IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 209/2012**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF THE CORRUPT PRACTICES (DISPOSAL OF RECOVERED PROPERTY) REGULATIONS, 1986

AND

IN THE MATTER OF THE DIRECTIVE BY THE DIRECTOR-GENERAL ANTI-CORRUPTION COMMISSION

ANTI-CORRUPTION COMMISSION **APPELLANT**

AND

AND TEDWORTH PROPERTIES INC. **RESPONDENT**

CORAM: MAMBILIMA, CJ; KAOMA AND KAJIMANGA, JJS
On 4th October, 2016 and 29th December, 2016

For the Appellant: **Mr. K. Phiri, Acting Director- Legal and Prosecutions and Mr. C. Moonga, Chief Legal and Prosecutions Officer, Anti-Corruption Commission**

For the Respondent: **Mr. R. Simeza, SC, of Messrs. Simeza Sangwa and Associates**

JUDGMENT

MAMBILIMA, CJ delivered the Judgment of the Court

CASES REFERRED TO:

1. **CHIKUTA V. CHIPATA RURAL COUNCIL (1974) ZR 241;**
2. **LUDWIG SONDASHI V. GENERAL GODFREY MIYANDA (1995-1997) ZR 1;**
3. **ROY CHULUMANDA V. ATTORNEY GENERAL 2006/HP/0797;**
4. **ATTORNEY-GENERAL V. MARCUS KAPUMPA ACHIUME (1983) ZR 1;**
5. **NEW PLAST INDUSTRIES V. COMMISSIONER OF LANDS AND ATTORNEY-GENERAL (2001) ZR 51;**
6. **NYAMPALA SAFARIS (Z) LIMITED & OTHERS V. ZAMBIA WILDLIFE AUTHORITY AND OTHERS (2004) ZR 49; AND**
7. **FORWARD V. WEST SUSSEX COUNCIL & OTHERS (1995) 4 ALL ER 207.**

STATUTES REFERRED TO:

a. **THE HIGH COURT RULES, CHAPTER 27 OF THE LAWS OF ZAMBIA;**
b. **THE CORRUPT PRACTICES (DISPOSAL OF RECOVERED PROPERTY) REGULATIONS, 1986;**
c. **THE ANTI-CORRUPTION COMMISSION ACT NO. 42 OF 1996;**
d. **THE COMPANIES ACT CHAPTER 388 OF THE LAWS OF ZAMBIA;**
e. **THE LANDS ACT, CHAPTER 184 OF THE LAWS OF ZAMBIA;**
f. **THE CORRUPT PRACTICES ACT, 1980;**
g. **THE HIGH COURT (AMENDMENT) RULES, STATUTORY INSTRUMENT NUMBER 69 OF 1998;**
h. **THE LANDS AND DEEDS REGISTRY ACT, CHAPTER 185 OF THE LAWS OF ZAMBIA;**
i. **THE BANKING AND FINANCIAL SERVICES ACT, CHAPTER 387 OF THE LAWS OF ZAMBIA; AND**
j. **THE INTERPRETATION AND GENERAL PROVISIONS ACT, CHAPTER 2 OF THE LAWS OF ZAMBIA.**

This matter was originally started by the Respondent against the Appellant on 7th May, 2003, by way of an Originating Summons filed into Court pursuant to Order VI Rule 2 of **THE HIGH COURT RULES[a].** The Originating Summons was supported by an affidavit

deposed to by one of the Respondent's advocates, Mr. Robert Mbonani SIMEZA, of Simeza, Sangwa & Associates. Later, on 4th June, 2003, one Vernon Emanuel Salazar ZURUTA, a Director in the Respondent Company, filed a further affidavit in support of the Originating Summons.

The case for the Respondent, as can be discerned from the foregoing originating documents, is that on 24th February, 2003, the Respondent received notification about a Seizure Notice issued by the Director-General of the Appellant and served on the Respondent's Property Managers, Access Leasing Limited. The said Notice indicated that Stand No. F/488a/26/C, also known as Horizon House, Stand F/488a/26/D, also known as Chibote House, and LUS/4829A, also known as Alberg Court, in Longacres, Lusaka (hereinafter collectively referred to as **"the properties"**), were going to be forfeited to the State if not claimed within three months from the date of publication of the said Notice. The Notice was published in the Government Gazette of 7th February, 2003 and served on Access Leasing Limited on 20th February, 2003. The Notice was issued under the provisions of the **CORRUPT PRACTICES**

(DISPOSAL OF RECOVERED PROPERTY) REGULATIONS[b] (hereinafter referred to as **"the Regulations"**). It stated that the properties were a subject of, and had been recovered during an investigation into an offence suspected to have been committed under the **ANTI-CORRUPTION COMMISSION ACT**[c].

