

An Evaluation of Zambia's Asset Recovery Laws

By

CASSANDRA SOKO

Student Number: 3368368



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Faculty of Law, University of the Western Cape

Supervisor: Prof. L Fernandez, Faculty of Law, University of the Western Cape

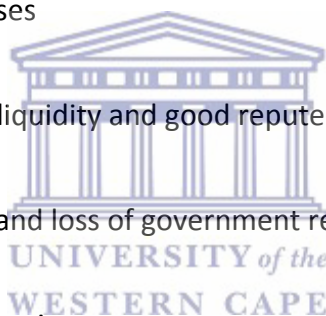
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KEY WORDS

Asset recovery

Asset retention

Confiscation

Conviction-based forfeiture

Crime

Economic crime

Forfeiture

Ill-gotten gains

Non-conviction based forfeiture

Preservation of property



ABSTRACT

Contrary to common perception, corruption is not all that ails Africa. It is only a component of the multifaceted economic criminality that leads to illicit capital flight from developing states and those undergoing political transition. The siphoning away of economic resources has a devastating impact on such countries, both economically and socially. This leads to an erosion of public confidence in government departments and in the administration of justice generally. The clandestine nature of economic criminality makes it particularly hard to prosecute. There has thus been an international consensus that asset recovery would be the most apt mode of deterrence and reparation. Having its genesis in the 1989 Vienna Convention, asset recovery has now become a useful tool with which developing countries can recoup some of the assets plundered by criminals. The United Nations Convention against Corruption has also made it possible for states to recover stolen assets by way of non-criminal or non-conviction-based procedures.

The main challenge for developing states is to make international treaties part of their national law. The democratization of former dictatorial states, especially those in Africa, also means that whatever international norms are domesticated in national legislation, should be in line with the tenets of their respective democratic constitutions, thus making them legally irreproachable. This paper evaluates Zambia's Forfeiture of Proceeds of Crime Act. It discusses Zambia's asset recovery provisions against the backdrop of international benchmarks and the laws of a few other countries that also have asset recovery laws. The paper concludes with a set of recommendations.

DEDICATION

To my beloved mothers Debra Masase and Johanna Masase for the pivotal roles that they played in different stages of my upbringing and their unconditional love.



DECLARATION

I, Cassandra Soko, declare that “An Evaluation of Zambia’s Asset Recovery Laws” is my work and that it has not been submitted for any degree or examination in any university or institution. All the sources used, referred to or quoted have been duly acknowledged.

Student: Cassandra Soko

Signature:

Date:



Supervisor: Prof. L Fernandez

Signature:

Date:

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ABBREVIATIONS AND ACRONYMS

ACC	Anti-Corruption Commission
AU Convention	African Union Convention on Preventing and Combating Corruption
CTR	Cash Threshold Report
DEC	Drug Enforcement Commission
DPP	Director of Public Prosecutions
ESSAMLG	Eastern and Southern Africa Anti-Money Laundering Group
FATF	Financial Action Task Force
FIC	Financial Intelligence Centre
FIU	Financial Intelligence Unit
NBFIs	Non-Banking Financial Institutions
PEPs	Politically Exposed Persons
SADC Protocol	Southern African Development Community Protocol against Corruption
STR	Suspicious Transaction Report
UNCAC	United Nations Convention against Corruption



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CHAPTER ONE

INTRODUCTION AND OVERVIEW OF STUDY

1.1 Problem statement

Financial crimes are of great global concern. They are of especial concern to emerging democracies because economic criminality hinders economic development and the efficient functioning of the public service. This invariably exacerbates the incidence of poverty. Furthermore, it reduces investor confidence, resulting in a loss of foreign direct capital injections into the economy of the affected country.

The perpetrators of these offences are well known for increasing their profits at all costs but with minimal risks. Crimes such as corruption in public institutions erode public confidence in these institutions and weaken their general efficacy. This in itself undermines the principle of good governance, which, in the case of developing countries, earns them bad reputations with donor agencies and foreign governments.

In March 2009, allegations were made of corruption in the Zambian Ministry of Health by a whistle blower. An investigation thereafter conducted by the Auditor General exposed an intricate syndicate of corruption in the health sector. The investigations revealed that no proper account could be rendered for monies in excess of US\$7.2 Million. Five per cent of this amount was money disbursed by the Global Fund to fight AIDS, Tuberculosis and Malaria.¹

1 'Zambia: Corruption Scandal Rocks ARV Programme' available at <http://www.irinnews.org/Report/92191/ZAMBIA-Corruption-scandal-rocks-ARV-programme> (accessed 25 March 2013).

In August 2009, Global Fund suspended a financial grant to Zambia to the tune of US\$137 million.² This came soon after the Netherlands and Sweden withheld millions of US dollars in health aid after uncovering evidence of embezzlement.³ These two countries are amongst the largest bilateral donors of aid to Zambia, particularly to the health sector.

In July, 2010 Zambia paid US\$0.9 million to Sweden and 970, 000 euros to the Netherlands.⁴ The Netherlands government was, however, not appeased because it was estimated that the misappropriated money could have been used to vaccinate 5.3 million children for polio or 10.7 million children for diarrhoea prevention.⁵

Investigations by the Anti-Corruption Commission (hereafter ACC) led to the arrest of Henry Kapoko Mulenga Ngosa, a former Ministry of Health Human Resource Manager, and prime suspect. On his arrest the ACC seized twelve vehicles, an executive lodge (Best Home Lodge), two houses and a building under construction in Lusaka.⁶ Among the vehicles seized was a Hummer H3, X5 BMW, two Mercedes Benz cars and two Lexus cars.⁷

Henry Kapoko and eight other employees in the same ministry from the accounts, purchasing and auditing departments were subsequently charged with the crimes of theft by a public servant, theft and money laundering. They were alleged to have intended to

2 Usher AD 'Donors lose faith in Zambian Health Ministry' (2010) 376 *The Lancet* 403 404 available at <http://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2810%2961205-6/fulltext> (accessed 25 March 2013).

3 Usher AD (note 2).

4 'Government pays back K13bn Health Donor Funds' *The Lusaka Times* 2 July 2010 available at <http://www.lusakatimes.com/2010/07/02/govt-pays-k13bn-health-donor-funds/> (accessed 25 March 2013), Usher AD (note 2).

5 Usher AD (note 2).

6 'Henry Kapoko's Court Cases Suddenly Stop Moving' *The Zambian Watch Dog* 30 May 2012 available at <http://www.zambianwatchdog.com/?p=35895&cpage=1> (accessed 25 March 2013).

7 *The Zambian Watch Dog* (note 6).

defraud the Ministry of Health of K1.9 billion (K stands for Kwacha, with one US\$ being equivalent to K5, 443) ⁸ by falsely pretending to have ordered and shipped 50,000 mother-baby kits, when in fact they had not.⁹ This amount is approximately US\$349, 072.

On the 31 of October 2012, Henry Kapoko was acquitted.¹⁰ He has also been acquitted in other cases involving colossal sums of money.¹¹ This account presents an ideal reflection of the impact of money laundering and corruption.

The difficulty lies in bringing the criminals to book. This is because economic crimes, especially corruption, are perpetrated in secret. Money launderers also use highly sophisticated schemes to disguise the proceeds of crime. Securing a conviction is, therefore, a huge challenge, as shown above. The main problem for the prosecution is to prove beyond reasonable doubt that the accused person's assets have a criminal provenance.

