600,000.00** as per **"MM8a"** and Subdivision F of Subdivision No. 26 of F/9/6 as per **"MM8b"**.
- 2.6 The Deponent also averred that the 2nd Interested Party, in addition to the numbered plots also had various unnumbered plots whose value after valuation by the Government Valuation Department was **ZMW41,800,000.00** as per exhibit **"MM9b"**.
- 2.7 The Deponent also stated that during his investigations which covered the period between 2018 and 2022 the only known source of income for the 1st and 2nd Interested Parties was the Contracts for the periodic maintenance of selected feeder roads.
- 2.8 That during his investigations, he established that the 2nd Interested Party did possess four (4) unnumbered plots valued at **ZMW26,300,000.00** as per **"MM10"**.
- 2.9 It was further deposed that during his investigations, he established that the only source of income for the 3rd Interested Party was derived from Contracts for the periodic maintenance of selected feeder roads.
- 2.10 The further deposition is that the Deponent during his investigations also established that the 4th Interested Party owned sixteen (16) flats situate at Lusaka namely Subdivision No.1 of

Subdivision B of Lot No. 15144/M altogether valued at **ZMW25,900,000.00.**

2.11 It was the Deponent's averment that during investigations he established that the 4th Interested Party is the son of the 2nd Interested Party and operated a small hardware business known as Two Brothers.

2.12 It was further stated by the Deponent that between 2018 and 2022, the only known source of income for the 4th Interested Party was also derived from the Contracts for the periodic maintenance of selected feeder roads.

2.13 The Deponent further averred that the 5th Interested Party owns various properties namely Subdivision A of Subdivision No. 14 of Farm 916 comprising a four (4) bedroomed house situate at Lusaka valued at **ZMW1,400,000.00**, Subdivision 5 of Subdivision No. 1 of Farm 916 comprising of a four (4) bedroomed house situate at Lusaka valued at **ZMW1,200,000.00**, Subdivision C and D of Subdivision 9 of Farm 916 comprising of eight (8) residential units situate at Lusaka, valued at **ZMW3,200,000.00**. The total value of the properties is **ZMW5,800,000.00.**

2.14 The Deponent further deposed that between 2018 and 2022, the only known source of income for the 5th Interested Party was derived from the Contracts for the periodic maintenance of selected feeder roads.

2.15 The Deponent further deposed that during his investigations he established that the 2nd, 3rd and 5th Interested Parties are

shareholders and Directors in the 1st Interested Party Company, which Company was incorporated on 13th January, 2015, as per **"MM11"**, which is a Patents and Companies Registration Agency (PACRA) Print Out.

- 2.16 It was further deposed that during investigations the Deponent established that between March 2018 to April 2022 the 1st Interested Party was awarded four (4) Contracts by Ministry of Local Government for the construction and periodic maintenance of selected feeder roads as per **"MM12a"**, **"MM12b"**, **"MM12c"** and **"MM12d"**.
- 2.17 That during investigations the Deponent established that the Ministry of Local Government issued bidding documents which stipulated the conditions required to be met by prospective Contractors for the Contracts relating to the periodic rehabilitation of feeder roads as per **"MM13a"**, **"MM13b"**, **"MM13c"** and **"MM13d"**.
- 2.18 The Deponent also deposed that during investigations it was established that one of the requirements to be satisfied was that prospective bidders needed to have certain individuals as Key Personnel, without which, a Contractor would not be eligible to bid.
- 2.19 The Deponent further deposed that the 1st Interested Party responded to the bidding documents issued by the Ministry of Local Government by submitting bids in which William Changamuka, Harold Makungu Chibwe, Nolias Kachasa, Ailola Maimbolwa, Lukona Mwewa and Baldwin Mwewa Chatupa were

named as Key Personnel employed as Site Engineer, Geomatics Engineer, Earthwork Foreman and Laboratory Technicians respectively as per “MM14a” to “MM14c” being bids submitted by the 1st Interested Party.

2.20 The Deponent further stated that he interviewed Banji Clever Nchimunya, William Changamuka, Harold Makungu Chibwe, Nolias Kachasa, Ailola Maimbolwa, Lukona Mwewa, Chibale Phiri and Baldwin Mwewa Chatupa and established that they did not consent to the use of their credentials in the bids that the 1st Interested Party submitted as per “MM15a” - “MM15g”.

2.21 It was the Deponent’s averment that the 1st Interested Party was awarded four (4) Contracts for the periodic maintenance of feeder roads following submissions of bids which conveyed the impression that the 1st Interested Party had certain Key Personnel in its establishment when in fact not.

2.22 The Deponent further deposed that upon examination of the Contracts for the periodic maintenance of feeder roads, he established that the 1st Interested Party misrepresented material facts which formed the basis for the award of the Contracts for the periodic maintenance of feeder roads.

2.23 The Deponent stated that as at 1st January, 2022, the Ministry of Local Government through the National Road Fund Agency (NRFA) had advanced payments in the sum of **ZMW199,828,137.00** to the 1st Interested Party.

2.24 The Deponent further averred that the totality of the investigations established that all properties acquired by the Interested Parties

were acquired using funds derived from the Contracts for the periodic maintenance of feeder roads.