The Respondent claimed that it was the rightful owner of the properties. It contended that the properties were purchased as an investment in Zambia by private treaty, through an estate agent, S. P. Mulenga & Associates. The Respondent, accordingly, claimed for the following reliefs:

1. **a declaration that it was the rightful owner of F/488a/26/C, also, known as Horizon House; F/488a/26/D, also known as Chibote House, and LUS/4829A, also known as Alberg Court, Longacres, Lusaka;**

2. **a declaration that the Notice issued pursuant to the Corrupt Practices (Disposal of Recovered Property) Regulations was illegal;**

3. **an order reversing the Notice issued by the Director-General of the Anti-Corruption Commission for the forfeiture of the said properties to the State; and**

4. **costs.**

On 24th July, 2003, the Respondent filed a supplementary affidavit in support of the Originating Summons. The affidavit was deposed to by one, Sonny Paul MULENGA. He averred that he was appointed by Meridian Property Fund to find buyers for various properties. He stated that the Respondent purchased F/488a/26/C, F/488a/26/D, and LUS/4829A, and retained him to manage the said properties, which he did until sometime in 1997/98, when the management contract was transferred to Access Leasing Limited.

The Respondent, in short, claimed that it was wrong for the Appellant to seize its properties when the Respondent was not under any investigations.

The Appellant reacted to the Respondent's action by filing an affidavit in opposition on 5th June, 2003 deposed to by Mr. Edwin SAKALA, Deputy Director in the Appellant Institution. In August, 2010, the Appellant filed a further affidavit deposed to by Mr. Friday TEMBO, a Senior Investigations Officer. The Appellant maintained that the properties were properly gazetted for forfeiture and subsequently forfeited by operation of the law following the

expiration of three months from the date of publication of the Notice.

The affidavit by Mr. Tembo particularly revealed that the Appellant received a complaint to the effect that the Respondent had acquired the properties in question under suspicious circumstances. According to him, investigations showed that the Respondent was incorporated in the Republic of Panama and registered in the Republic of Zambia by Mr. Faustin KABWE on 6th September, 2000. He said that although Mr. Faustin KABWE and a Ms. J.C. MULUNGA were given Power of Attorney on 5th November, 1997, in relation to properties acquired by the Respondent in South Africa, they used that Power of Attorney to register the disputed properties in Zambia. He stated that investigations further revealed that the Respondent had registered the properties before it was registered as a company in Zambia, contrary to the requirement of the law that a foreign company can only acquire land in Zambia if it is an investor. He went on to state that investigations revealed that the Respondent had acquired a suspicious loan of K3,145,774,450.00 which it used to purchase the properties. He

claimed that his enquiry established that Mr. Faustin KABWE, who had been prosecuted and convicted for corruption and theft of public funds, was involved in the illegal acquisition of the properties on behalf of the Respondent.

On 10th August, 2010, Mr. Faustin KABWE attested to an additional affidavit, on behalf of the Respondent, which was effectively a reaction to Mr. Friday TEMBO's affidavit. Mr. KABWE stated that he was never involved in the acquisition of the properties on behalf of the Respondent. He deposed that he only got involved in the management of the properties sometime in the year 2000, when his company, Access Financial Services Limited, was contracted to manage the properties on behalf of the Respondent. He said that the Power of Attorney was only issued to him in the year 2000, although the properties had been acquired in 1997. That the registration of the Respondent Company on 16th May, 2000, with the then Patents and Companies Registration Office (PACRO), was intended to normalise the company's existence in Zambia for purposes of payment of taxes. He averred that none of the cases for

which he was convicted related to the disputed properties. He denied having been involved in the acquisition of the properties.

On the evidence before it, the lower Court found that the seizure of the property by the Appellant was unlawful because the rightful owner **"was and is not under investigations for seven years since the property was seized and it is unconstitutional and Wednesbury unreasonable it is so declared."** It would appear that this conclusion by the trial Judge rested on the premise that the Respondent bought the properties in issue from Meridian Bank Biao. That there had never been any investigation against the Respondent or any of its directors. The learned trial Judge stated that Mr. KABWE became a local director of the Respondent on 10th May, 2000, three years after the properties were bought. The Judge expressed the view that-

> **"The Plaintiffs became guilty by association with Mr. Kabwe three years after they bought the property. No responsible investigating officer properly directing his mind would have reached such an outrageous conclusion which is Wednesbury unreasonable."**

There was an argument that the action was wrongly commenced in that a declaration was sought when the matter was commenced by originating summons. The Judge cited the decision

by Doyle CJ; in the case of **CHIKUTA V. CHIPATA RURAL COUNCIL**[1] where he said-

> **"The commencement of an action by originating summons clearly does not apply to an action for a declaration which depends on evidence being called on both sides."**

The Judge found the argument that the proceedings in this case were wrongly commenced to be flawed. He reasoned that ***"the overriding objective is that matters should not be decided on technicalities especially fundamental rights and freedoms."*** He relied on the case of **LUDWIG SONDASHI V. GENERAL GODFREY MIYANDA**[2] (sued as Secretary General of Movement for Multi-Party Democracy) in which we expressed the view that wrongly commenced proceedings, instead of being refused, should continue as if they had been brought by writ.

The Judge was of the view that the case in casu was on all fours with the case of **ROY CHULUMANDA V. ATTORNEY GENERAL**[3] in that, according to him, the properties in that case were seized based on the assumed relationship between the owner of the property and Mrs. CHILUBA. The Judge ordered that the seizure notice and the seizure itself were null and void since the

properties were bought on market overt. According to him, the seizure was based **'on groundless speculation and illegal.'** He ordered that the properties should revert to the Respondent. He also ordered that *mesne* profits be accounted for within 30 days from the date of judgment failure to which there should be an assessment by the Deputy Registrar.