This paper will focus mainly on the forfeiture of instrumentalities or proceeds of crime as a means to combat economic criminality. The Forfeiture of Proceeds of Crime Act¹² provides for confiscation, conviction and non-conviction based forfeiture. The provisions governing these modes of asset recovery will be discussed against the backdrop of the procedural

8 Zambia National Commercial Bank available at <http://www.zanaco.co.zm/> (accessed 9 April 2013).

9 'Study Judgment before Appealing Kapoko's Acquittal, TIZ Urges ACC' *The Post Newspaper* 5 November 2012 available at http://www.postzambia.com/post-read_article.php?articleId=29513 (accessed 25 March 2013).

10 'Kapoko Acquitted: Prosecution Failed to Prove Allegations Beyond Reasonable Doubt say Magistrate' *The Lusaka Times* 1 November 2012 available at http://www.lusakatimes.com/2012/11/01/kapoko_acquitted_prosecution_failed_prove_allegations_reasonable_doubt_magistrate/ (accessed 25 March 2013).

11 'Fast Track: Kapoko Acquitted in another case' *The Zambian Watchdog* 7 December 2012 available at <http://www.zambianwatchdog.com/?p=46610> (accessed 25 March 2013).

12 No. 19 of 2010.

guarantees contained in the Constitution. Lack of constitutional validity impugns the law and makes its vulnerable to being overruled by the Court.

In order to ensure that there are domestic and global benefits from asset recovery, a comprehensive legal and administrative framework is required. Whereas this paper will focus on the constitutional validity of Zambia's asset recovery regulations, comparable laws in a few other common law jurisdictions will help to inform the contentions made in this study.

Zambia ratified the United Nations Convention against Corruption (hereafter UNCAC) on 7 December 2007. Since then the country has enacted a number of related laws, namely, the Prohibition and Prevention of Money Laundering Act,¹³ Anti-Corruption Act¹⁴, Forfeiture of Proceeds of Crime Act¹⁵ and Financial Intelligence Centre Act.¹⁶ The Government of Zambia has, in addition, established the Anti-money Laundering Investigations Unit under the Drug Enforcement Commission, and the Asset Recovery Unit under the Anti-Corruption Commission. The former initially dealt with money laundering aligned with drug-related offences, but after the enactment of the Anti-Money Laundering Act, the Asset Recovery Unit was given an extended mandate to investigate and prosecute money laundering offences. This unit is thus ideally placed to recover the proceeds of all crime. The Unit under the Anti-Corruption Commission is restricted to recovering proceeds of corrupt activities.

The question, then, is this: Is Zambia legally well-equipped to prevent and combat economic crime through asset recovery in order to foster domestic and international prosperity? But

13 No. 14 of 2001.

14 No. 3 of 2012.

15 No. 19 of 2010.

16 No. 46 of 2010.

this question cannot be dealt with in isolation, for it is crucially tied to the following questions;

- Does Zambian legislation adequately provide for asset stripping preventive measures?
- Do law enforcement agencies have the legal authority, investigative powers and administrative facilities to implement asset recovery laws?
- Is the appropriate law constitutional?

The answers to these questions will determine whether the combined Zambian anti-economic crime laws serve the purpose for which they were enacted.

1.2 Answer

This paper aspires to provide a watertight means by which the impact of economic crime is averted or ameliorated. It does not place emphasis on one economic crime, although illustrations will be drawn from corruption and money laundering cases.

These economic crimes transcend geographical boundaries, hence the global concern with their increasing incidence. Consequently, there has been an insistent outcry that the profits gained from such crimes be recovered in order to hit the criminals hard and to deter others from engaging in economic criminality. The attachment of these ill-gotten gains could help to develop the country economically. The most effective weapon that the State can deploy to punish economic delinquency is by way of assets recovery, which may be either conviction or non-conviction based.

Conviction-based forfeiture is an enforcement tool that has been used for a long time. The United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic

Substances¹⁷ (hereafter Vienna Convention) is one of the international instruments which provides for the confiscation of instrumentalities and proceeds of crime, particularly drug-related offences. Zambia enacted the Dangerous Drugs (Forfeiture of Property) Act¹⁸ which was later repealed by the Narcotic Drugs and Psychotropic Substances Act.¹⁹ This Act provides for the automatic forfeiture of any property seized by the Drug Enforcement Commission (hereafter DEC) upon the expiration of 6 months if no claim is made for the property or no proceedings are instituted against it.²⁰ It further provides for: a mandatory conviction-based forfeiture of instrumentalities irrespective of the death of the convict;²¹ conviction based forfeiture of tainted property isolated by the Director of Public Prosecutions (hereafter DPP)²² against the convict or his estate if a forfeiture notice issued prior to his death;²³ and forfeiture of substitute property in instances where the actual tainted property is abroad, inextricably intermingled with untainted assets, or diminished in value.²⁴ The latter form of forfeiture equally extends to the estate of the deceased convicted person, and failure to avail the Court with substitute property is an offence punishable by a maximum term of 7 years' imprisonment.²⁵ The Act further makes provision for mutual legal assistance with reference to the Mutual Legal Assistance in Criminal Matters Act, 1993.²⁶

17 United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), entered into force on 11 November, 1990, in accordance with Article 29(1).

18 No.7 of 1989.

19 Chapter 96 of the Laws of Zambia.

20 Section 33 of Narcotic Drugs and Psychotropic Substances Act.

21 Section 34 (note 20).

22 Section 35 (note 20).

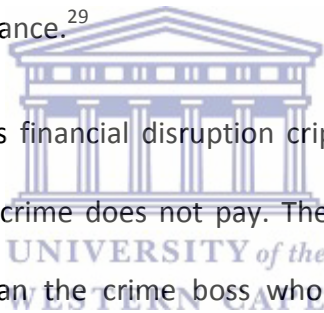
23 Section 40 (note 20).

24 Section 38 (note 20).

25 Section 38 (2) (note 20).

26 Section 47 (note 20).

There are other international conventions that contain forfeiture provisions, the most prominent of which is UNCAC.²⁷ This Convention leads the way by expressly providing for non-conviction based forfeiture.²⁸ The general overview of UNCAC does not limit its applicability by title. It recognises that typical forms of corruption intermingle with other crimes such as money-laundering and the obstruction of justice. From this angle, one may discern the inter-relationship of ordinary crime, corruption and organised crime. This is basically crime in general and its transnational nature. It is thus imperative that UNCAC make provision for prevention, criminalisation and international co-operation. It places an obligation on member states to co-operate on criminal matters and to provide each other with financial and technical assistance.²⁹



For large criminal syndicates this financial disruption cripples the criminal enterprise and sends a deterring message that crime does not pay. The money generated from criminal activities is more vulnerable than the crime boss who usually remains covertly in the background, leaving the actual carrying out of the crime to his henchmen. This is where non-conviction based asset forfeiture may play a major role in demolishing criminal organisations, for asset recovery can take place even where the culprit is deceased, has fled, or is clothed with immunity because it is an action *in rem*, which means a legal action brought against the asset itself.

27 The United Nations Convention against Corruption (2005).

28 See Ch V art 54 1 (c) of UNCAC.

29 Article 54 (1) (c) of UNCAC.

1.3 Literature survey

There is a dearth of literature dealing with Zambia's civil forfeiture laws. This paper attempts to fill this gap. The need to start growing a body of literature on this topic arises out of the fact that civil forfeiture in Zambia has only just been legislated into effect. In practice, there is, therefore, still a considerable degree of misunderstanding amongst key functionaries within the administration of justice as to when civil forfeiture comes into play, how it works, and what its overall purpose is. At the same time, the paper will point out some of the flaws in the laws, based on how civil forfeiture is implemented elsewhere. The idea is to persuade the justice authorities to address such flaws early, thus avoiding the embarrassing situation where the courts hand down judgments against the justice authorities and eventually declare the law unconstitutional. It is submitted that this paper will also help to guide other African common law countries which are contemplating implementing similar legislation and are bent on coming to grips with economic crimes in an effective way. It is the author's intention to use the outcomes of this study as a basis for writing an article in an influential journal with the hope that it would contribute towards effecting the much-needed changes in the law.