2.25 The Deponent further stated that when the 2nd, 3rd, 4th and 5th Interested Parties were interviewed under warn and caution, they opted not to explain the source of their wealth as per “MM16a” – “MM16d”.

2.26 The Deponent further deposed that the total sum of the Contract was **ZMW264,464,513.67** of which the sum of **ZMW199,828,137.00** was received and a balance of **ZMW64,636,376.70** remained as per “MM17”.

3.0 APPLICANT’S WRITTEN SUBMISSION IN SUPPORT

3.1 In its written submission, the Applicant submitted that the Court has, pursuant to **Sections 29 and 31** of the **Forfeiture of Proceeds of Crime Act No. 19 of 2010**, jurisdiction to determine this Application.

3.2 **Section 31 (1) of Act No. 19 of 2010** provides as follows:

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

3.3 Based on the above provision, the Applicant submitted that the properties herein should be forfeited because the Interested

Parties have reasonably been suspected of having committed a crime.

- 3.4 The Applicant submitted that this is so because the Interested Parties tendered into Court exhibits marked **"MM13a"** – **"MM13d"**, being bidding documents, from Ministry of Local Government, stipulating conditions to be met by prospective Contractors relating to the periodic rehabilitation of feeder roads which were fraudulent. According to the Applicant, **"MM13a"** – **"MM13d"** sets out conditions that needed to be met by the prospective bidders and the bidders also had an obligation to provide correct information as to their eligibility.
- 3.5 The Applicant also submitted that one of the requirements was that the bidders ought to have certain Key Personnel within their establishment in order to be eligible for award of Contract and that the 1st Interested Party responded by submitting bids marked **"MM14a"** – **"MM14d"** purporting that William Changamuka, Harold Makungu Chibwe, Nolias Kachasa, Ailola Maimbolwa, Lukona Mwewa and Baldwin Mwewa Chatupa were Key Personnel as Site Engineers, Earthwork Foremen and Laboratory Technicians, when in fact not.
- 3.6 According to the Applicant, the 1st Interested Party in which the 2nd, 3rd and 4th Interested Parties are Shareholders and Directors misrepresented facts in a manner tantamount to false pretences.
- 3.7 It was the Applicant's submission that following the submission of bids by the 1st Interested Party in **"MM12a"** – **"MM12d"**, Contracts were awarded, when the said Key Personnel did not

consent to the use of their credentials by the 1st Interested Party in the Bid Documents for the maintenance and rehabilitation of feeder roads.

- 3.8 According to the Applicant, when the 1st Interested Party purported that it had certain Key Personnel within its establishment when in fact not, the 1st Interested Party and its Directors gave false statements which induced the Ministry of Local Government to award them the four (4) Contracts, which was a false pretence, as defined by **Section 308 of the Penal Code**.
- 3.9 It was Counsel's submission that in line with **Section 308**, the 1st Interested Party while acting through the 2nd, 3rd and 5th Interested Parties obtained Contracts fraudulently and derived financial gain amounting to **ZMW264,464,513.00**, out of which **ZMW199,828,137.00** was paid to the Interested Parties, which sums falls within the definition of tainted property, as the same amounts to proceeds of crime.
- 3.10 The Applicant also submitted that **"MM11"** (print out from PACRA) shows that the 2nd, 3rd and 5th Interested Parties are Shareholders and Directors in the 1st Interested Party's Company and that the 4th Interested Party is the 2nd Interested Party's son who runs a small-scale hardware business.
- 3.11 The Applicant also submitted that they have demonstrated that all the Interested Parties acquired various properties between 2018 and 2022 which was the time when the 1st Interested Party

received payments from the Contracts for the maintenance and rehabilitation of feeder roads.

3.12 The Applicant also submitted that the Interested Parties did not show any evidence that they had other sources of income commensurate to the value of the properties acquired by them between 2018 and 2022.

3.13 Counsel for the Applicant also submitted that the properties of the Interested Parties should be forfeited because the Interested Parties have assets whose value is disproportionate to their known sources of income at or around the period of investigation.

3.14 It was Counsel's submission that during the period of interest, the Interested Parties derived their income from Contracts that they were awarded by the Ministry of Local Government.

3.15 According to Counsel, the Interested Parties acquired assets, both moveable and immovable, which cannot be linked to any business. Counsel referred the Court to the United Kingdom case of **National Crime Agency Vs Mrs. A**,⁽¹⁾ where it was held that, for an unexplained wealth order (forfeiture order) to issue, there must be reasonable grounds for suspecting that the known sources of an individual's lawfully obtained income would have been insufficient for the purpose of enabling the individual to obtain the property.

3.16 It was Counsel's submission that the known sources of income for the Interested Parties and the time interval within which the Interested Parties acquired the properties is insufficient for purposes of enabling them to acquire the properties in question.

According to Counsel, the State has therefore proved that the Interested Parties have assets disproportionate to their legitimately known sources of income.

3.17 The Applicant also submitted that the properties must be forfeited because the Interested Parties have not provided a satisfactory explanation for the disproportionate assets.