Dissatisfied with the judgment of the lower Court, the Appellant has appealed to this Court raising only two grounds of appeal. The first one, simply stated, is that the learned trial Judge erred both in fact and in law, to proceed with the matter when the properties in issue had already been forfeited to the State in accordance with the **REGULATIONS.**

In brief, the contention of the Appellant on this ground is that the properties were forfeited to the State at the expiry of three months from the date of the Seizure Notice. They are relying on Regulation 3(2) of the **REGULATIONS,** which provides that-

"(2) No recovered property shall vest in the State under paragraphs (a), (b) or (c) of sub-regulation (1) unless-

(a) the Commissioner gives, in accordance with these Regulations, notice to the effect that such recovered

property is liable to vest in the State if it is not claimed within three months; and

(b) three months after the giving of such notice, such recovered property remains unclaimed."

Counsel for the Appellant submitted that the Court below found that service of the Gazette Notice was properly done on the Respondent, care of Access Financial Services Limited, except for the fact that it was not the Respondent which was under investigation but Access Financial Services Limited. Counsel contended that on this understanding, the Court went on to hold-

"Section 63 under which S.I. No. 194 of 1986 Regulations were made, the rightful owner of the property, in this case Tedworth Properties, must, as a condition precedent have been subject of an investigation in respect of an offence alleged or suspected to have been committed by them under the Act before notices could issue. The rightful owner did not abscond, the investigation officer had their Panamanian address, nor did they admit to corruption. They filed an objection, though late. The notice was contrary to the Regulation and unlawful as the right owner was not subject of investigation ..."

Counsel contended that in this holding lies the error that the Court below found itself in, in that these findings were contrary to the evidence that was laid before it. That arising from this holding by the Court, the question that needed to be answered was- ***'who was under investigation.'*** According to Counsel, the answer to this question is found in the affidavit of Friday TEMBO. It was

Counsel's submission that from that affidavit, it is clear that the Respondent was under investigation and this was the condition precedent for the issuance of the Gazette Notice under the **REGULATIONS**.

Counsel further argued that the notice was duly served on Access Financial Services Limited, the documentary agent of the Respondent, in accordance with the **COMPANIES ACT**[d]. That the Respondent having been duly served with the Gazette Notice, did not make a claim within the requisite three months period as required by law. That the Court below was alive to this fact as it observed that **'Tedworth Properties filed an objection to the seizure though late.'** That notwithstanding this observation, the Judge did not deal with the consequences of filing the objection late and ignored the provisions of the **REGULATIONS** which stipulate that recovered property pursuant to the **REGULATIONS** shall vest in the State if it is not claimed within three months from the date of publication of the Gazette Notice. Counsel invited us to consider the intent of the **REGULATIONS**, the import and effect of a claim made through an objection filed in Court instead of being

made to the Appellant. His view is that a claimant should present themselves to the Appellant for questioning, which institution, if any illegality is rebutted, may cease the investigation and if not, may decide to prosecute.

It is Counsel's view that the **REGULATIONS** did not contemplate a claim being made through the Court because courts do not have the competence to inquire into the criminality alleged on the property. He was quick to concede, however, that the forfeiture could be subject to judicial challenge but that such judicial inquiry in essence is limited to establishing whether the conditions defined by law have been fulfilled.

Counsel submitted further that the Respondent, in this case, instead of making a claim to the Appellant, elected to go to Court and prayed for a number of reliefs, which was contrary to the provisions of the **REGULATIONS.** That by electing to go to Court, the Respondent was attempting to use the Court to stop a criminal investigation. That if we agree with his submission, that a claim under the **REGULATIONS** ought to be made to the Appellant by way of presenting oneself for questioning, possible arrest and\or

prosecution, then we must find, on the facts of this case, that no claim was made and, therefore, the property was properly forfeited to the State.

The second ground of appeal is that the learned trial Judge erred in law and in fact when he delivered a declaratory judgment, based on affidavit evidence ignoring an earlier ruling that the matter be dealt with as if it was commenced by writ of summons and the parties be at liberty to call *viva voce* evidence.

Counsel for the Appellant submitted that although this action was commenced by way of an Originating Summons, on an application by the Appellant, NYANGULU, J, ruled that this matter should be dealt with as if it had been commenced by Writ and, consequently, that the parties were at liberty to call witnesses. Counsel alleged that when the matter was allocated to MUSONDA, J, he disregarded the said ruling by NYANGULU, J. That he instead directed the parties to file any further affidavits and final submissions after which he proceeded to deliver his judgment. Counsel urged this Court to decide on whether it is appropriate for a Judge to disregard a ruling made by that Judge's predecessor

which substantially affects the rights of the parties to the matter without the parties' consent. Counsel argued that the Appellant's right to cross-examine the deponents of the affidavits and call witnesses was substantially affected by the decision of MUSONDA, J, to depart from the ruling of NYANGULU, J.

