

IN THE HIGH COURT FOR ZAMBIA

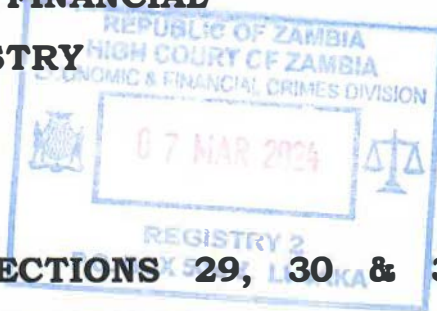
2023/HPEF/10

AT THE ECONOMIC AND FINANCIAL

CRIMES DIVISION REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



**IN THE MATTER OF: SECTIONS 29, 30 & 31 OF THE
FORFEITURE OF PROCEEDS OF
CRIME ACT NO. 19 OF 2010;**

**IN THE MATTER OF: SECTIONS 272 AND 278 OF THE
PENAL CODE, CHAPTER 87 OF THE
LAWS OF ZAMBIA;**

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

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

BETWEEN:

**THE DIRECTOR OF PUBLIC
PROSECUTIONS**

APPLICANT

AND

IN RE PROPERTY:

**UNITED STATES DOLLARS 7,004,007.43 CASH HELD IN
ACCOUNT NO. 62694542731 AT FIRST NATIONAL BANK (FNB)**

**UNITED STATES DOLLARS 7,000,287.92 CASH HELD IN
ACCOUNT NO. 9130004809223 AT STANBIC BANK; AND**

**UNITED STATES DOLLARS 10,000,000.00 CASH HELD IN
ACCOUNT NO. 025-1095663 AT ABSA BANK.**

MILINGO LUNGU

1ST INTERESTED PARTY

**KONKOLA COPPER MINES PLC
(IN LIQUIDATION)**

2ND INTERESTED PARTY

**BEFORE THE HONOURABLE JUSTICES P. K. YANGAILO, A.
MALATA-ONONUJU AND I. M. MABBOLOBOLO, IN CHAMBERS,
ON 6TH FEBRUARY, 2024 AND 7TH MARCH, 2024.**

For the Applicant:

*Ms. M. K. Chitundu, Deputy Chief
State Advocate & Mr. M. C.
Chipawa, Senior State Advocate –
National Prosecutions Authority.*

For the 1st Interested Party:

*Mr. S. Sikota SC. – Central
Chambers.*

For the 2nd Interested Party:

*Mr. G. Mileji – Messrs. Malambo &
Company.*

COMBINED RULING

P. K. YANGAILO J., DELIVERED THE RULING OF THIS COURT.

CASES REFERRED TO:

1. *Savenda Management Services Limited v Stanbic Bank Zambia Limited and Gregory Chifire – Selected Judgment No. 47 of 2018;*

2. *Commonwealth Development Corporation v Central African Power Corporation* (1968) Z.R. 70;
3. *Maiden Publishing House & Stationers Limited and Others v Indo Bank Limited* – SCZ/8/266/2013 (unreported);
4. *Re SBA Properties Limited* (1967) 2 ALL E.R. 615;
5. *D.B. Brace, ex p. The Debtor v H. Gabriel* (1966) 2 ALL E.R. 38;
6. *Republic v Kenya Revenue Authority ex parte, Althaus Management & Consultancy Ltd* (2015) eKLR;
7. *DPP re Property & Chiyeso Lungu as Interested Party* – 2023/HPEF/26; and
8. *Development Bank of Zambia v Rhozo Enterprise Limited, Zhoromin Kazhinga and Rodinah Chiweta Kazhinga* – 2017/HPC/0083.

LEGISLATION REFERRED TO:

1. *The High Court Act, Chapter 27, Volume 3 of the Laws of Zambia*;
2. *The Forfeiture of Proceeds of Crimes Act No. 19 of 2010*; and
3. *The Rules of Supreme Court of England, 1999 Edition, London Sweet & Maxwell.*

OTHER WORKS REFERRED TO:

1. *Halsbury's Laws of England, 4th Edition, Volume 17.*

1. INTRODUCTION

1.1 This combined Ruling is in respect of the two applications that were heard simultaneously by this Court on 6th February, 2024. The applications are Summons for leave to file Clarifying and/or Affidavit in Rejoinder, made by the 2nd Interested Party, Konkola Copper Mines Plc (in liquidation); and Summons for an Order to Cross-Examine Deponent of the Affidavit Verifying Facts, made by the 1st Interested Party, Milingo Lungu.