1.4 Research Methodology

This is a pure desk-top study. The paper will draw on both primary and secondary sources such as treaties, laws, cases, reports, books, chapters in books, law journal articles, as well as media reports and electronic sources.

1.5 Overview of chapters

This paper is comprised of five chapters, including this one. The second chapter will analyse the nature of economic criminality in Zambia and its effects on the economic livelihoods of ordinary people and the national economy as a whole. It will also show how criminal prosecution of economic crime, especially insofar as it involves the political elite, has eroded public confidence in the justice institutions.

The third chapter will examine Zambia's asset recovery regime from an international perspective. Unification of laws and strengthened mutual legal assistance are crucial in the eradication of economic criminality. The chapter will, therefore, show whether or not Zambia has enacted its laws in compliance with international standards. It will also reveal the legal capacity of Zambia to effectively participate in the global fight against the scourge of economic crimes.



The objective of the fourth chapter will be to provide some practical guidance on the basic principles that need to be considered when interpreting the provisions of Zambia's asset recovery laws in the light of the Constitution. This discussion will focus mainly on South Africa's asset recovery legislation; with due regard being given to similar laws in other common law-based countries.

Chapter five will sum up the study and suggest a few recommendations.

CHAPTER TWO

THE INCIDENCE OF ECONOMIC CRIME IN ZAMBIA AND ITS IMPACT ON THE ECONOMY AND THE PUBLIC IMAGE OF THE LAW

2.1 Introduction

It is generally suggested that all crime creates an economic cost. According to the Financial Action Task Force, thriving money laundering activities act as an incentive for corruption and crime.³⁰ This in turn injures the integrity of the whole society and erodes democracy and the rule of law.³¹ The argument that developing countries need not be selective of investment opportunities is thus turned on its head. Disregard for the need to implement countermeasures only encourages the entrenchment of economic crime, thereby creating, *inter alia*, a dampening effect on foreign direct investment and impeding the creation of an attractive business environment. Crime prevention is thus perceived to be a prerequisite for sustainable economic development.³²

In Zambia economic crime primarily manifests in motor vehicle theft, armed robbery, including robbery of cash in transit, tax evasion, commercial fraud, drug trafficking, copper theft, corruption and money laundering. The list is endless.

Economic crime is perpetrated *via* activities in a milieu of lawful ones. This entails that criminal enterprises will compete with, infiltrate, and weaken or destabilise lawful economic endeavours. The predicament lies in the fact that such crime is not exclusive to organised

30 FATF 'F.A.Q.' available at <http://www.fatf-gafi.org/pages/faq/moneylaundering/> (accessed 10 June 2013).

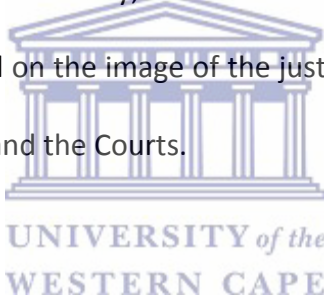
31 FATF 'F.A.Q.' (note 30).

32 FATF 'F.A.Q.'(note 30).

criminal syndicates but can also be committed by legitimately established corporate enterprises.

The effect of crime on the economy has been a major subject of contemporary discourse. Most of the literature on the subject is unsubstantiated by scientific country specific research and is focused on developed jurisdictions. This paper relies quite heavily on these literal effects of crime on the economy and attempts to relate them to Zambia *via* illustrations.

This chapter will now proceed to outline the effects of crime on the economy, its effect on society with a trickle down to the economy, and thereafter it will delve into the impact that traditional prosecutions have had on the image of the justice institutions such as the police, National Prosecutions Authority and the Courts.



2.2 Economic effects of crime

2.2.1 Impedes economic development through privatisation

Crimes such as money laundering and official corruption provide an obstacle to economic success sought through privatisation. These criminal activities tend to overtake legitimate bids for State-owned enterprises, thereby depriving the country of corporate entities that would contribute positively to the economy.³³

33 Schott P.A. *Reference Guide to Anti-Money Laundering and Combating the Financing Terrorism* 2 ed (2006) 11-7 , McDowell J 'The Consequences of Money Laundering and Financial Crime, Economic Perspectives' *US Department of State* May 2001 available at http://www.apgml.org/issues/docs/30/Negative%20Effects%20of%20ML_Economic%20Perspectives%20May%202001.pdf (accessed 10 June 2013).

Criminal entities which permeate the economy resort to non-conventional business considerations and their performance or existence is ensured by different incentives.³⁴ They can adjust production and pricing on a whim in order to evade police detection.³⁵ Such enterprises can also change their physical location due to legal reforms less friendly to their unscrupulous modes of doing business.³⁶ The consequence of this blatant lack of business acumen is that a number of economic sectors will perform against false economic indicators thereby introducing a speculative and non-competitive approach to conducting business in these sectors.³⁷ This will invariably and significantly extend the readjustment process for a newly privatised economy.³⁸

When laws that allow for privatisation of parts of the economy are enacted, local banks are usually constrained in meeting credit needs.³⁹ This is largely attributable to their predisposition to financing non-profit making state owned enterprises.⁴⁰ Invariably they cut back on credit provision and increase interest rates.⁴¹ Firms that are about to be liquidated resort to financial services offered by money launderers, who are primarily concerned with integrating their tainted money into the legitimate formal sector.⁴² This option is more attractive to such firms because of the lower interest rates, deposit rates and extended repayment periods. The banking sector and its reforms are consequently negatively

34 Unger B *et al* *The Amounts and the Effects of Money Laundering* (2006) 88.

35 Unger *et al* (note 34).

36 Unger *et al* (note 34).

37 Unger *et al* (note 34).

38 Unger *et al* (note 34).

39 Unger *et al* (note 34).

40 Unger *et al* (note 34).

41 Unger *et al* (note 34).

42 Unger *et al* (note 34) 88-89.

impacted, which means that it takes longer for them to adjust during the period of privatisation.⁴³

In October 1991 Zambia ushered in to office its second republican President, Fredrick Jacob Titus Chiluba. In pursuance of his vision to relieve Zambia from the grasp of an economic crunch, the government conceived several policies and implemented structural reforms, liberalised interest and exchange rates, shifted the tariff structure, removed quantitative restrictions on trade, and privatised most stated-owned enterprises.⁴⁴ It was, however, perplexing that despite these valiant economic strides, Zambia's economy remained lacklustre and the socio-economic conditions regressed even further.

The period ranging from 1991 to 2002 saw Zambia's GDP decline at an average yearly rate of 1.5 per cent.⁴⁵ Zambia's poor economic performance was accurately reflected in the increase in poverty from 70 per cent in the early 1990s to 73 per cent in 1998.⁴⁶ Other social indicators such as the incidence of mortality of children under five, life expectancy, primary school enrolment and adult literacy deteriorated correspondingly.⁴⁷

In addition to the haphazard implementation of these reforms, there were dismal forecasts made about weak governance and lack of accountability during this time, particularly during the second half of the 1990s.⁴⁸ At this time Zambia's performance in the areas of governance, corruption and government effectiveness was rated less than average for Sub-

43 Unger et al (note 34) 88-89.

44 World Bank 'Zambia-Country Economic Memorandum- Policies for Growth and Diversification' available at <http://worldbank.org/en/country/zambia/.../all?...exact=Economic> (accessed 10 June 2013).