Counsel referred us to their submissions in the lower Court on their contention that this matter should have been commenced by Originating Summons. Counsel submitted that in view of the reliefs sought by the Respondent, the matter should have been commenced by Writ of Summons. For this argument, Counsel relied on the case of **CHIKUTA V. CHIPATA RURAL COUNCIL**[1] where Doyle, CJ, stated that-

> **"the commencement of an action by originating summons... clearly does not apply to an action for a declaration which depends on evidence being called on both sides."**

Counsel went on to argue that the learned trial Judge proceeded on the basis that, among other things, the following matters were not in dispute:

(i) that the Plaintiffs are registered proprietors and are rightful owners;

(ii) there were no criminal investigations against Plaintiffs Tedworth Inc.;

(iii) that properties were purchased through a loan; and
(iv) that properties were seized because Mr. Kabwe was prosecuted for corruption and theft of public funds, not that Tedworth (plaintiff) were subject of investigations.

Counsel disagreed with the above findings by the learned trial Judge. They argued that it was clear from the affidavits deposed to on behalf of the Appellant that the Appellant's position had always been that the Respondent was not the rightful owner of the properties. That the Appellant had always contended that it had a reasonable basis to conclude that the properties were in fact acquired using public funds disguised as a loan. That the Appellant questioned the legality of the Respondent's acquisition of the properties in dispute before the Respondent was incorporated in Zambia. They stated that this was contrary to Section 3(3) of the **LANDS ACT**[e]. Further that there is no evidence to suggest that consent under the hand of the President was granted for the Respondent to acquire the land despite its legal status in Zambia at the time.

According to Counsel, the fact that they disagreed on the findings of fact by the lower Court showed that this matter should have proceeded as if commenced by Writ.

Counsel added that the controversy was heightened by the fact that the Respondent, through their Counsel, now claimed that the beneficial owner of the property was the late Republican President Fredrick T. J. CHILUBA. That this interest was never disclosed before and that President CHILUBA did not depose to any affidavit in support of the originating process.

Counsel went on to submit that the Court below misdirected itself when it found as a fact that the person under investigations was Faustin KABWE and not Tedworth Properties Inc. According to Counsel, the further affidavit in opposition to Originating Summons deposed to by Mr. Friday TEMBO clearly demonstrates that investigations by the Appellant centered on the Respondent.

In Counsel's view, the above should lead this Court to the conclusion that there are a lot of unresolved issues relating to the properties in dispute. That the said issues can only best be addressed in a fresh trial in which the parties would be obliged to give disclosure of their respective cases and have the evidence tested by cross-examination.

Counsel went on to submit that the lower Court should not have made adverse findings of fact based on affidavit evidence because it had no opportunity to observe the demeanor of the deponents and the deponents had not been subjected to cross-examination. Counsel faulted the learned trial Judge for having dismissed Mr. Friday TEMBO's evidence as 'groundless speculation' with 'a comedy of contradictions' but without saying anything about the inadequacies in the evidence on behalf of the Respondent. Further, that the lower Court's judgment was silent on the question of the appropriateness of Counsel for the Respondent deposing to an affidavit in a contentious matter. In addition, that the Judge did not comment on the apparent unwillingness by the purported beneficial owners of the disputed properties to avail themselves and either testify before the Court or present themselves for questioning by the Appellant over the impugned properties.

Counsel implored this Court to interfere with the learned trial Judge's findings of fact because, according to Counsel, the Court did not make a proper consideration of the flaws in the Respondent's evidence. They based this contention on the case of

ATTORNEY-GENERAL V. MARCUS KAPUMPA ACHIUME[4] where we stated that-

> **"... an unbalanced evaluation of the evidence where only the flaws of one side but not the other are considered is a misdirection which no trial Court should reasonably make and entitles the appeal Court to interfere."**

Counsel expressed knowledge about this Court's decision in the case of **NEW PLAST INDUSTRIES V. COMMISSIONER OF LANDS AND ATTORNEY-GENERAL**[5] where we said that-

> **"It is not entirely correct that the mode of commencement of an action largely depends on the relief sought. The correct position is that the mode of commencement of any action is generally provided for by statute."**

Counsel, however, went on to contend that the facts of this appeal are distinguishable from the facts of the **NEW PLAST INDUSTRIES CASE**[5] because the **CORRUPT PRACTICES ACT**[f], pursuant to which the regulations in issue were issued, did not provide for the mode of commencement. Further, that Order 6 rule (1) of the **HIGH COURT RULES**[a] as amended by **STATUTORY INSTRUMENT NUMBER 69 OF 1998**[g] provides that-

> **"Except as otherwise provided by any written law or these rules every action in the High Court shall be commenced by writ of summons and accompanied by a full statement of claim."**

According to Counsel, the above shows that the appropriate mode of commencement ought to have been by writ. They, therefore, prayed that this matter be referred back to the High Court for re-trial and be retried as if commenced by way of writ of summons.

In response to the appeal, the learned Counsel for the Respondent, Mr. Simeza, SC, filed written heads of argument which he briefly supplemented with oral submissions. On the first ground of appeal, Counsel has contended that this ground raises three questions, namely-

(i) whether the Judge in the court below should have declined to hear the matter before him;
(ii) whether the corrupt practices (Disposal of Recovered Property) Regulations of 1986 were legal; and
(iii) whether the properties in the case qualify to be considered as recovered properties under the Regulations.