2. BACKGROUND

- 2.1 The genesis of this matter is that on 28th February, 2023, the Applicant, the Director of Public Prosecutions (DPP) launched an application by way of Originating Notice of Motion, for an Order of a non-conviction based forfeiture of tainted property, which Application was made pursuant to **Order XXX, Rules 15 and 17 of The High Court Rules**¹, as read together with **Sections 29 and 31 of The Forfeiture of Proceeds of Crime Act**². Two Parties were identified as being interested in the properties that are the subject of the Application for forfeiture, being Milingo Lungu and Konkola Copper Mines Plc (in liquidation), cited herein as the 1st Interested Party and 2nd Interested Party, respectively.
- 2.2 Both Interested Parties filed herein their respective Affidavits in response to the Applicant's application. However, the 1st Interested Party served their Affidavit in Opposition on the 2nd Interested Party, after the 2nd Interested Party had already filed its Affidavit. Upon perusal of the 1st Interested Party's Affidavit in Opposition, it became apparent to the 2nd Interested Party that there was need to file an Affidavit in Rejoinder to clarify some positions, as they relate to the 2nd Interested Party.
- 2.3 It is against this backdrop that the 2nd Interested Party moved this Court for an Order for leave to file Clarifying and/or Affidavit in Rejoinder. This was followed by an application by the 1st Interested Party, for an Order to

Cross-Examine the Deponent of the Applicant's Affidavit Verifying Facts, which accompanied the Originating Notice of Motion.

2.4 For convenience's sake, we heard both applications simultaneously and now render a combined Ruling in respect of both applications.

3. SUMMONS FOR LEAVE TO FILE CLARIFYING AND/OR AFFIDAVIT IN REJOINDER

3.1 This application was made on 4th September, 2023, by the 2nd Interested Party, pursuant to **Order III, Rule 2** of **The High Court Rules**¹. It is supported by Affidavit, which is augmented by Skeleton Arguments and List of Authorities.

3.2 AFFIDAVIT EVIDENCE

3.2.1 The Affidavit in Support of this application is sworn by one Celine Meena Nair, in her capacity as Official Receiver and Provisional Liquidator of the 2nd Interested Party. She deposed, *inter alia*, that having had sight of the 1st Interested Party's Affidavit in Opposition to the Applicant's Affidavit in Support of the Originating Notice of Motion, which was served on the 2nd Interested Party's Advocates after the 2nd Interested Party had filed its Affidavit Verifying Facts in relation to the Notice of Motion, it became apparent to the 2nd Interested Party that it ought to file an

Affidavit in Rejoinder to clarify some positions as they relate to the 2nd Interested Party. Accordingly, the 2nd Interested Party prepared its proposed Affidavit and Skeleton Arguments, which it exhibited marked “CMN1(a)(b)” in the Affidavit in Support of this application.

3.2.2 It is further deposed that the documents referred to in the proposed Affidavit will assist the Court in resolving the matter conclusively and that no prejudice will be occasioned to any Party herein, but instead the interest of justice will be served.

3.2.3 Both the Applicant and 1st Interested Party did not file any Affidavit in Opposition to this Application.

3.3 **SKELETON ARGUMENTS**

3.3.1 The Application is augmented by Skeleton Arguments of even date, in which it is submitted, *inter alia*, that the Court has inherent jurisdiction to hear this application and grant the Order sought. The case of ***Savenda Management Services Limited v Stanbic Bank Zambia Limited and Gregory Chifire***¹ was cited for its explanation on the utilisation of the inherent jurisdiction of the Court.

3.3.2 It was further submitted that the Application is also motivated by the fact that one requires leave of Court in order to file a further Affidavit. To fortify this submission, the case of **Commonwealth Development Corporation v Central African Power Corporation**² was cited for the Court's reasoning, as follows: -

"As I pointed out in the course of the hearing, the practice on application of this sort is, in general, to limit the number of affidavits – usually to one affidavit in opposition, which the defendant is entitled to put in as of right, and, with leave, one affidavit in reply on behalf of the plaintiff. As, however, neither side objected to the inclusion of these affidavits, and as most of them had already been prepared by the time that the matter came before me, I decided to allow them to be put in. In any case, in so far as they deal with matters of foreign law which were relevant to the argument of counsel (although not necessarily relevant to my decision in the present case), they were of assistance to the court."