45 World Bank (note 44).

46 World Bank (note 44).

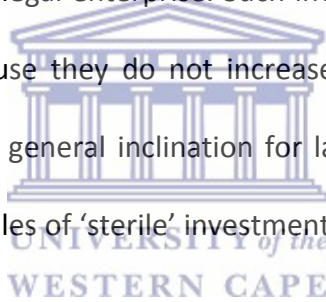
47 World Bank (note 44).

48 World Bank (note 44).

Saharan African countries.⁴⁹ It was a widely held public perception that corruption was at its worst and that privatisation was used by political figures and public officials as a conduit to personal wealth accumulation.⁵⁰ This perception was later confirmed to have been justified.

2.2.2 Preference for sterile assets and lopsided competitive advantage over legitimate businesses

The ultimate aim of the players in the criminal underworld is to conceal the proceeds of their crimes. This ensures that all incriminating links are obliterated. In order to achieve this, ill-gotten money is commonly converted into assets, used to set up shell companies or pumped into an already existing legal enterprise. Such investments are commonly referred to as 'sterile' investments because they do not increase the general productivity of the economy.⁵¹ In Zambia there is a general inclination for launderers to invest in real estate and luxury vehicles. Other examples of 'sterile' investments include buying art, antiques and jewellery.⁵²



Due to availability of funds and their primary goal, money launderers will purchase assets at an inflated price. This will place an artificially driven value on such assets and make them

49 World Bank (note 44).

50 World Bank (note 44).

51 Bartlett BL 'The Negative Effects of Money Laundering on Economic Development' available at <http://www.u4.no/...negative-effects-of-money-laundering-on-economic-development> (accessed 10 June 2013), Unger *et al* (note 34) 85, Yikona S *et al Ill-gotten Money and the Economy: Experiences from Malawi and Namibia* (2011) 13.

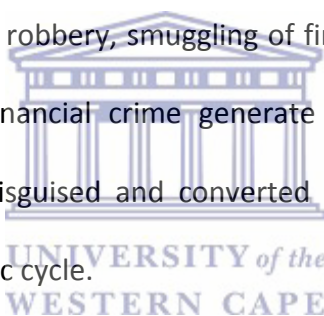
52 Yikona *et al* (note 51) 13, Unger *et al* (note 5) 85.85, Walker J 'The Extent of Money Laundering in and Through Australia in 2004' available at <http://www.criminologyresearchcouncil.gov.au/reports/200304-33.pdf> (accessed 10 June 2013).

unaffordable to legitimate buyers.⁵³ As Bartlett put it succinctly, the effect is the ‘crowding out of productive investments to less productive uses’.⁵⁴

These legal enterprises run by launderers are basically loss-making ventures held afloat by the large amounts of tainted money used to subsidise them.⁵⁵ This will result in a speculative and non-competitive economic sector as stated above and invariably ‘bad money drives out the good money.’⁵⁶ in addition, it creates optimal conditions for tax evasion, with the national economy being deprived of much needed revenue.⁵⁷

2.2.3 Risk of loss of solvability, liquidity and good repute for the financial sector

Criminal activities such as armed robbery, smuggling of firearms, trafficking in narcotic and psychotropic substances, and financial crime generate substantial wealth. This tainted money is worthless until it is disguised and converted into funds that are available for investment in the lawful economic cycle.



Although money laundering *per se* does not necessarily connote the use of formal financial institutions, the so-called *Money Laundering Typologies* that the Financial Action Task Force issues now and again, designate banks, equity markets, and non-banking financial institutions (NBFIs, for example, *Bureaux de changes* and insurance companies) as the most preferred by money launderers, especially to place their money before layering it and

53 Unger *et al* (note 34) 85.

54 Bartlett (note 51) 18.

55 Van Duyne PC and Soudijn MRJ ‘Crime Money in the Financial System. What We Fear and What We Don’t Know’ available at <http://www.petrusvandyne.nl/files/Hoofdstuk%20Van%20duyne%20-%20soudijn.pdf> (accessed 10 June 2013), MacDowell (note 34), Unger *et al* (note 34) 86, Schott (note 33)11-6.

56 Yikona *et al* (note 51) 14, Unger *et al* (note 34) 85.

57 Wright A. *Organised Crime* (2006) 70, Schott (note 33) 11-6.

integrating it into the legal economy.⁵⁸ Although the effects of money laundering will be similar in all institutions comprising the financial sector, this discussion will, however, be inclined towards the banking sector.

Banks are ideal commercial platforms for launderers to initiate their 'cleaning' process. The launderer's funds might appeal to banks eager to receive investments, but the downside of it is that, as stated above, criminals lack business acumen and are, as such, unpredictable in their conduct.

Banks that rely on investments derived from crime thereby find themselves not knowing how to go about managing these assets, for criminals could withdraw these investments suddenly to evade detection. This can have a hugely detrimental impact on the bank's liquidity. What is more, by holding money emanating from crime, banks make themselves vulnerable to criminal investigations that injure their reputation in view of its existing and potential customers. Adverse publication of a bank's administration, substantiated or otherwise, will ultimately cast a dark shadow on its integrity and result in the loss of public confidence.⁵⁹ The effects manifest through borrowers, depositors and investors ceasing to do business with such an institution, consequently reducing profitable loans with a correlative increase in risk for its overall loan portfolio and loss of a cheap source of funds through withdrawals by depositors.⁶⁰

58 Bartlett (note 51) 4, Schott (note 33) II-5.

59 Wright (note 57) 68, Schott (note 33) II-5, Yikona et al (note 51) 12-13.

60 Basel Committee on Bank Supervision 'Customer Due Diligence for Banks' available at <http://www.bis.org/publ/bcbs85.pdf> (accessed 15 June 2013), PA Schott (note 33)II-5.

In addition, the bank is exposed to legal risks such as law suits, unfavourable judgments, unenforceable contracts, asset seizures and freezes, investigation costs, fines and penalties resulting in increased expenses for the bank or even closure.⁶¹

There is also what is referred to as concentration risk.⁶² This occurs when the bank has loan or credit over exposure to one borrower. This is of much concern in cases of related counter-parties or connected borrowers with a single source of income or assets for repayment.⁶³ These loans can become bad loans where contracts are unenforceable or made with fictitious persons.⁶⁴ Such incidents may pose the risk of a systemic calamity and fiscal flux in the financial sector due to its integrated and interrelated nature.⁶⁵

The Zambian financial sector's liberalisation policies of the early 1990s which gave banks *carte blanche* in determining and formulating their lending policies, paved the way for the emergence of new players in the banking sector.⁶⁶ This positive move was, however, not complemented by improved standards of risk management practices by banks or the revision of the Bank of Zambia supervisory procedures.⁶⁷ The catastrophic response by the emerging banking sector was risky lending to entice customers, lower revenue from foreign exchange operations, lower treasury bills yield, periodical shortages of liquidity and limitations in raising capital. These effects, coupled with the added competition for small banks from the non-banking financial institutions, resulted in the fall of some banks.⁶⁸