Mr. Simeza argued the second and third questions first, before arguing the first question. On the second question, Counsel submitted that the **REGULATIONS** were illegal because they were made by the Commissioner of the Anti-Corruption Commission. According to Counsel, the Commissioner had no authority under Section 63(i) of the **CORRUPT PRACTICES ACT[f],** to make the

Regulations as that section gave the powers to the Republican President. Section 63(i) provided that-

> **"The President may by statutory instrument and on the recommendation of the Commission make regulations for the better carrying out of the purposes of this Act."**

Counsel has submitted that the role of the Commissioner, under Section 63(i), was limited to recommending to the President what Regulations could be made. He argued, therefore, that the **REGULATIONS** were illegal and incapable of enforcement as the Commissioner's actions were ultra vires the **CORRUPT PRACTICES ACT**[f]. To reinforce the above arguments, Counsel relied on the case of **NYAMPALA SAFARIS (Z) LIMITED & OTHERS V. ZAMBIA WILDLIFE AUTHORITY AND OTHERS**[6] where it was held that-

> **"a decision of an inferior court or a public authority may be quashed (by an order of certiorari) where that court or authority acted-**
> **(i) without jurisdiction; or**
> **(ii) exceeded its jurisdiction; or**
> **(iii) failed to comply with the rules of natural justice where those rules are applicable."**

Counsel submitted that clearly, the Appellant acted without jurisdiction when it made the **REGULATIONS** when the **CORRUPT PRACTICES ACT**[f] only permitted the President to make Regulations.

Mr. Simeza then moved to the third question, that is, **whether the said regulations were applicable to the subject properties**. He submitted that even assuming that the **REGULATIONS** were enforceable, the question is- **'whether the properties against which the notices were issued were recovered property within the meaning of Regulation 2 of the REGUALTIONS'**. The said Regulation 2 provided that-

> **"In these Regulations, unless the context otherwise requires, recovered property means any monies, property or thing of any description which was the subject of and was recovered during the course of an investigation into any offence alleged or suspected to have been committed under the Act."**

Counsel contended that for property to be considered as recovered property, it must have been the subject of, and must have been recovered during the course of, an investigation. Further that the investigation must relate to an offence alleged or suspected to have been committed under the **CORRUPT PRACTICES ACT[f]**. Counsel expressed the view that the onus was on the Appellant to show that the properties were recovered during the course of an investigation into an offence alleged or suspected to have been committed under the **CORRUPT PRACTICES ACT[f].** According to

Counsel, there was nothing said in the affidavits of Edwin SAKALA and Friday TEMBO to suggest that the properties or indeed the Respondent were subject of an investigation or that the properties were recovered during an investigation. Counsel submitted that what Mr. Friday TEMBO's affidavit shows is that Mr. Faustin KABWE was the subject of their investigations and not the Respondent or the disputed properties. In Counsel's view, the mere acquisition of the properties before the Respondent was registered in Zambia at the Companies Registry as a foreign company and the fact that the Respondent, as a foreign company without an investors licence, acquired land in Zambia, could not have been a matter for investigation under the **REGULATIONS.**

Counsel contended that if there was any wrong committed by the Respondent in acquiring property in Zambia as a foreign company or acquiring property before it was registered in Zambia, such a wrong should have been addressed under different statutes such as the **LANDS AND DEEDS REGISTRY ACT**[h] or the **COMPANIES ACT**[d] and not the **CORRUPT PRACTICES ACT**[f]. In Counsel's view, all the wrongs the Appellant claimed they were

investigating the Respondent for cannot be offences under the **CORRUPT PRACTICES ACT[f].**

Counsel submitted that there was nothing in the affidavits of Mr. Friday TEMBO and Mr. Edwin SAKALA which showed that the officers attempted to speak to the owners of the properties. That this was despite the fact that they had the owner's full physical address. That even Mr. Faustin KABWE, whom the investigations officer erroneously concluded to have been involved in the acquisition of the properties has never been interviewed in relation to the properties.

Counsel contended that once it was established that the properties could be categorized as recovered, the next step was for the Appellant to demonstrate that the recovered properties could not be returned to the rightful owner for any of the reasons stated in Regulation 3(1). Regulation 3(1) provides that-

> **"3. (1) Any recovered property which comes into the possession of the Commission shall, subject to the other provisions of these Regulations, vest in the State if such recovered property cannot be returned because-**
> **(a) the rightful owner thereof, being the subject of an investigation in respect of an offence alleged or suspected to have been committed by him under the Act, leaves Zambia for the**

purpose, or apparent purpose, of evading the consequences of such investigation or of the trial of a prosecution brought against him.
(b) the rightful owner or the person in possession thereof absconds; or
(c) the rightful owner cannot be traced or ascertained; or
(d) the person in possession thereof admits his involvement in the alleged corrupt act and agrees to the surrender of such recovered property to the State because of such involvement."

According to Counsel none of the above paragraphs of Regulation 3(1) applied to the facts of the instant case. In Counsel's view, recovered property cannot vest in the State unless the property cannot be returned to the owner due to the circumstances contained in Regulation 3(1).

Counsel then dealt with the first question, that is, **whether the lower court erred by hearing the matter**. He submitted that there was no objection from the Appellant to the Court proceeding to hear the matter.