3.4 **THE HEARING**

3.4.1 At the hearing of this Application, the 2nd Interested Party solely relied on the documents on record, save to add that they were of the considered view that the Application will not

prejudice the other parties and will serve the interest of justice by bringing all issues before this Court so that all issues are dealt with at once.

- 3.4.2 In response to the Application, the 1st Interested Party opted to rely on the 2nd Interested Party's Affidavit in Opposition to his Application for an Order to Cross Examine the Deponent of Affidavit Verifying Facts in relation to the Notice of Motion, which was filed herein by the 2nd Interested Party on 2nd November, 2023.
- 3.4.3 The 1st Interested Party further relied on the 2nd Interested Party's Skeleton Arguments of even date. Counsel for the 1st Interested Party also submitted that the said documents that the 1st Interested Party wished to rely on clearly show that the 2nd Interested Party stated therein that there are no contentious issues, yet in this Application it has stated that there are issues that need clarification and elaboration.
- 3.4.4 For these reasons, Counsel prayed that the Application by the 2nd Interested Party fails as it cannot be allowed to take two different positions, which will lead to an absurdity.
- 3.4.5 On the other hand, the Applicant joined issue with the 2nd Interested Party's Application.

3.4.6 In reply to the 1st Interested Party's oral submissions, the 2nd Interested Party submitted that there are no contradictory issues coming from the 2nd Interested Party as all it has indicated is that there are few factual issues which need clarification because these issues arose in the 1st Interested Party's Affidavit in Opposition. The 2nd Interested Party reiterated its prayer for its Application to be granted.

4. APPLICATION FOR AN ORDER TO CROSS-EXAMINE THE DEPONENT OF THE AFFIDAVIT VERIFYING FACTS IN RELATION TO THE NOTICE OF MOTION

4.1 This Application was filed on 11th October, 2023, by the 1st Interested Party. The Application is made pursuant to ***Order XXX, Rule 21 of The High Court Rules***¹, as read together with ***Order 38, Rule 2 (3) of The Rules of the Supreme Court***³.

4.2 AFFIDAVIT EVIDENCE

4.2.1 The application is supported by an Affidavit deposed to by one Milingo Lungu, the 1st Interested Party. It is averred, *inter alia*, that the Applicant did file an Affidavit Verifying Facts in Relation to the Notice of Motion, which is deposed to by one Celine Meena Nair and that the said Celine Meena Nair raised contentious diametrically opposed factual issues, which

require cross-examination of the said Deponent for clarity of the same evidence.

4.2.2 It is further averred that the only way to test the veracity of the issues raised is to cross-examine the Deponent for justice to be served and that no prejudice will be occasioned to the Applicant and 2nd Interested Party by the grant of the Order sought but conversely the interest of justice will be served.

4.2.3 The Application is opposed by the 2nd Interested Party, who filed herein an Affidavit in Opposition, on 2nd November, 2023. The same is deposed to by one Celine Meena Nair, in her capacity as Official Receiver and Provisional Liquidator of the 2nd Interested Party. It is averred, *inter alia*, that the 1st Interested Party's Affidavit in Support of this Application does not state the contentious issues to form the background of the application. It is further averred that the rules recognise the use of Affidavits in matters of this nature as the one before Court. It is also averred that the Court is able to form a view on the matter without having cross-examination of the Deponent.

4.2.4 The Applicant did not file herein any opposition to this Application.

4.3 **SKELETON ARGUMENTS**

4.3.1 The 1st Interested Party filed herein Skeleton Arguments of even date, in which it is submitted, *inter alia*, that this Application, which seeks to cross-examine the Deponent in relation to the Affidavit Verifying Facts in relation to the Notice of Motion, is made pursuant to **Order XXX, Rule 21 of The High Court Rules**¹, as read together with **Order 38, Rule 3 of The Rules of the Supreme Court**³, which empowers the Court, in addition to or instead of Affidavits, summon any person to attend to produce documents or to be examined or cross-examined, if it deems it expedient.

4.3.2 In fortifying his submissions, the 1st Interested Party called in aid **paragraph 277 of Halsbury's Laws of England**, at **page 193**¹, which sets the general principles as relates to the importance of a party to be able to test the evidence of his opponent by cross-examination. He further cited the case of **Publishing House & Stationers Limited and Others v Indo Bank Limited**³, where the Supreme Court stated as follows: -

"Affidavit Evidence, like oral evidence, may sometimes traverse issues of disputed fact. In such cases, the veracity of such evidence needs to be tested. When a Court is faced with two competing contentions on an issue

of fact, it is called upon to resolve those contentions and come up with findings of fact.”