61 Schott (note 33) II-5.

62 Schott (note 33) II-6.

63 Basel Committee on Bank Supervision (note 60), Schott (note 33) II-5.

64 Schott (note 33) II-5.

65 Unger *et al* (note 34) 86, Schott (note 33) II-6.

66 World Bank (note 44).

67 World Bank (note 44).

68 World Bank (note 44).

Between 1994 and 1998 nine commercial banks, including Meridian Bank, were closed at the cost of 7.6% of the average annual 1996-2000 Gross Domestic Product for Zambia.⁶⁹ This cost was substantially shouldered by the Government and the Bank of Zambia which, in turn, led to a strain in monetary control and fiscal deficits.⁷⁰

The closure of the United Bank of Zambia on the 4 June 2001 exposed the existence of money laundering in the financial sector. The bank was being probed for money laundering, tax evasion and corruption. The suspension of said bank's licence and its possession was not due to fiscal unsoundness, but because of the unsafe and unsound banking practices resorted to by the bank's management.⁷¹ The action taken by the Bank of Zambia was in order to protect the interests of the depositors and safeguard the integrity of the financial sector.⁷²



Investigations led to the arrest of four top officials of the bank: Benedict Ash, Monoj Gupta, Rajesh Kaushik and Pandialika Shenoy. They were alleged to have been involved in money laundering, forgery and failure to comply with the Bank of Zambia Directives.⁷³

These illegal transactions were facilitated through two fictitious accounts opened using fraudulently obtained documents in the names Lesley Mulenga and Justine Sakala, respectively.⁷⁴ These accounts were used to externalise money ranging from US\$ 30 000 to

69 World Bank (note 44).

70 World Bank (note 44).

71 Pan African News Agency 'Authorities shut up Bank linked to Money Laundering' <http://www.panapress.com/Authorities-shut-up-bank-linked-to-money-laundering--13-463742-17-1-ang1-index.html> (accessed 22 July 2013).

72 Pan African News Agency (note 71).

73 *Times of Zambia* '4 Ex-Bank Chiefs Guilty of Money Laundering' available at <http://allafrica.com/stories/200306050476.html> (accessed 22 July 2013).

74 *Times of Zambia* (note 73).

114, 000 to Pearstrand, a New York based company, during the period 1 January 1999 to 29 February 2001.

Shenoy was additionally charged with failing to comply with the Bank of Zambia Directives between 19 November 1997 and 27 February 2001 when he directly entered into a lease agreement with Trais Investment Limited to pay rentals of US\$ 5, 000 per month, totalling up to US\$119, 000 on an empty building not used by the United Bank of Zambia and which was owned by Shenoy himself without the approval of the Bank of Zambia.⁷⁵

They were subsequently found guilty and convicted on four counts of money laundering and forty eight counts of forgery involving US\$ 1.7 million. Shenoy was further found guilty and convicted of failing to comply with the Bank of Zambia Directives. All the accused were sentenced to one year's imprisonment with hard labour and a fine of 15 million Kwacha (approximately US\$2 280. 00)⁷⁶ on each of the money laundering charges. Shenoy was fined an additional 5 million Kwacha (approximately US\$ 962. 00) for flouting the Bank of Zambia Directives.⁷⁷ In passing sentence, Magistrate Mwamba Chanda stated that externalisation of funds contributed to weakening the economy. On appeal to the High Court, Kaushik and Gupta were acquitted while the conviction and sentence of the other two were upheld.⁷⁸

The case above not only illustrates how crime can affect the financial sector, but it also buttresses the argument that it impedes economic development through liberalisation.

75 *The Post Newspaper* 'Court Jails 4 Ex-Bank Managers available at <http://allafrica.com/stories/200306160238.html> (accessed 22 July 2013).

76 Zambia National Commercial Bank available at <http://www.zanaco.co.zm/> (accessed 22 July 2013).

77 *The Post Newspaper* (note 75).

78 *Times of Zambia* 'Lusaka High Court Upholds Bank Directors Jail Terms' available at <http://allafrica.com/stories/200501240505.html> (accessed 22 July 2013).

There is no empirical correlation between financial sector repute and economic development for Zambia at present, but most of the research in this field indicates that financial sector integrity is not a mere matter of domestic concern but also pertinent for attracting foreign direct investment.⁷⁹

2.2.4 Illicit capital flight and loss of government revenue

Capital flight has been identified as a threat to economic development in Africa. It is estimated that capital flight is four times more than what Africa receives in foreign aid, which is approximately US\$148 billion.⁸⁰ This paper will focus more particularly on illicit financial flows, which are a form of capital flight.

These illicit financial flows deprive countries of revenue coming from the untaxed or under-taxed profits from the sale of natural resources by transnational corporations. The natural consequence of this is that the taxpayer has to shoulder the burden by paying more tax or sharing the burden of repaying the money borrowed from abroad by the State.⁸¹ More than this, the taxpayer also has to help bear the cost of criminal investigations into cases involving illegal capital flight. This could be obviated if innovative measures were to be formulated to prevent illicit capital flight and recover such funds.⁸²

The Global Financial Integrity Report of December 2011 shows that between 2001-2010 Zambia lost US\$ 8.8 billion to illicit financial flows, of which US\$ 4.9 billion is attributable to

79 Bartlett (note 51) 8, Yikona *et al* (note 51) 13.

80 Institute For Security Studies 'Copper and Capital Flight: How Corporate Debt becomes Public Debt' available at <http://www.issafrica.org/iss-today/copper-and-capital-flight-how-corporate-debt-becomes-public-debt> (accessed 31 July 2013).

81 Unger *et al* (note 34) 87, MacDowell (note 34), Bartlett (note 51) 24, ISS (note 80)

82 ISS (note 80).'

trade misinvoicing.⁸³ This is a form of trade fraud common amongst dubious commercial importers and exporters.⁸⁴ The extent of loss reflected by these estimates does not include the loss suffered due to the illustration below.

A case that exposes how intricately illicit capital flight schemes are conducted is that of Mopani Copper Mines, one of the largest mining corporations in Zambia which controls vast copper and cobalt reserves. It is owned by Carlisa Investments Corporation, First Quantum Minerals, and Zambia Consolidated Copper mines in the following percentages; 73.1%, 16.9% and 10%, respectively.⁸⁵

After noticing some irregularities in Mopani Copper Mine's tax submissions of the 2008 fiscal year, the Zambia Revenue Authority contracted Grant Thornton Zambia and Econ Poyry, a Norwegian Engineering and Consulting firm, to conduct a Pilot Audit of the mine.⁸⁶ Despite its successful extraction of huge quantities of metal, and even with the increase in the metal prices on the London Metal Exchange, Mopani Copper Mines declared it had not made a profit between 2005 and 2007.⁸⁷ The reasons unfolded when the audit report

83 Trehan J. *Mechanics and Typologies of Money Laundering: Crime and Money Laundering: The Indian Perspective* (2004) 114, Global Financial Integrity 'Zambia Lost \$8.8 Billion in Illicit Outflows 2001-2010, According to Forthcoming Report' available at <http://www.gfintegrity.org/content/view/590/70/> (accessed 31 July 2013). In 2011 Zambia's Gross Domestic Product was US\$19.2 billion, its per-capita income was US\$1,413 and the revenue collected by Zambia Revenue authority was US\$4.3 billion. Such outrageous amounts in illicit capital flight could have dire consequences for the ordinary taxpayer and ultimately cripple an economy of this size.

84 Financial Global Coalition 'What Billions in Illicit Capital Flight Means for the People of Zambia' available at <http://www.financialtransparency.org/2012/12/13/what-billions-in-illicit-and-licit-capital-flight-means-for-the-people-of-zambia/> (accessed 31 July 2013).