Counsel went on to submit that the argument by Counsel for the Appellant that the disputed properties had been forfeited to the State is misconceived. In his view, the properties could not have been forfeited to the State when the notice of forfeiture was not served on the party affected by the notice. For these arguments,

Counsel relied on Regulation 3(3) of the **REGULATIONS** which provided that-

> **"The notice referred to in sub-regulation (2) shall be deemed to have been duly given if it is published in the Gazette and a copy is-**
> **(a) served on the person concerned; or**
> **(b) left at, or posted to, the usual or last known place of abode or business of the person concerned; or**
> **(c) published in a national newspaper if the person concerned is unknown or if his address or whereabouts are unknown."**

Counsel submitted that service on Access Financial Services was not effective because Access Financial Services was under liquidation. He argued that after the decision to liquidate Access Financial Services, the fiduciary functions performed by that Institution, which included management of the Respondent's disputed properties, terminated. That even Access Financial Services' role as documentary agents for the Respondent terminated. That, therefore, service of the notice should have been effected on the Respondent itself at its registered office in Panama or on its local Directors. To reinforce the above arguments, Counsel cited section 104(3)(a) of the **BANKING AND FINANCIAL SERVICES ACT**[i] which provides that-

> **"After the decision to liquidate, wind up or dissolve a bank or financial institution , the Bank of Zambia shall-**

(a) take any necessary step to terminate all fiduciary functions performed by the bank or financial institution, return to each owner all assets and property held by the bank or financial institution in relation to the owner, and settle its fiduciary account."

Mr. Simeza added that the liquidation manager for Access Financial Services was Mr. Marshal MWANSOMPELO. He alleged that Mr. MWANSOMPELO was also assisting the Appellant with their investigations. That, therefore, service of the notice on him was the same as the Appellant serving on itself. That this would defeat the purpose of Regulation 3(3), namely, to bring the notice to the attention of the owner of the property. For these arguments Counsel relied on the case of **FORWARD V. WEST SUSSEX COUNCIL & OTHERS**[7] where the Court of Appeal said that-

"It would be surprising if the alternatives to personal service treated as irrelevant what personal service guaranteed, that the defendant had notice of the proceedings. We are not satisfied this is not the case. The alternatives to personal service are allowed because they found a good working presumption (rebuttable, but still a good presumption) that they bring the proceedings to the notice of the defendant."

Mr. Simeza contended that the test for effective service under Regulation 3(3) is when the owner of the property is duly notified of the notice and not mere publication of the notice in the Gazette or delivery to the documentary office address. According to Counsel,

Regulations do not say that the claim ought to be directed to the Appellant.

Coming to the second ground of appeal, Counsel for the Respondent has argued that the objection to the mode of commencement was already dealt with by NYANGULU, J. That NYANGULU, J, disagreed with the Appellant's application to dismiss the action on the ground that it was wrongly commenced. That the Court instead ordered that the action continues and that the parties be at liberty to call *viva voce* evidence in addition to the affidavit evidence. That the Appellant did not appeal against NYANGULU, J's ruling and cannot, therefore, re-introduce, in this Court, the arguments on the mode of commencement.

Counsel submitted that when this matter came up before MUSONDA, J, the Appellant did not indicate that it wished to call *viva voce* evidence. Further, that the Appellant did not even make any application to cross-examine any witness.

Counsel went on to argue that it is wrong for the Appellant to argue that just because the Respondent was seeking declaratory reliefs the action ought to have been commenced by writ of

"5. (1) The President may on such terms and conditions as he thinks fit, appoint a Commissioner who shall be responsible for the administration of the Commission, subject to any specific or general directions of the President.
(2) The Commissioner shall not be subject to the direction or control of any person other than the President.
(2) The holder of the office of Commissioner shall, in addition to his functions as such, discharge the functions of such offices as the President may direct."

Counsel went on to submit that under section 4(2) of Act No. 14 of 1980, the Anti-Corruption Commission was a Government Department under the control and supervision of the President. That in fact all statutory instruments under that Act were signed by the Commissioner. That conversely, under the **ANTI-CORRUPTION COMMISSION ACT**[c], the Director-General was the Chief Executive Officer of the Commission and was subject to specific or general direction of the Commission and not the President.

Counsel went on to submit that none of the statutory instruments signed by the Commissioner was annulled by the National Assembly pursuant to Section 22(1) of the **INTERPRETATION AND GENERAL PROVISIONS ACT**[j]. The said Section provides that-

"22. (1) All rules, regulations and by-laws shall be laid before the National Assembly as soon as may be after they are made, and, if a resolution is passed within the next subsequent twenty-one days on

which the National Assembly has sat after any such rule, regulation or by-law is laid before it that the rule, regulation or by-law be annulled, it shall thence-forth be void but without prejudice to the validity of anything previously done thereunder, or to the making of any new rule, regulation or by-law."

Counsel accordingly contended that the **REGULATIONS** in issue were valid because they had not been annulled by the National Assembly.

With regard to the question as to whether the **REGULATIONS** were applicable to the disputed properties, Counsel submitted that they were because they had been recovered during investigations against the Respondent.

On the issue of service of the Gazette Notice on the Respondent, Counsel submitted that the Court below found that there was proper service in this case. That the Respondent has not appealed against that finding.

Coming to the contention by Counsel for the Respondent that the Respondent made its claim within three months, Counsel for the Appellant submitted that the Respondent has not cross-appealed against the finding that the Respondent made the claim late.

In reply to the Respondent's arguments on ground two, Counsel for the Appellant reiterated their arguments in the heads of argument.