3.18 It was Counsel's submission that it is trite that the evidentiary burden in relation to unexplained assets is prove it or lose it; which position was affirmed by the Kenyan Court of Appeal in the case of **Ethics and Anti-Corruption Commission Vs Patrick Ochieno Abachi and 6 Others**⁽²⁾ for the proposition that an individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset.

3.19 It was Counsel's submission that the Interested Parties, as evidenced by exhibits "MM16a" – "MM16d", failed to provide a satisfactory explanation as regards the source of the wealth acquired by them in such a short period and that the only explanation for the source of income used to purchase the suspected proceeds of crime herein are the Contracts that were awarded to Pittscon Zambia Limited, the 1st Interested Party, by the Ministry of Local Government.

4.0 THE INTERESTED PARTIES' RESPONSE

4.1 On the 29th of August, 2023, the Matter came up for a Status Conference. During the Status Conference, we gave an Order of Direction and adjourned the Matter to the 22nd of February, 2024.

By the 22nd of February, 2024, the Interested Parties had not complied with the Order of Direction. For that failure, we ordered that the Application was unopposed and we would render Judgment based on the documents on Record. However, we allowed the Interested Parties to address us on points of law only.

5.0 THE HEARING

- 5.1 On behalf of the Applicant, Mr. Ngwira submitted that he would rely on the Amended Affidavit in Support thereof, further Affidavit and Skeleton Arguments of even date and briefly augmented the same by submitting that the Application centres on whether the Interested Parties should receive protection under the law having regard to the fact that they are in possession of property reasonably suspected to be proceeds of crime.
- 5.2 It was Counsel's submission that the relief sought by the Applicants be granted as a way of affirming the long-standing rule that there is no protection under the law for tainted properties.
- 5.3 In opposing the Application, Mr. Lemba, on behalf of the Interested Parties submitted that the Application by the State should not be granted because the State's Application is based on mere allegations and is not based on facts as envisioned by **Section 2** of the **Forfeiture of Proceeds of Crime Act Number 19 of 2010** of the **Laws of Zambia**.
- 5.4 It was Mr. Lemba's argument that **Section 2** of the **Forfeiture of Proceeds of Crime Act Number 19 of 2010** of the **Laws of Zambia**, puts a responsibility on the prosecution to come to Court

armed with facts indicating that the property sought to be forfeited is tainted.

- 5.6 According to Counsel, the allegation in this case is anchored on the Statement of Mr. Mulenga Mulenga who deposed that the Interested Party submitted false documents for Key Personnel to Ministry of Local Government and in submitting a false bid to the Ministry of Local Government, the Interested Party was awarded four (4) Contracts marked **"MM12a", "MM12b", "MM12c"** and **"MM11"**.
- 5.7 It was Mr. Lemba's submission that the Bid Documents were not false because the documents have a provision of submission of proposed personnel for the execution of a Contract tendered and, that the said Contract does not obligate a bidder to use the proposed personnel in the execution of the work of the Contract.
- 5.8 According to Counsel, the obligation is placed on the Project Manager to accept the proposed names in the Bid.
- 5.9 It was Mr. Lemba's argument that this action stemmed from the fact that the Key Personnel named in the Bid Documents distanced themselves from the project and by virtue of that fact an offence was then committed.
- 5.10 It was Mr. Lemba's submission that there was no offence committed when the Key Personnel distanced themselves and that is why the criminal charges that were laid against the Interested Parties in the Subordinate Court could not stand and the same had to be withdrawn.

5.11 It was Mr. Lemba's submission that since the Contracts in issue were not terminated and are still valid, the said Contracts were legally awarded and the proceeds therefrom are clean and not tainted.

5.12 Finally Counsel submitted that the Applicant's Application should not be granted because the Applicant has not shown that all the properties lined up for forfeiture were instruments of crime or that they were used in the commission of offences. Counsel relied on the case of **National Director of Public Prosecutions Vs Cook Properties and 37 Others**⁽³⁾, for the proposition that property will be an instrumentality of an offence if it plays a reasonably direct role in the commission of the offence in real or substantial sense.

5.13 According to Counsel, in the case at hand, the Application by the State is not anchored on the fact that the property is tainted but on mere allegations.

5.14 Mr. Mukuka on behalf of all the Interested Parties submitted that the Application by the Applicants should not be granted because the Applicants have not discharged their burden of proof in this Matter.

5.15 According to Mr. Mukuka the four (4) Contracts in issue are still valid and have not been terminated by the Ministry of Local Government as provided for in Clause 59 2(4) of the Contract.

5.16 Further, Mr. Mukuka argued that on examination of the Affidavit in Support of the Originating Notice of Motion, the Deponent clearly states that the 1st Interested Party derived an income close

to K200 Million from the four (4) Contracts which to date are still valid.

5.17 It was Counsel's submission that the said Assets applied to be forfeited is way less than the value derived from the lawful source, which is the 4 (four) Contracts from Ministry of Local Government and that the Assets are disproportionate to the known source of income.

5.18 According to Counsel, there is a clear justification in the Assets acquired in that the Assets acquired by the Interested Parties are of a lower value and the same was derived by the mere fact of being Shareholders who derived a benefit from a lawfully entered into Contract with Ministry of Local Government.

5.19 On behalf of the Interested Parties, Mr. Simbeya submitted that, the Application by the Applicants should be dismissed because the Application is not anchored on reasonable suspicion.