85 ISS (note 80).

86 *Lusaka Times* 'Mopani Copper Mine Accountants under Investigation for 'Flawed' Tax Submissions' available at <http://www.lusakatimes.com/2011/02/28/mopani-copper-accountants-investigation-flawed-tax-submission/> (accessed 31 July 2013); ISS (note 54).

87 ISS (note 80).

revealed that despite other ownership interests, 90% of Mopani Copper Mines is controlled by Glencore International and First Quantum Minerals Limited.⁸⁸

Glencore, at this time, controlled 60% and 50% of the global zinc and copper markets, respectively.⁸⁹ It was thus able to influence the prices of these goods.⁹⁰ It also had complete authority over the copper extractive process at Mopani Copper Mines, literally from production to sale.⁹¹ This ability to influence the global market and vertical ownership style clearly poses a huge constraint on the ability of Zambia to generate revenue from such mining operations.⁹²

In view of an existing 'Copper Marketing and Off-take Agreement' Glencore is the sole buyer of copper from Mopani Copper mines, thereby creating a non-competitive environment which completely derogates from the conditions normally applicable to a third party buyer.⁹³ Such sales do not sufficiently cover the production costs because the price is always less than the global market prices set by the London Metal Exchange.⁹⁴ In a transaction that occurred between 2006-2008, copper was sold to Glencore at 25% below the global market price.⁹⁵ There was evidence that the price cuts rose stealthily from 2000-2007.⁹⁶

88 ISS (note 80).

89 ISS (note 80).

90 *The Post Online* Mopani pilot audit reveals tax payment irregularities' available at http://www.postzambia.com/post-read_article.php?articleId=18078 (accessed 31 July 2013), ISS (note 80).

91 ISS (note 80), *The Post Online* (note 90).

92 ISS (note 80).

93 *The Post Online* (note 90), ISS (note 80).

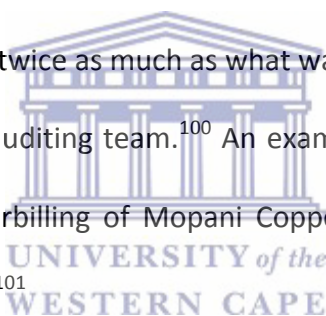
94 ISS (note 80).

95 *Lusaka Times* (note 86).

96 ISS (note 80).

In order to ensure that Glencore continues to buy Mopani's copper below market value and for Mopani's tax submissions to declare no profit, the two corporations have a 'hedging' scheme⁹⁷ in which their contract is confined at the least point of the fluctuating copper prices.⁹⁸ Mopani will not be taxed by Zambia Revenue Authority if it does not declare a profit and Glencore will sell the copper at market value to third parties thereby generating massive profits beyond the reach of the Zambian taxman, a true symbiotic relationship.

As a means to hold on to the non-profitability label, Mopani's production costs more than doubled in a space of two years and were comparatively higher than those of other local mines. The costs rose from US\$35 762 million to US\$80 491 million within a space of two years.⁹⁹ These costs were almost twice as much as what was seen to be the average industry growth in such a period by the auditing team.¹⁰⁰ An example of the means in which these costs were inflated was the overbilling of Mopani Copper Mines for freight by Glencore between Zambia and Rotterdam.¹⁰¹



These distasteful revelations caused national and international outrage. Consequently, the European Investment Bank suspended any further loans to Glencore and its subsidiaries on 31 May 2011, pending independent investigations into the allegations.¹⁰² The EIB is adamant

97 This is essentially a risk management measure resorted to for the purpose of restricting or offsetting the possibility of incurring a loss due to fluctuations in the price of commodities, currencies or securities.

98 ISS (note 80).

99 ISS (note 80).

100 ISS (note 80).

101 ISS (note 80).

102 Counter Balance: Challenging the European Investment Bank 'Mopani Copper Mine, Zambia- How European Development Money has Fed a Mining Scandal' available at <http://www.counterbalance-ib.org/wp-content/uploads/2011/03/Mopani-Report-English-Web.pdf> (accessed 31 July 2013), Counter Balance: Challenging the European Investment Bank 'EIB Bans after pressure from CSO's , the Press and

to release its findings but has maintained that its decision to suspend all loans to Glencore still stands.¹⁰³ This is a boggling turn of events that points to Glencore's liability.

In response to the forgoing and in an effort to enhance financial transparency, accountability and policy making, Zambia has enacted the Bank of Zambia (Amendment) Act¹⁰⁴ and The Bank of Zambia (Monitoring the Balance of Payments) Regulations 2013.¹⁰⁵ These legislative instruments are meant to ensure the use of the banking system in transnational financial transactions such as trade and external borrowing.

One could only hope that despite the lenient corporate tax regime,¹⁰⁶ this law will suppress illicit capital flight through tax evasion and other crimes.

2.2.5 Loss of foreign direct investment

Damage caused to the integrity of a country's financial and commercial sector by crime can have dire effects on its economic development.¹⁰⁷ It may adversely impact on the country's

the European Parliament' available at <http://www.counterbalance-eib.org/?p=1305> (accessed 31 July 2013), Mail Online 'European Investment Bank is Taxed by Secret Report into Glencore' available at <http://www.thisismoney.co.uk/money/markets/article-2356243/European-Investment-Bank-taxed-secret-report-Glencore.html>(accessed 31 July 2013). In view of its aspirations to encourage the development of the African region, EIB lent Mopani Copper Mines Euro 48 million in February 2005 for the purpose of renovating its smelter at Mufulira. It was perceived that this would ultimately reduce pollution, safeguard jobs and alleviate poverty through economic growth.

103 Mail Online (note 102).

104 No. 1 of 2013.

105 Statutory Instrument No. 55 of 2013.

106 ISS (note 80)- Despite Zambia's efforts to promote the extractive industries as its primary economic mainstay, its lenient tax regime negates its aspiration of economic growth. It is indisputable that Zambia did not benefit during the rise of global copper prices. In 2006 it received mineral royalties slightly higher than US\$20 million against a US\$3.3 billion turnover. It is said that at 0.6%, Zambia had the lowest corporate tax percentage in the world. This position will not in the least change in the light of the new tax structure of 1 April 2007 as it is predicted that mining companies will pay less than US\$165 million while citizens are set to contribute almost US\$462 million in taxes. This too is a drawn out symptom of how crime affects privatisation efforts by unconscionable contracts.

107 Walker (note 52), Unger *et al* (note 34) 90.

reputation and undermine investor confidence.¹⁰⁸ This is even more pernicious to economic development when a country is placed on the Financial Action Task Force's list of "non-cooperating countries and territories" because of non-compliance with the standards it sets for countries to combat money laundering and the financing of terrorism.¹⁰⁹ In addition, individual FATF member countries could also enforce counter-measures against a country that does not actively endeavour to remedy the deficiencies.¹¹⁰

Crime also affects financial aid allocations. Chapter One has shown how the reputation of government institutions can have a negative impact on the receipt of foreign aid – a life saver for many a developing country.

2.3 Effects of crime on society and the economy

Studies reveal that Africa has the highest incidence of crime on the globe and it is suggested that crime exacerbates poverty.¹¹¹ African societies are disproportionately affected by crime because of their lack of adequate social and welfare services. The death of a sole bread winner will thus have devastating effects on those reliant on him/her. Victims of crime or their kin suffer not only psychologically but also financially.

Crime lowers the quality of life which, in turn, causes skilled people to emigrate to seek greener pastures. It is predicted that brain drain will have a disastrous effect on developing

108 Unger *et al* (note 34) 87, Walker (note 52).

109 FATF 'High Risk and Non-Cooperative Jurisdictions' available at <http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/documents/public-statement-june-2013.html> (accessed 14 August, 2013), Schott (note 33) II-4, Unger *et al* (note 34) 90.