4.3.3 Based on the foregoing, Counsel for the 1st Interested Party submitted that this is a fit and proper case for the Court to grant the 1st Interested Party’s Application as prayed.

4.3.4 In augmenting its opposition to the 1st Interested Party’s Application, the 2nd Interested Party filed herein its Skeleton Arguments on 2nd November, 2023, in which it is submitted, *inter alia*, that the law with regard to requirement to cross-examine a deponent to a matter which is ordinarily by Affidavit involves the exercise of discretionary power that the Court sparingly exercises. The case of ***Re SBA Properties Limited***⁴, was cited for the Court’s view that cross-examination on an Affidavit will not generally be allowed on matters extraneous to the proceedings in which the Affidavit was filed. Counsel submitted that based on the above Court’s view, the Applicant should disclose to the Court what matters are required for cross-examination, which the 1st Interested Party has not disclosed in its Application in *casu*.

- 4.3.5 Further, Counsel cited the case of ***D.B. Brace, ex p. The Debtor v H. Gabriel***⁵, where the Court affirmed that a party is not bound to cross-examine the opposite party or his witness upon their Affidavits, and the Court may form its view without hearing such cross-examination.
- 4.3.6 Counsel also cited the case of ***Republic v Kenya Revenue Authority ex parte, Althaus Management & Consultancy Ltd***⁶ wherein the Court outlined when a deponent may be subjected to cross-examination as follows: -

“Cross-examination on the affidavit is a discretionary power conferred upon the court by the provision of Order 19 Rule 2 of the Civil Procedure Rules. It is not given as a matter of right and therefore, any party who wishes to cross-examine a deponent must satisfy the court that there is a good reason for the purpose of examination. In other words, a party ought to lay down a proper legal foundation to justify his application for leave to cross-examine the deponent. As the requisite rules recognise the use of affidavits in evidence especially in the course of interlocutory applications, the courts ought not to readily permit cross-examination of the deponent’s affidavits otherwise if the courts become too willing to allow for cross-examination, the already

limited time available for applications would be further curtailed to the detriment of the wider interests of justice. Therefore, in order to ensure that no more time than is really necessary is further taken up by cross-examination, it is only in instances where the court is satisfied that the cross-examination is essential in enhancing the course of justice, that the court would allow deponents to be cross-examined.”

4.3.7 Counsel argued that the 1st Interested Party has not laid down any foundation to justify this Court to depart from the rules which require the matter to be resolved on the Affidavit.

4.4 **THE HEARING**

4.4.1 At the hearing of this Application, State Counsel for the 1st Interested Party augmented his Skeleton Arguments with *viva voce* submissions. He submitted that there is no doubt that there are contentious issues, as shown by the fact that the 2nd Interested Party is even seeking to file what it terms a Clarifying Affidavit, which indicates that the only way that this Court can be able to fairly decide which facts as set out in the various Affidavits are to be believed is if the Deponents are cross-examined on these contentious issues.

4.4.2 Further, State Counsel submitted that the 1st Interested Party will not concede to the facts averred to in the proposed Clarifying Affidavit and in order to avoid a situation where the 1st Interested Party or indeed the Applicant may wish to put in a Clarifying Affidavit on the Clarifying Affidavit, this Application must succeed as cross-examination of the 2nd Interested Party will be the only means by which justice can be seen to be done.

4.4.3 In response to the 1st Interested Party's oral submissions, Counsel for the 2nd Interested Party submitted that it is trite that Affidavits are also meant to address contentious issues save that it is those contentious issues which by their very nature can be verified and clarified in Affidavit evidence, and as such, making a sweeping statement that there are contentious issues is not sufficient to justify calling a Deponent for cross-examination. In support of this submission, Counsel called in aid our recent decision in the case of **DPP re Property & Chiyeso Lungu as Interested Party**⁷, where we quoted the case of **Development Bank of Zambia v Rozho Enterprises Limited & Others**⁸, which gives circumstances when a Deponent can be cross-examined, as follows: -

- “1. The Applicant must satisfy the Court that the Affidavit evidence before it is not sufficient;***
- 2. There is in existence a factual issue which necessitate the testing of the veracity of the Affidavit; and***
- 3. There should be good and convincing reasons upon which to exercise the discretion to subpoena a deponent for cross-examination.”***

4.4.4 Counsel argued that a perusal of the 1st Interested Party's Application clearly shows that other than making general comments of the need to cross-examine the Deponent, the 1st Interested Party has not shown or met the three requirements set out above in paragraph 4.4.3. and have failed to show which factual issues the Deponent will be cross-examined on for justice to be served. Accordingly, Counsel prayed that the Application be dismissed with costs.