5.20 According to Counsel, **Section 29** of the **Forfeiture of Proceeds of Crime Act** does not anchor on reasonable suspicion as the basis of making an Application.

5.21 It was Counsel's submission that in accordance with **Section 34** of the **Forfeiture of Proceeds of Crime Act**, any person who makes an Application before Court bears the responsibility of adducing evidence to establish his/her allegations.

5.22 According to Counsel, false pretences was not established in the Criminal Matter that was before the Subordinate Court and in the bidding process. Based on the foregoing facts, Counsel submitted

that the Applicants have not met the requirements of **Sections 29** and **34** and therefore the Application cannot stand.

5.23 It was Counsel's submission that the Applicant's Application should fail because according to the Contracts, there was no need to get consent of the Key Personnel to be used in the execution of the Contract.

5.24 It was Counsel's submission that there is a significant difference between Key Personnel and proposed Key Personnel.

5.25 In reply, Ms. Muyunda, on behalf of the Applicant, submitted that it was procedurally incorrect to refer to criminal proceedings in the Subordinate Court because as provided for by **Section 33** of the **Forfeiture of Proceeds of Crime Act**, forfeiture proceedings are not criminal in nature but Civil and therefore the rules of construction applicable in relation to criminal law does not apply in the interpretation of this **Act**.

5.26 It was submitted by the Applicant that it was a requirement for the Interested Parties in bidding for the Contract to submit the names of their Key Personnel Staff and that, that requirement was not only on paper but to ensure that the said Key Personnel were in the employ of the Interested Parties for the proper execution of the Contract.

5.27 According to Counsel, in blatant disregard, the Interested Party, submitted a list of Key Personnel who were not even aware that their credentials were to be used as demonstrated in "**MM12a**" – "**MM12d**".

5.28 It was Counsel's submission that in submitting false information as regards their personnel, the Interested Parties offended **Section 309** of the **Penal Code**.

5.29 It was also Counsel's submission in Reply that the Application by the State should not be dismissed because in line with **Section 71** of the **Forfeiture of Proceeds of Crime Act** on which the Application was anchored, the State has reasonably established that the properties were proceeds of crime more so that given an opportunity to render an explanation, the Interested Parties opted to remain silent as evidence by "**MM16a**" – "**MM16d**".

5.30 It was Counsel's submission that once **Section 71** is invoked, the evidential burden to prove how a suspect acquired property shifts to the suspect and does not lie with the person who is alleging that an offence has been committed.

5.31 It was Counsel's submission that through the Amended Originating Notice of Motion, the State has demonstrated the reasonable suspicion that the Contract was obtained from the Ministry of Local Government by false pretences without meeting the stipulated requirements and that failure to terminate the Contract for false pretences in line with Clause 59 of the Contract does not mean that an offence was not committed.

5.32 It was also Counsel's submission that the argument that some properties were not numbered and therefore, could not be attributed to the Interested Parties, did not show the shallowness of the investigations. According to Counsel, the said argument was misplaced because the investigations were not shallow and that

actually the 2nd Interested Party in the presence of his Lawyers actually took the Deponent to the said properties and indicated that the properties were his.

5.33 It was Counsel's submission that in the circumstances the investigations were not shallow but actually did what was required under the circumstances to link the Interested Parties to the unnumbered properties.

5.34 As regards the value of the properties and the amount of money that was obtained being less than the proceeds obtained from the Contract, Counsel submitted that only because the investigations did not establish where the entire money went does not mean that the properties that have been linked to the said proceeds of Contract then became legitimized.

4.35 It was Counsel's submission that the Contract that was awarded to the Interested Parties was a proceed of crime as it was obtained by false pretences as demonstrated in the Affidavit in Support of the Originating Notice of Motion.

6.0 ISSUES FOR DETERMINATION

6.1 The issues framed for determination, as we see them are as follows:

- i. *Whether the Application is correctly before Court;*
- ii. *Whether the properties in issue can reasonably be suspected to be proceeds of crime; and*
- iii. *Whether the Interested Parties have demonstrated to the Court's satisfaction that they have legitimately acquired the properties in issue.*

7.0 ANALYSIS AND DECISION OF THE COURT

i. *Whether the Application is correctly before Court.*

7.1 As correctly submitted by Counsel for the Applicant, **Sections 29 and 31** of the **Forfeiture of Proceeds of Crime Act No. 19 of 2010**, clothes this Court with sufficient jurisdiction to determine this Matter.

7.2 In the same vein, the Court in the case of **The Director of Public Prosecutions Vs Lillian Namiye Munalula, Sydney Mwiya Mayamba and Bank of Zambia**⁽⁴⁾ and **The Director of Public Prosecutions and Tasila Lungu**⁽⁵⁾, reaffirmed the position that this Court has jurisdiction to determine such Applications.

ii. *Whether the properties in issue can reasonably be suspected to be proceeds of crime.*

7.3 We felt it prudent that before we consider question (ii) above, we needed to elucidate the nature of Non-Conviction Based Forfeiture, in the light of the recent Court of Appeal Judgment in the case of **Sydney Mwansa Vs The People**⁽⁶⁾.