110 Schott (note 33) II-4, FATF (note 84).

111 WHO 'The Economic Dimensions of Interpersonal Crime' available at <http://whqlibdoc.who.int/publications/2004/9241591609.pdf> (accessed 17 August 2013), United Nations Office on Drugs and Crime 'Crime and Development in Africa' available at www.unodc.org/pdf/African_report.pdf (accessed 10 June 2013).

countries in the 21st century, especially when it comes to the need for modern agricultural and industrial production.¹¹² In the medical field alone, at the turn of this century, Zambia lost over 1200 medical practitioners within three years. The brain drain results in the loss of huge capital investments that were made to educate the people who leave the country.¹¹³ As a result of the loss of skilled personnel, the government is forced to invest in expatriate experts in the various fields, which also places a strain on government revenue, causing other development projects to be short-changed.

The people left behind do not strive to develop themselves because they live in peril of crime and constant victimisation. People in such vulnerable communities do not endeavour to open up their own businesses or buy assets for fear that their capital investment will be pillaged. This has a detrimental effect on economic development as it has implications for revenue collection. Not only is this effect felt by local potential investors, it extends to foreign direct investment. Crime drives investment away because it inflates the cost of doing business. This is particularly so in cases of corruption, the perceived prime cause of all that ails Africa. In 2005 someone who sought to be contracted by the Government to do a job, would be required to pay a bribe that was 3.7% of the value of the contract itself.¹¹⁴

Additionally, crime hinders access to employment and education opportunities.¹¹⁵ A World Bank survey of a poor Zambian community revealed that crime was regarded by the

112 UNODC (note 111).

113 WHO 'World Health Organisation Country Cooperation Strategy: Zambia 2002-2005' available at http://www.afro.who.int/index.php?option=com_docman&ask=do_download&gid=1442 (accessed 17 August 2013), UNODC (note 111).

114 UNODC (note 111).

115 UNODC (note 111).

community as the second most pressing concern after water supply.¹¹⁶ Some 93% of the women felt unsafe because of crime. The high incidence of crime caused teachers to stop reporting for work.¹¹⁷ As a consequence of regular looting and vandalism, evening classes were terminated because the electrical fixtures had been removed from the classrooms.¹¹⁸ In a concerted effort, parents had to raise funds themselves to fence the schools.¹¹⁹

Tourism is inherently a social-cultural venture.¹²⁰ Because of this, it is fast becoming the world's largest and most rapidly growing industry. Zambia recognises the benefits of promoting its tourism industry as a part of its economic development agenda. In addition to economic development, tourism enhances transnational relations and goodwill.¹²¹ However, tourists are very sensitive to crime, which is why it is so important to combat criminality.

Crimes such as corruption can undermine public institutions and democracy. Public loss of respect for and interest in the government and public institutions can have dire effects on societal law and order. The people's lack of trust catalyses contempt of law and forces especially the poor and marginalised to eke out a living in the unregulated underground economy which is also riddled with crime. Crime essentially breeds crime. It not only impedes economic growth but also erodes the fabric of society and affects its mores.¹²²

116 UNODC (note 111).

117 UNODC (note 111).

118 UNODC (note 111).

119 UNODC (note 111).

120 UNODC (note 111).

121 UNODC (note 111).

122 Unger *et al* (note 34) 93.

2.4 Public confidence in the justice institutions

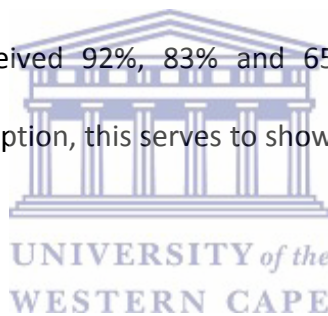
The criminal justice institutions are responsible for preserving public order and decency. Ordinary citizens, therefore, have a legitimate interest in their functioning. This is why it is essential that the machinery of justice commands the respect of the people they serve. As the old adage goes, justice must not only be done, but be seen to be done. Public legitimacy is indeed a prerequisite for the efficient and effective administration of justice.

The measure of public confidence is not an empirical science; it is based on public perception. The traditional means of dealing with criminal elements in society has since time immemorial been criminal prosecution. Proof beyond reasonable doubt sums up the weakness of prosecution, from the point of view of the ordinary member of the public. People known to be engaged in criminal activities are acquitted by the courts because of evidential insufficiency. They resume their lavish lifestyles, living off the booty of their crimes, leaving the public appalled at the workings of the criminal justice system. Lay persons generally frown on such outcomes and label the justice institutions as accomplices. This is evident from comments posted in response to online media and also verbal aspersions ranted out in public. The prosecutions of former President Chiluba and Henry Kapoko, amongst others, bear this to the fore. It cost about US\$14 million (approximately £8 930 000) to prosecute Chiluba in London.¹²³ Nothing was recovered and his debt to the Zambian people was not liquidated.

123 UKZAMBIANS 'Zambia Runs Up Huge Legal Bill to sue FTJ' available at <http://ukzambians.co.uk/home/2010/11/27/zambia-runs-huge-legal-bill-sue-ftj/> (accessed 15 August 2013).

The illegitimacy of the justice institutions in the view of the ordinary Zambian has currently reached its apex. Current affairs in newspaper articles and television broadcasts are overrun with calls for judicial reform and for the removal of the Acting Chief Justice and Director of Public Prosecutions.¹²⁴ At the time of writing this paper, the Law Association of Zambia had instituted proceedings in the High Court seeking a declaration as regards the legality of the Acting Chief Justice's tenure.

Another forum through which the Zambian people have expressed their opinion on trust and confidence in the justice institutions is Transparency International's Global Corruption Barometer. *Via* anecdotal evidence, it indicates that the police, judiciary and public officials/civil servants are perceived 92%, 83% and 65% corrupt respectively. Though premised on the offence of corruption, this serves to show the disdain of the public towards the core justice institutions.



2.5 Conclusion

Having reviewed rather elaborate schemes and means of criminally impacting economic development, the inescapable conclusion is that economic crime ultimately hits the poor hardest. However, prosecuting the offenders is not always viable or leads to acquittals thereby creating public mistrust in the justice institutions.

Public trust and confidence in the justice institutions can be enhanced by showing the public that crime does not pay and that when all preventive measures fail, tax payers will be

124 Lusaka Times 'Zambia Needs Progressive and Independent Judiciary-Wynter Kabimba' available at <http://www.lusakatimes.com/2013/08/13/zambia-needs-a-progressive-and-independent-judiciary-wynter-kabimba/#comments> (accessed 15 August 2013).

vindicated through the forfeiture or confiscation of tainted assets. The next chapter will elaborate further.



CHAPTER THREE

ZAMBIA'S ASSET RECOVERY LEGAL REGIME IN THE LIGHT OF INTERNATIONAL LEGAL INSTRUMENTS

3.1 Introduction

Asset recovery is tedious and costly, but a necessary measure to deprive the criminal of the fruits of his crime. This chapter examines Zambia's asset recovery legal regime against the backdrop of the international instruments pertaining to asset recovery and to which Zambia is a State Party.

3.2 International legal framework

The international instruments to which Zambia is a State Party and of relevance to this discussion are: the UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention),¹²⁵ the UN Convention against Transnational Organised Crime (UNTOC),¹²⁶ the UN Convention against Corruption (UNCAC)¹²⁷, the Southern African Development Community Protocol against Corruption (SADC Protocol

125 United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted on 20 December 1988 and entered into force on 11 November, 1990, in accordance with Article 29(1).