4.4.5 The Applicant, in his brief *viva voce* submissions, contended that the 1st Interested Party has not met the threshold for the grant of this Application and he has failed to demonstrate exceptional circumstances upon which a Deponent may be cross-examined. The Applicant joined issue with the 2nd Interested

Party and placed reliance on the authorities cited by the 2nd Interested Party.

4.4.6 In replying to the submissions by the 2nd Interested Party and Applicant, State Counsel submitted that there is need to interrogate whether or not the amounts the 1st Interested Party got were correct amounts and if it was legally done, thus Affidavit evidence alone will not help this Court to evaluate what the correct amounts were. State Counsel contends that the Court would benefit from the cross-examination of the Deponent as it goes to the very root of what this action is all about.

4.4.7 State Counsel further submitted that there is in existence factual issues in contention and going back to the first Application made herein by the 2nd Interested Party, the 2nd Interested Party had submitted that there are issues that need clarifying and therefore, there is contentious issues. He argued that the fact that the 2nd Interested Party has seen the need to file a Clarifying Affidavit means that the 2nd Interested Party will be putting into contention the facts which the other side had deposed to.

4.4.8 Additionally, State Counsel contended that the 1st Interested Party has shown good and

convincing reasons upon which to exercise the discretion to *subpoena* the Deponent.

4.4.9 Finally, State Counsel submitted that this matter touches upon the preservation of property of an individual, which is something protected in our Bill of Rights in the Constitution of Zambia and thus derogation from those rights should not be a casual and everyday occurrence. He argued that the rights of the 1st Interested Party from cross-examining the 2nd Interested Party should not be closed off, in order to have the benefits and fruits of the rights guaranteed in our Constitution, as that is not only good but special, and not only a convincing but a compelling reason upon which to exercise the discretion to *subpoena* the Deponent. State Counsel prayed that the Application be granted.

5. CONSIDERATION AND DECISION OF THE COURT

5.1 We have considered both Applications, and have perused the various Affidavit evidence and exhibits. We have further considered the various submissions made by Counsel and the authorities cited, for which we are grateful to Counsel. We shall proceed to first determine the 2nd Interested Party's Application for leave to file Clarifying and/or Affidavit in Rejoinder.

5.2 APPLICATION FOR LEAVE TO FILE CLARIFYING AND/OR AFFIDAVIT IN REJOINDER

- 5.2.1 The Application was made pursuant to **Order III, Rule 2** of **The High Court Rules**¹, which empowers the Court to make any interlocutory Order which it considers necessary for doing justice.
- 5.2.2 The 2nd Interested Party submitted that there is need to file a Clarifying and/or Affidavit in Rejoinder, after having had sight of the 1st Interested Party's Affidavit in Opposition, which was served on it after it had filed its Affidavit Verifying Facts in relation to the Notice of Motion. It contends that there are issues raised by the 1st Interested Party in his Affidavit in Opposition, which the 2nd Interested Party needs to clarify. The Applicant joined issue with the 2nd Interested Party.
- 5.2.3 On the other hand, the 1st Interested Party has opposed this Application on the basis that he has had sight of the 2nd Interested Party's proposed Clarifying Affidavit and he does not concede to the contents therein, thus allowing this Application will entail that the 1st Interested Party also files a Clarifying Affidavit in response to the proposed Clarifying Affidavit.

5.2.4 Having analysed the Application and submissions by the parties, the issue for determination is whether there is justification for the grant of leave to the 2nd Interested Party to file Clarifying Affidavit and/or Affidavit in Rejoinder.