We have carefully considered the evidence on the record of appeal, the arguments of Counsel and the judgment appealed against. We will deal with the two grounds of appeal seriatim.

The gist of the submissions on behalf of the Appellant, in support of the first ground of appeal, is that the lower Court erred when it proceeded to hear and determine this matter when the properties in issue had already been forfeited to the State. According to Counsel, the learned trial Judge misdirected himself when he arrived at the conclusion that the Respondent was not under investigations and consequently that the Gazette notice was illegal.

The crux of the response by Counsel for the Respondent is that the **REGULATIONS** were illegal and incapable of enforcement because they were made by the Commissioner of the Appellant instead of the President. Counsel submitted that even assuming that the **REGULATIONS** were legal, they were not applicable to the

properties in issue because, according to Counsel, the properties were not recovered property in terms of the provisions of the **REGULATIONS**. Further that the owner of the properties was not under any investigations.

Counsel further contended that even if the properties in issue had been recovered property, the Appellant did not demonstrate that the properties could not be returned to the owner under any of the circumstances listed in Regulation 3(1) of the **REGULATIONS**.

It is clear from the above that the question under the first ground of appeal is- **'whether the properties in question had been forfeited to the State by operation of the law by the time that the Respondent raised its claim to the properties'.**

We have carefully looked at the history of this matter. In our view, the resolution of the first ground of appeal depends on the interpretation and application of Regulations 2 and 3 of the **REGULATIONS**. Regulations 2 and 3, respectively, provide as follows:

> **"2. In these Regulations, unless the context otherwise requires, "recovered property" means any monies, property or thing of any description which was the subject of, and was recovered during the**

course of an investigation into, any offence alleged or suspected to have been committed under the Act."

3. (1) Any recovered property which comes into the possession of the Commission shall, subject to the other provisions of these Regulations, vest in the State if such recovered property cannot be returned because-

(a) the rightful owner thereof, being the subject of an investigation in respect of an offence alleged or suspected to have been committed by him under the Act, leaves Zambia for the purpose, or apparent purpose, of evading the consequences of such investigation or of the trial of a prosecution brought against him.

(b) the rightful owner or the person in possession thereof absconds; or

(c) the rightful owner cannot be traced or ascertained; or

(d) the person in possession thereof admits his involvements in the alleged corrupt act and agrees to the surrender of such recovered property to the State because of such involvement.

(2) No recovered property shall vest in the State under paragraphs (a), (b) or (c) of sub-regulation (1) unless-

(a) the Commissioner gives, in accordance with these Regulations, notice to the effect that such recovered property is liable to vest in the State if it is not claimed within three months; and

(b) three months after the giving of such notice, such recovered property remains unclaimed.

(3) The notice referred to in sub-regulation (2) shall be deemed to have been duly given if it is published in the Gazette and a copy is-

(a) served on the person concerned; or

(b) left at, or posted to, the usual or last known place of abode or business of the person concerned; or

(c) published in a national newspaper if the person concerned is unknown or if his address or whereabouts are unknown.

The question is- **were the properties in dispute "recovered property"?** Counsel for the Respondent has argued that the properties in issue were not recovered property because the

Respondent was never under investigations in relation to the said properties.

We do not agree with Counsel for the Respondent that the Respondent was not under investigations. A cursory study of the evidence on the record of appeal establishes that the Respondent was under investigations in connection with the alleged suspicious circumstances in which it had acquired the properties. This is evident particularly from the further affidavit deposed to by Mr. Friday TEMBO. For the sake of clarity, we will reproduce relevant portions of Mr. TEMBO's affidavit which are as follows:

> **5. That I was one of the officers assigned to investigate the matter involving Tedworth Properties Inc. the Applicants herein.**
> **6. That a complaint was received to the effect that Tedworth Properties Inc. had acquired property in Zambia under suspicious circumstances.**
> **7. That investigations revealed that Tedworth Properties Inc. was incorporated in the Republic of Panama and registered in the Republic of Zambia by Mr. Faustin Kabwe on 6th September, 2000 ....**
> **10. That despite Tedworth Properties Inc. having been registered on 6th September, 2000, investigations revealed that the company had acquired the subject properties before it was registered in Zambia.**
> **12. That despite the dictates of the law to the effect that a foreign company cannot own land unless it is an investor. Tedworth Properties Inc. obtained land and property in questionable circumstances."**

It is clear from the above paragraphs of Mr. TEMBO's affidavit that the Appellant had instituted investigations into allegations that the Respondent had acquired the subject properties in questionable circumstances. We, therefore, find it difficult to understand how the learned trial Judge arrived at the conclusion that there were no criminal investigations against the Respondent relating to the properties in dispute. From the reasoning by the learned trial Judge, it seems he expected the Appellant to prove something more than the mere fact that they had received a complaint against the Respondent and they had instituted investigations into that complaint. What needed to be shown at that stage was simply that there were investigations against the Respondent in connection with the disputed properties. And that the said properties were recovered in the course of those investigations.

We, therefore, hold that there was uncontroverted evidence to establish that there were criminal investigations against the Respondent relating to the properties in question.

the Respondent to appear before the Appellant. The Respondent did not appear as required. The Appellant cannot, therefore, be blamed for not having listened to the Respondent's side of the story when the Respondent simply refused to appear before the Appellant to claim the properties.