7.4 In the earlier Supreme Court case of **The People Vs Liato**⁽⁷⁾, Malila J.S., as he then was, at page 751 stated:

“The passage of the Forfeiture of Proceeds of Crime Act 2010 was therefore, a deliberate act of the State, sequel to international clamour in this regard, to restate the burden and standard of proof in proceedings relating to forfeiture of proceeds of crime. The framing of Section 71 (1), (2) and (3) was a conscious and deliberate desire to change the standard of proof and the evidentiary

burden of proof. Section 78 of the Act, which we have earlier on quoted, makes the intention of the Legislature quite evident.”

7.5 In the case of Director of Public Prosecutions Vs Dhiraj Dhumputha⁽⁸⁾, it was stated 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.”

(emphasis ours)

7.6 Further, in the case of Director of Assets Recovery Agency Vs Szepletowsk⁽⁹⁾. It was held that:

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

And at paragraph 107:

“In order to do that it is sufficient, in my view, for the Director to prove that a criminal offence was committed, even if it is impossible to identify precisely when or whom or in which circumstances, and that the

property was obtained by or in return for it. In my view, Sullivan J, was right, therefore, to hold that in order to succeed, the Director need not prove commission of any specific offence, in the sense of proving that a particular person committed a particular offence on a particular occasion.” (emphasis ours)

- 7.7 In our understanding of the **The People Vs Liato**⁽⁷⁾ case and the persuasive cases we have referred to, Non-Conviction Based Forfeiture is not premised on proof of having committed a criminal offence as the case of **Sydney Mwansa Vs The People**⁽⁶⁾ seems to suggest.
- 7.8 In our humble view, the decision in **Sydney Mwansa Vs The People** is a departure from the settled international standards on Non-Conviction Based Forfeiture. What the decision in **Sydney Mwansa** case instructs is that there must be a nexus between the property and a criminal offence. This interpretation is in line with Conviction Based Forfeiture which is distinct from Non-Conviction Based Forfeiture made pursuant to **Sections 29, 31 and 71 of FPOCA** on which the Applicant’s Application is anchored. On that premise, we respectfully distinguish the **Sydney Mwansa** case from the Matter in *casu* as it does not apply and we firmly follow the guidance laid down in the Supreme Court case of **Liato** and the other persuasive authorities we have cited above.
- 7.9 We now address the question we posed to ourselves being: *Whether the properties in issue can reasonably be suspected to be proceeds of crime.*

- 7.10 Considering the number of properties involved, we felt it prudent to clearly establish if the properties in issue belong to the Interested Parties.
- 7.11 From exhibit **"MM1a"**, **"MM1c"**, **"MM1d"**, **"MM1e"**, **"MM1g"** and **"MMJ"** (White Book) the motor vehicles in question all belong to Pittscon Zambia Limited, who is the 1st Interested Party.
- 7.12 From exhibit **"MM2"**, **"MM8b"** and **"MM8b"** (Certificate of Title) all the listed properties were acquired by the 2nd Interested Party (Emmanuel Sipande Mugala) between 2018 to 2021 and are valued as per **"MM9a"** and **"MM10"**.
- 7.13 From exhibit **"MM9c"** and **"MM9h"** were properties for the 2nd Interested Party. Properties **"MM9a"** and **"MM9b"** (were not numbered but were established to be the properties of the 2nd Interested Party, (see paragraph 7 of Amended Affidavit in Support of Notice of Motion).
- 7.14 That the 3rd Interested Party had in his possession four (4) unnumbered properties valued at K26,300,000.00 as per exhibit **"MM10"** (properties not numbered but were established to be the properties of the 3rd Interested Party, see paragraph 12 of the Amended Affidavit in Support of Notice of Motion).
- 7.15 That the 4th Interested Party owned sixteen (16) Flats situate at Lusaka, Subdivision No. 1 of Subdivision B of Lot No. 15144m, as per exhibit **"MM9a"** and **"MM9b"**.
- 7.16 That the 5th Interested Party owned various properties as per paragraph 18 (c) to (l) of the Amended Affidavit in Support of Originating Notice of Motion.

7.17 Having established that the said properties belong to the Interested Parties, can the properties be said to be reasonably be suspected to be proceeds of crime.

7.18 In support of the Application, Mr. Ngwira submitted that the Court should grant the Application by the State because the Interested Parties are in possession of property reasonably suspected to be proceeds of crime and as such, they should not be given protection of the law.

7.19 In opposing the State Application, Counsel for the Interested Parties submitted that the State's Application should not be granted because the said Application is based on mere allegations and is not based on facts as provided for in **Section 2** of the **Forfeiture of Proceeds of Crime Act**.

7.20 We have considered the Arguments of all the Parties.

7.21 According to *Black's Law Dictionary* 10th Edition, ***"reasonable suspicion is a particularized and objective basis, supported by specific and articulable facts for suspecting a person of a criminal activity."***

7.22 Regarding reasonable suspicion, Malila, JS., (as he then was) in the case of ***The People Vs Liato***⁽⁶⁾ held that:

"... whether grounds of suspicion actually exist at the time the suspicion is formed is to be tested objectively. Consequently, a suspicion may be reasonable even though subjectively it was based on unreasonable grounds. In our considered view, proof of reasonable

suspicion never involves certainty of the truth. Where it does, it ceases to be suspicion and becomes fact.