5.2.5 The rules of procedure as contained in ***The High Court Act***¹, do not explicitly provide for a filing of “Clarifying” or “Rejoinder” Affidavit as the term is not legally defined. However, the Court in exercise of its jurisdiction is empowered to grant leave for the filing of a Clarifying or Rejoinder Affidavit to allow a party to furnish clarifications regarding additional facts or issues that may have been raised by the opposite party in their Affidavit in response. Filing of a Clarifying or Rejoinder Affidavit is also essential to explain the issues and project the correct position of the party with respect to the new submissions averred by the other party in its Affidavit in response. Therefore, a Clarifying or Rejoinder Affidavit may include responses to the new facts raised through the Affidavit filed by the opposing party. In other words, a Clarifying or Rejoinder Affidavit can only be sworn to clarify or rejoin specific issues raised by the opposing party. It cannot

introduce fresh issues which were not at all alluded to in the opposing party's response.

5.2.6 In the usual practice and procedure under ***The High Court Rules***¹, the Applicant files an application supported by an Affidavit. The Respondent then responds or answers by filing an Affidavit in Opposition, which may raise new matters or fresh issues touching the subject matter of the dispute. In such circumstances, the Applicant may, as of right, file an Affidavit in rejoinder or reply only to explain or clarify the specific new matters or issues mentioned in the opposing party's Affidavit. In rejoinder, the Applicant is only permitted to simply explain if certain additional facts have been taken in the opposing party's Affidavit but cannot be allowed to come forward with an entirely new case in the rejoinder.

5.2.7 In *casu*, the matter is commenced by Originating Notice of Motion and it is an application for an Order for a non-conviction based forfeiture of tainted property, made pursuant to **Sections 29 and 30 of *The Forfeiture of Proceeds of Crime Act***². We must pause here and emphasise that a matter brought pursuant to the sections cited above, is an action in *rem* and not against persons. All

that is required of the Public Prosecutor, to institute such an action, is sufficient belief that the property is tainted. **Section 30 (b) of The Forfeiture of Proceeds of Crime Act²** requires any person who claims an interest in the property in respect of which the application is made to appear and produce evidence of such interest. It is for this reason that the 1st and 2nd Interested Parties were notified of this application as they may be persons and/or entity with an interest in the property believed to be tainted property by the Applicant.

5.2.8 As stated earlier, all that is required of the Interested Parties is to appear before Court and produce evidence of their interest in the properties subject of this matter. **Section 31 (2) of The Forfeiture of Proceeds of Crime Act²**, provides for issues that the interested person must adequately address to satisfy the Court that they have a legitimate interest in the tainted property and these are as follows: -

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

2. That the Interested Party had the interest before any serious offence occurred; and
3. That the Interested Party acquired the interest for fair value after the serious offence occurred and did not know or could not reasonably have known at the time of the acquisition that the property was tainted property.

5.2.9 In this case it is clear that the evidentiary burden of proving the interest in the property on a balance of probabilities shifts to the Interested Parties.

5.2.10 In *casu*, the 1st Interested Party chose to file an Affidavit in Opposition, in which he has laid out his interest in the property subject of this matter. The 2nd Interested Party chose to file an Affidavit Verifying Facts in relation to the Notice of Motion. The rules of procedure, as outlined above in paragraph 5.2.6 entails that only the Applicant can file a Clarifying and/or Rejoinder Affidavit by way of reply. This has already been done by the Applicant, who filed his Affidavit in Reply on 28th August, 2023 and there has been no application made by the Applicant to supplement this Affidavit in Reply.

5.2.11 On the basis of the foregoing, we see no justification for the 2nd Interested Party to be granted leave to file a Clarifying and/or Affidavit in Rejoinder. Accordingly, the Application is denied.

5.3 **APPLICATION FOR AN ORDER TO CROSS-EXAMINE THE DEPONENT OF THE AFFIDAVIT VERIFYING FACTS IN RELATION TO THE NOTICE OF MOTION**

5.3.1 This Application was made by the 1st Interested Party, pursuant to ***Order XXX, Rule 21 of The High Court Rules***¹, as read together with ***Order 38, Rule 2 (3) of The Rules of the Supreme Court***³, whose provisions empowers the Court, where it deems it expedient, to summon a person to be examined or cross-examined in applications made by Summons or Motions.

5.3.2 The 1st Interested Party contends that there are contentious issues that have been raised in the 2nd Interested Party's Affidavit Verifying Facts in relation to the Notice of Motion, which need to be tested for their veracity by way of cross-examination of the Deponent.

5.3.3 The 2nd Interested Party has opposed the Application on the basis that there is sufficient evidence on record on which the Court can determine the matter and that the 1st Interested

Party has not met the requirements upon which the Court can exercise its discretion to allow the Application. The Applicant joined issue with the 2nd Interested Party.