Counsel for the Respondent has argued that even after establishing that the subject properties could be categorized as recovered property, the Appellant should have demonstrated that the recovered properties could not be returned to the rightful owner because of any of the reasons stated in paragraph 3(1) of the **REGULATIONS**. It is not in dispute that the Commissioner issued a Gazette Notice requiring the Respondent to claim the properties within three months failure to which the properties would vest in the State.

The question is- **did the Respondent make the claim for the properties?** A perusal of the record of appeal establishes that the learned trial Judge held that the Respondent filed an objection to the seizure of the properties late. He specifically said the following at page J9 of his judgment:

"The rightful owner did not abscond the investigations officer had their Panamanian address nor did they admit to corruption. <u>They filed an objection to the seizure though late</u>." (Emphasis ours)

The Respondent has not cross-appealed against the above holding by the learned trial Judge. We, therefore, cannot interfere with that holding.

Even assuming that the Respondent had made a claim within time, we are of the considered opinion that the properties were supposed to be claimed from the Appellant and not from the Court. It is clear from Regulation 3 that the intention of Parliament was that the person claiming to be the owner of a property should appear before the Appellant to claim the property. The intention of enacting Regulation 3 was not to simply provide for a way of routinely handing over recovered property. The wording of Regulation 3 shows that the provision envisages that the person claiming to be the rightful owner of the property would have to appear before the Appellant and make a claim. This is so because the Regulation clearly states that the recovered property would at that point have come into the possession of the Appellant. Therefore, the claim can only be made to the Appellant as the

Institution not only conducting investigations into how the properties were acquired but also having possession of the properties. We do not, therefore, agree with Counsel for the Respondent that the Regulations do not say that the claim should be made to the Appellant.

We must add that the purpose of the **REGULATIONS** is to ensure that people who acquire property in suspicious ways answer to the Appellant. The claim does not literally mean that the disputed owner would simply go and collect the properties upon adequately providing proof of their identity. Indeed, if the disputed owner makes a claim for the property and they are cleared, the property would be handed over to them and the matter would end there. Conversely, if the Appellant finds that the properties were acquired through suspected criminal means, it would proceed to either conduct further investigations or institute criminal proceedings against the purported owner. This is clear from Regulation 3(1)(a).

For the above reasons, we are of the view that holding that the properties could be claimed by filing a Court action would have

explanation by the disputed owner of the circumstances under which they acquired the property.

Mr. Simeza has gone further to submit that the **REGULATIONS** were illegal. In Counsel's view, this is because they were issued by the Commissioner of the Anti-Corruption Commission when they should have been issued by the President.

We agree with the argument by Counsel for the Respondent that, according to Section 63(1) of the **CORRUPT PRACTICES ACT**[f], Regulations were supposed to be made by the President. Section 63(1) specifically provided that-

> **"63(1) The President may, by Statutory Instrument, make regulations generally for the effective carrying out of the provisions of this Act."**

A cursory look at the **REGULATIONS** establishes that they are headed **"Regulations by the Commissioner"**. In the absence of any evidence or explanation to the contrary, this implies that the Regulations were made by the Commissioner of the Appellant instead of the President. The question, however, is- **were the Regulations void by reason of the fact that they were made by**

the Commissioner when the Corrupt Practices Act, 1980 provided that they should be made by the President?

The answer to this question lies in Section 22 of the **INTERPRETATION AND GENERAL PROVISIONS ACT**[j]. That Section provides that-

> **"22. (1) All rules, regulations and by-laws shall be laid before the National Assembly as soon as may be after they are made, and, if a resolution is passed within the next subsequent twenty-one days on which the National Assembly has sat after any such rule, regulation or by-law is laid before it that the rule, regulation or by-law be annulled, it shall thence-forth be void but without prejudice to the validity of anything previously done thereunder, or to the making of any new rule, regulation or by-law."** (Emphasis by underlining ours)

The onus was on the Respondent to demonstrate to us that the **REGULATIONS** were annulled by the National Assembly pursuant to Section 22 of the **INTERPRETATION AND GENERAL PROVISIONS ACT**[j]. There is nothing on the record of appeal to show that the National Assembly annulled the **REGULATIONS**. Even assuming that the Regulations were annulled, the annulment could not have affected the Gazette Notice issued by the Appellant in this case in relation to the disputed properties. This is because Section 22 of the **INTERPRETATION AND GENERAL**

PROVISIONS ACT[j] provides that the annulment of a Statutory Instrument by the National Assembly is without prejudice to the validity of anything previously done under the annulled Statutory Instrument.

For the above reasons, we hold that the **REGULATIONS,** were legal and, consequently, that the Gazette Notice issued pursuant to the said **REGULATIONS** was legally issued.

Accordingly, we find merit in the first ground of appeal.

Our decision on the first ground of appeal makes consideration of the second ground of appeal nugatory.

On the totality of the issues in this appeal, we hold that the disputed properties were effectively and legally forfeited to the State. We, therefore, allow the appeal with costs for the Appellant.

I.C. Mambilima
CHIEF JUSTICE

R.M.C. Kaoma
SUPREME COURT JUDGE

C. Kajimanga
SUPREME COURT JUDGE