7.23 In light of the above guidance, has the Applicant reasonably proved that the properties in issue are proceeds of crime?

7.24 From the Affidavit in Support deposed to by Mulenga Mulenga, it was established that he formed the suspicion after carrying out investigations covering the period March 2018 to April 2022 in which it was discovered that the Interested Parties had acquired numerous properties both movable and immovable which were directly linked to Contracts “MM12a”, “MM12b”, “MM12c” and “MM12d”.

7.25 From the Affidavit in Support, his suspicion stems from the fact that the 2nd Interested Party to the 6th Interested Party acting through the 1st Interested Party acquired monies from the Ministry of Local Government for the maintenance of selected roads in Chibombo, Kapiri Mposhi and Serenje Districts by false pretence in that they submitted names for Key Personnel without the consent of the said personnel and that the said personnel were not in the employ of the Interested Parties.

7.26 For us to properly appreciate the genesis of this suspicion, we first have to refer to the Contract in issue. In this case, we shall refer to “MM12c” Clause 9.1.

7.27 Clause 9.1 reads:

“The Contractor shall employ the Key Personnel named in the schedule of Key Personnel, as referred to in the SCC, to carry out the functions stated in the schedule

or other personnel approved by the Project Manager. The Project Manager shall approve any proposed replacement of Key Personnel only if their relevant qualification and abilities are substantially equal to or better than those of the personnel listed in the schedule." (emphasis ours)

7.28 Clause GCC 9.1 (schedule of Key Personnel) in the Special Condition of Contract states:

"Qualifications and experience of the following key site management and technical personnel proposed for the Contract are required:

- 1) Contract Manager***
- 2) Site Engineer/Agent***
- 3) Surveyor***
- 4) Materials/foreman***
- 5) Earth works foreman***
- 6) Concrete foreman***
- 7) Laboratory supervisor***

All bidders shall provide details of the proposed Key Personnel and their experience records in the relevant qualification information forms included in Section IV."

7.29 In our reading of Clause 9.1 and the Schedule thereto, our understanding is that the issue of Key Personnel is mandatory. The Contractor is mandated to employ the Key Personnel named in the schedule of Key Personnel.

7.30 Flowing from our understanding of Clause 9.1, the Contractor in this matter, should have had on site the Key Personnel who were named in Clause 9CC.1. Where that was not possible, the Project Manager is given power to approve any proposed replacement of Key Personnel and amend the list with approval of the client.

7.31 However, in this case, the 1st Interested Party did not only have a schedule of personnel who did not exist as earlier submitted in exhibit “MM14a” – “MM14c” but also had a schedule of personnel who did not consent as per “MM15a” – “MM15g”.

7.32 It is abundantly clear that the 1st Interested Party in this Matter, by false pretences submitted a list of Key Personnel who were not in its employ, which was a fundamental breach of the Contract.

7.33 We say so because Clause 59.1 of the Contract states:

“The procuring entity or the Contractor may terminate the Contract if the other party causes a fundamental breach of the Contract.”

7.34 As regards what a fundamental breach is, Clause 59.2 (h) states:

“Fundamental breach of Contract shall include, but shall not be limited to, the following:

(h) if the Contractor, in his judgment of the procuring entity has engaged in corrupt practices in competing for or in executing the Contract.

For the purposes of this paragraph:

(i) ...

(ii) “fraudulent practice” means a misrepresentation of facts in order to influence a procurement

process or the execution of a Contract to the detriment of the procuring entity.”

7.35 Looking at the terms of the Contract, a Contractor is required to supply correct information in order to meet the standards or requirements set in the Contract and where that is not done, the failure amounts to a fundamental breach which can lead to termination of the Contract in line with Clause 59.1 and 59.2 of exhibit “**MM12c**”.

7.36 The failure by the Interested Parties in this case to provide correct information to the client means that the Interested Parties breached the Contract, which triggers the termination of the said Contract.

7.37 It is clear that the 1st Interested Party in this matter, by submitting a list of Key Personnel who were not in its employ, misrepresented facts which was a fundamental breach of the Contract in line with Clause 59.1 and 59.2 (h) (ii) which provides:

“If the Contractor, in the judgment of the procuring entity has engaged in corrupt or fraudulent practice in competing for executing the Contract.

For the purpose of this paragraph:

(ii) “fraudulent practice” means a misrepresentation of facts in order to influence a procurement process or the execution of a Contract to the detriment of the procuring entity...”

7.38 From the foregoing, we are of the view that based on **Section 31** of **FPOCA**, the State has on a balance of probabilities managed to

establish that the properties acquired by the Interested Parties could be reasonably be suspected to be proceeds of crime.

7.39 We say so firstly because the State has established that the 2nd to 5th Interested Parties by false pretence submitted names to the Ministry of Local Government stating that they had Key Personnel in the employ of the 1st Interested Party when in fact not.

7.40 As we state that fact, we are aware that the 1st to the 5th Interested Parties argued that the submission of those names was not fatal because the names were for proposed personnel and that the same does not in any way invalidate the Contract and that is why the Contract was still valid today.