5.3.4 From our analysis of the Application and submissions by the Parties, the issue for determination is whether there is need to exercise our discretion to summon the Deponent of the 2nd Interested Party's Affidavit and allow the 1st Interested Party to cross-examine the said Deponent.

5.3.5 Allowing cross-examination on an Affidavit is a matter of discretion, and cross-examination should be avoided unless exceptional circumstances exist. Any party wishing to cross-examine a deponent must convince the Court that the cross-examination is justified. Given that the rules of procedure in our **High Court Act**¹ permit the use of Affidavits as evidence, we opine that Courts should avoid allowing cross-examination of the Deponent's Affidavits unless the circumstances merit it.

5.3.6 Accordingly, in considering this application, we have had sight of the case cited by Counsel for the 2nd Interested Party of ***Development Bank of Zambia v Rhozo Enterprise Limited, Zhoromin Kazhinga and Rodinah Chiweta***

Kazhinga⁸, wherein the High Court of Zambia had occasion to pronounce itself in a similar application as in *casu*. In that case, the Court took the view that for such an application to be granted, the Applicant must demonstrate the following: -

- “1. The affidavit evidence before the Court is not sufficient;**
- 2. there is an existence of factual issues in contention which necessitate the testing of the veracity of the affidavit evidence; and**
- 3. lastly there should be good and convincing reasons upon which to exercise the discretion to Subpoena the Deponent for purpose of cross examination and Subpoena witnesses.”**

5.3.7 We have further had sight of the case cited by the 2nd Interested Party of **Republic v Kenya Revenue Authority ex parte, Athaus Management & Consulting Ltd**⁶, where the Court outlined when a Deponent of an Affidavit may be subjected to Cross Examination, which is reproduced above in paragraph 4.3.6.

5.3.8 We have also perused the 1st Interested Party's Affidavit in Support of this Application and we note that it is bereft of the substance of the paragraphs from the 2nd Interested Party's

Affidavit on which the 1st Interested Party require to cross-examine the Deponent. Further, the 1st Interested Party has not established that the Affidavit evidence before Court is not sufficient for purposes of determination of whether the property in issue is tainted or not. Additionally, the 1st Interested Party has not advanced good and convincing reasons upon which we should exercise our discretion to grant leave for cross-examination of the Deponent.

5.3.9 Applying the principles of law laid down by the authorities discussed above, we find that the 1st Interested Party has not set out particular paragraphs that he wishes to cross examine the Deponent on or indeed laid a basis for it. Further, even if the Deponent were to be cross-examined, we do find that such a process will not add any value in determining the dispute herein. The law is very clear in **Section 31 (2) of *The Forfeiture of Proceeds of Crime Act***² that all that is required of the Interested Parties is to appear before Court and produce evidence of their interest in the properties subject of this matter.

5.3.10 As we earlier stated, this is a matter commenced by Originating Notice of Motion as

a Chamber application which is determinable by Affidavit evidence. The Order pursuant to which the substantive application has been made envisions that such applications will be determined in Chambers, on Affidavit evidence.

5.3.11 For the foregoing reasons, we are not persuaded in the circumstances that there is any need to allow cross-examination by or of any party in this Court and in any event, no party will be prejudiced by such an action as all necessary material to enable us hear and determine this matter is already on the record. Accordingly, the Application is denied.

6. CONCLUSION

6.1 We see no justification for the 2nd Interested Party to be granted leave to file a Clarifying and/or Affidavit in Rejoinder as the rules of procedure entails that only the Applicant can file a Clarifying and/or Rejoinder Affidavit by way of reply. Accordingly, the Application is denied.

6.2 We are not satisfied that the 1st Interested Party has laid a good foundation upon which we can grant his application to cross-examine the Deponent of the 2nd Interested Party's Affidavit. Accordingly, the Application is denied.

6.3 We order that the substantive application shall be heard on 27th March, 2024, at 14:30 hours. By that date, our

expectation will be that the Parties will be ready to proceed with the substantive application. There shall be no liberty to apply 14 days prior to the scheduled date of hearing.

6.4 Costs are in the cause.


**SIGNED, SEALED AND DELIVERED AT LUSAKA, ON THE 7TH
DAY OF MARCH, 2024.**



P. K. YANGAILO
HIGH COURT JUDGE



A. MALATA-ONONUJU
HIGH COURT JUDGE



I. M. MABBOLOBOLO
HIGH COURT JUDGE