7.41 In our considered view, the submission of the names to Ministry of Local Government when the said Key Personnel did not consent and were not in the employ of the 1st Interested Party is a false pretence, which is a crime.

7.42 **Section 309** of the **Penal Code** provides as follows:

“Any person who, by any false pretences and with intent to defraud obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen is guilty of a misdemeanor and is liable to imprisonment for three years.”

7.43 As **Section 309** guides, we have as a fact, found that the submission of the Key Personnel was a false pretence in that the 2nd to 5th Interested Parties submitted names of people through the

1st Interested Party who were not in the employ of the 1st Interested Party.

7.44 The submission of the proposed Key Personnel by false pretences in turn triggered the commission of an offence. Therefore, since the 1st to 5th Interested Parties committed an offence under **Section 309** the off shots of the false pretences, which is the money paid to them by Ministry of Local Government and the properties bought using the same are tainted properties as per **Section 2 of Act No. 19 of 2010** which provides as follows in relation to tainted property; "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 crime.*

7.45 Drawing an inference from the above, it is our view that since the State has proved the commission of an offence, the property that is obtained from such an offence is therefore reasonably suspected to be proceeds of crime in conformity with **Section 2** of the **Forfeiture of Proceeds of Crime Act**.

7.46 **Section 2 of the Act** provides a definition of proceeds of crime as follows:

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

a. Wholly or partly derived or realized directly or indirectly, by any person from the commission of a serious offence or a foreign serious offence;

b. Wholly or partly derived or realized from a disposal or other dealing with proceeds of a serious offence or a foreign serious offence; and includes on a proportional basis derived or realized directly from the serious offence or foreign serious offence.”

7.47 We are satisfied that the properties in *casu* are proceeds of crime because a common thread of illegality runs through from the time the false pretence was made up to the time property was acquired.

7.48 We must add also that the timing of the acquisition of the properties and the amounts involved, coupled with the fact that before the Contracts in issue were awarded, the Interested Parties had no income, triggers elements of suspicion. That is, the property in issue was reasonably suspected to be proceeds of crime.

7.49 We further state that the argument by Counsel for the Interested Parties that no offence was committed because the 1st Interested Party was not mandated to use the Key Personnel lacks merit because the component of Key Personnel was put there so that, the Contractor given the job does quality work and was not put there for cosmetic purposes. See **Regulation 90 (1) of the Public Procurement Act, No. 8 of 2020.**

7.50 We further agree with the Applicant that, the fact that the Contract is still running does not mean that there is no illegality that was committed.

7.51 We must state that in cases of such a nature, the illegality begins to run from the time the false pretence is discovered as guided in the case of **Stanbic Vs Bentley Khumalo and 29 Others**⁽¹⁰⁾. Therefore, the fact that the Contract is still valid does not mean that the Contracts in issue cannot be said to have been procured by false pretences.

7.52 Similarly the argument that no offence was committed since the charges in the Subordinate were withdrawn lacks merit.

7.53 It lacks merit because the case in *casu* stands on its own and is not dependent on criminal charges. In saying this we are persuaded by the Namibian case of **Teckla Nandjila Lameck Vs President of Namibia**⁽¹¹⁾ where the Court stated as follows:

“Asset forfeiture is a civil remedy directed at confiscation of the proceeds of crime and not at punishing the Accused even if there is a prosecution, the remedy is not affected by the outcome of the criminal proceedings. The remedy is thus directed at the proceeds and instrumentalities of the crime and not the person having possession of them”. (emphasis ours)

7.54 Similarly in the Kenyan case of **Assets Recovery Agency Vs Joseph Wanjahi and Others**⁽¹²⁾ where the Court held that:

“The proceedings before this Court are to determine the criminal origins of the property in issue and are not a criminal prosecution against the Accused”.

7.55 Having stated the above, we are satisfied that the Applicant has adduced sufficient grounds that triggered their suspicions as guided in the **Liato** case cited above. In this case, the Applicant has even gone beyond mere suspicion in that they adduced evidence to show that the Interested Parties herein committed an offence, which offence was the route through which they got the monies used to purchase all the properties in *casu*.

iii. Whether the Interested Parties have demonstrated, to the Court's satisfaction, that they have legitimately acquired the properties in issue.

7.56 For us to resolve this issue properly, we will first seek guidance from **Section 31 (2)** of the **FPOCA**, which sets out the issues that the Interested Parties ought to adequately address to satisfy the Court that they have a legitimate interest in the alleged tainted properties. These are:

- i. That the Interested Party did not acquire the Interest in the Property as a result of any serious offence.*
- ii. That the Interested Party had the interest before any serious offence occurred.*
- iii. That the Interested Party acquired the interest for fair value after the serious offence occurred and did not know or could not reasonably have known at the time of acquisition that the property was tainted.*

i. That the Interested Party did not acquire the Interest in the Property as a result of any serious offence.

7.57 Mr. Lemba on behalf of the Interested Parties submitted that the genesis of this case centres on the statement given by Mr. Mulenga Mulenga when he deposed that the Interested Parties herein used documents for Key Personnel in submitting a Bid to the Ministry of Local Government and as a consequence of that bid, the 1st Interested Party was awarded four (4) Contracts marked **“MM12a”**, **“MM12b”**, **“MM12c”** and **“MM11”**.

7.58 It was Mr. Lemba's argument that this action stemmed from the fact that the Key Personnel named in the Bid Documents distanced themselves from the project and by virtue of that fact an offence was then committed.

7.59 It was Mr. Lemba's submission that there was no offence committed when the Key Personnel distanced themselves from the Contract.

7.60 It was Mr. Lemba's submission that since the Contracts were legally awarded and the proceeds therefrom are clean and not tainted.

7.61 In response, Mrs. Muyunda on behalf of the Applicant submitted that it was a requirement for the Interested Parties in bidding for the Contract to submit the names of their Key Personnel staff and that, that requirement was not only on paper but to ensure that the said Key Personnel were in the employ of the 1st Interested Party for the proper execution of the Contract.

7.62 It was Counsel's submission that in submitting false information as regards their personnel, the Interested Parties offended **Section 309** of the **Penal Code**.

7.63 In our own analysis, it is clear that the properties in issue were acquired through the Contracts awarded to the 1st Interested Party by Ministry of Local Government based on the Bids submitted.

7.64 In submitting the Bids to Ministry of Local Government, the 1st Interested Party made a representation that it had Key Personnel and as a result of that representation Contracts were awarded, yet in actual fact the 1st Interested Party never had such Key Personnel.

7.65 As already stated the submission of false personnel amounted to false pretences pursuant to **Section 308** of the **Penal Code**, which in turn triggered in **Section 309**, which creates a criminal offence, whose term of imprisonment is three years.

7.66 Therefore, having found that the submission of false information as regards Key Personnel amounted to false pretences, it follows that proceeds of the said Contract is tainted. This therefore, entails that the Interested Parties did acquire the interest in the property as a result of a serious offence.

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

7.67 In the Affidavit in Support of the Application, Mulenga Mulenga deposed that during his investigations which covered the period between 2018 to 2022, the only known source of income for the

1st to 5th Interested Parties were Contracts for the periodic maintenance of selected feeder roads.

7.68 The Deponent further deposed that during investigations, he established that between March 2018 to April 2022 the 1st Interested Party was awarded four (4) Contracts by Ministry of Local Government for the construction and periodic maintenance of selected feeder roads as per “MM12a”, “MM12b”, “MM12c” and “MM12d”.

7.69 In our analysis, it has been established that all the properties in issue were acquired after the Contracts were awarded to the Interested Parties.

7.70 We are saying so because the award of the Contracts coincides with the acquisition of the properties. The inference that we draw is that the Contracts were the source of the monies that were used to acquire the properties in issue, which confirms that the properties were instruments of crime as guided in the case of **National Director of Public Prosecutions Vs Cook Properties and 37 Others**⁽³⁾ cited above.

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

7.71 Mr. Lemba submitted on behalf of the Interested Parties that since the Contracts in issue were not terminated and are still valid, the said Contracts were legally awarded and the proceeds therefrom are clean and not tainted.

7.72 Similarly, Mr. Mukuka submitted that the four (4) Contracts in issue are still valid and have not been terminated by the Ministry of Local Government as provided for in Clause 59 (4) of the Contract.

7.73 Mr. Mukuka also argued that an examination of the Affidavit in Support of Originating Notice of Motion, shows that the Deponent clearly states that the 1st Interested Party derived an income close to K200 million from the four (4) Contracts which to date are still valid.

7.74 In response, Mrs. Muyunda submitted that through the Amended Originating Notice of Motion, the Applicant has demonstrated the reasonable suspicion that the Contracts were obtained from the Ministry of Local Government by false pretences without meeting the stipulated requirements and the failure to terminate the Contract for false pretences in line with Clause 59 of the Contract does not mean that an offence was not committed.

7.75 It was also submitted that as regards the value of the properties being less than the proceeds obtained from the Contract, Counsel submitted that only because the investigations did not establish where the entire money went does not mean that the properties that have been linked to the said proceeds of the Contract then became legitimized.

7.76 We have heard the arguments of all the Parties. From the evidence on Record it is not in dispute that the Interested Parties were awarded four (4) Contracts from which they were paid huge sums of money. For the validity of the Contracts does not mean no

illegality was committed, because false pretences starts running from the date of discovery (see Stanbic Vs Bentley Khumalo and 29 Others⁽¹⁰⁾ cited above).

7.77 Be that as it may, it also has been established that the money was paid after a serious offence was committed.

7.78 In the same breath, it has been established that the Interested Parties knew at the time of acquiring the property that the property was tainted because the false pretence was committed by them.

8.0 CONCLUSION

8.1 From the above analysis, we are of the firm view that the Applicant has established on a balance of probabilities that the properties in issue are tainted properties.

8.2 Having so found, we therefore Order that properties captioned above be forfeited to the State to be applied as the Applicant deems fit within the confines of the law.

8.3 The Interested Parties in consequence, are condemned in costs to be taxed in default of agreement.

DELIVERED AT LUSAKA THIS 21ST DAY OF AUGUST, 2024.


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




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


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S. V. SILOKA
HIGH COURT JUDGE