126 United Nations Convention against Transnational organised Crime adopted on 15 November 2000 and entered into force on 29 September, 2003.

127 United Nations Convention against Corruption adopted on 31 October and entered into force on the 14 December, 2005 in accordance with Article 68(1) of resolution 58/4.

against Corruption)¹²⁸ and the African Union Convention on Preventing and Combating Corruption (AU Convention against Corruption).¹²⁹

3.2.1 Asset retention as opposed to asset recovery

Asset recovery is expensive, time consuming, and devilishly bureaucratic. It also requires engaging with national and foreign courts. Adherence to international prescriptive measures which create a disincentive for crime is thus central to averting asset recovery.

The pre-emptive measures against economic crime entail conducting due diligence audits, preventing the setting up of shell banks and obliging public officials to disclose their financial status and interests.¹³⁰

Given their inherent vulnerability, financial institutions are required to implement stringent precautionary measures against money laundering and terrorist financing. They are enjoined to know their customers and account holders and identify them.¹³¹ Further, they have a duty to scrutinise the accounts of politically exposed persons (PEPs) meticulously, as well as those of their close relatives and associates in order detect suspicious transactions.



128 Southern African Development Community Protocol on Corruption adopted on 14 August 2001 and entered into force on 6 July 2005.

129 African Union Convention on Preventing and Combating Corruption adopted on 11 July 2003 and entered into force on 5 August 2006.

130 See also, Article 7 of the AU Convention, Article 18(1)(b) of the International Convention for the Suppression of the Financing of Terrorism, Article 7(1)(a) and 31(2)(d) of UNTO, International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations available at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf (accessed 3 September 2013) R's 9- 12, 20-23 .

131 Article 52(1) of UNCAC, Article 18(1)(b) of the International Convention for the Suppression of the Financing of Terrorism, Article 7(1)(a) of UNTOC, FATF Recommendations 10, 11, 22.

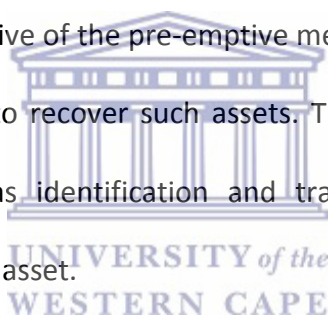
Comprehensive records of clients of a financial institution should be kept over an appropriate period of time¹³², tentatively 5 years.¹³³

Shell banks are literally shells, with no actual physical existence or presence and are not allied to a regulated financial group.¹³⁴ Physical presence in this case should be taken to mean 'meaningful mind and management' within the territory of the concerned state.¹³⁵

States should ensure that their domestic financial institutions have no direct or indirect dealings with shell banks.¹³⁶

3.2.2 Asset recovery processes

If asset-stripping occurs irrespective of the pre-emptive measures put in place, the next step would be a diligent endeavour to recover such assets. The asset recovery processes may systematically be categorised as identification and tracing, preservation, confiscation, forfeiture and repatriation of the asset.



Identification and tracing are essentially investigative processes involving law enforcement agencies such as the police, prosecution authorities and the Financial Intelligence Units (FIUs). It is imperative that law enforcement authorities are legally empowered to identify, trace and evaluate suspected proceeds of crime that could be vulnerable to confiscation

132 Article 52(3) of UNCAC.

133 Article 18(1)(b)(iv) Convention for the Suppression of Financing of Terrorism.

134 United Nations Office on Drugs and Crime *United Nations Legislative Guide for Implementation of the United Nations Convention Against Corruption* 2 ed (2012) 204, Basil Institute of Governance, Asset Recovery Knowledge Centre: UNCAC Chapter V Article 52: Prevention and Detection of Transfers of Proceeds of Crime available at <http://www.assetrecovery.org/kc/node/124d716a-a348-11dc-bf1b-335d0754ba85.html> (accessed 20 September 2013), Article 31(2)(d) of UNTOC.

135 UNODC (note 134) 204.

136 Article 52(4) of UNCAC.

without prejudice to the rights of *bona fide* third parties.¹³⁷ This should include authority to inspect or seize banking, financial and commercial documents.¹³⁸ Bank secrecy laws, which shield the identities of account holders and their accounts activity, should not be designed to frustrate inquiries made by investigative authorities.¹³⁹

Given the fact that ill-gotten assets can be whizzed across continents in minutes by a few clicks of the computer mouse, it becomes absolutely essential for investigative authorities to freeze and attach such assets very quickly.¹⁴⁰ Frozen assets are temporarily 'blocked' or 'restrained' to prevent them from being dissipated¹⁴¹ while seized assets are temporarily placed under the control or possession and administration of competent authorities.¹⁴² The basis of these two procedures is to preserve the property for confiscation or repatriation by depriving the owner of authority to transfer, convert, dispose of, move or use the property as a means to an illegal end. Conversely, confiscation or forfeiture is the transfer of funds or assets to the state.¹⁴³ Court action is indispensable for giving effect to the latter three procedures.

137 Article 5(2) of the Vienna Convention, Article 12(2) of UNTOC, Article 31(2) of UNCAC, Article 16(1)(a) of the AU Convention, Article 8(1)(b) of the SADC Protocol, Schott (note 33) V-17, FATF Recommendation 4.

138 Article 5(3) of the Vienna Convention, Article 12(6) of UNTOC, Article 31(7) of UNCAC, Article 17(1) of AU Convention, Article 8(2) of the SADC Protocol.

139 FATF Recommendation 9, Article 5(3) of the Vienna Convention, Article 12(6) of UNTOC, Article 31(7) of UNCAC, Article 17(3) of the AU Convention and Article 8(2) of the SADC Protocol.

140 Article 5(2) of the Vienna Convention, Article 12(2) of UNTOC, Article 31(2) of UNCAC, Article 16(1) (a) of the AU Convention and Article 8(1)(b) of the SADC Protocol.

141 Schott (note 33) IX-5, Article 2 (f) of UNCAC.

142 Schott (note 33) IX-6.

143 Schott (note 33) IX-5, Article 2(g) of UNCAC.

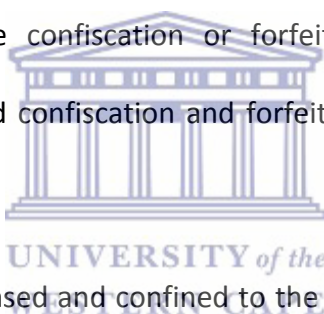
In instances where the assets recovered are not within the territory of the victim state, the process is complete when these assets are returned to their place of origin.¹⁴⁴

3.2.3 Modes of asset recovery

The primary modes of asset recovery are conviction-based forfeiture and confiscation or non-conviction-based forfeiture.¹⁴⁵

Conviction-based confiscation and forfeiture are the principal means by which criminals are deprived of their illegal benefits and proceeds. Proceedings are against the convict, *in personam*, which means “against the person”, and are inextricably linked to his conviction.

The trial is bifurcated and the confiscation or forfeiture is determined in ‘ancillary proceedings’.¹⁴⁶ Conviction-based confiscation and forfeiture may thus be incorporated as part of sentence.



Confiscation is generally value-based and confined to the convict’s illicit gains.¹⁴⁷ Forfeiture is used to permanently deprive the convict of the objects, instrumentalities and proceeds of the crime that he or she committed. This is not restricted to the originally tainted property. Forfeiture may be value-based in instances where the identified property cannot be located, belongs to a *bona fide* third party, beyond the court’s jurisdiction, or cannot be disentangled from other assets.¹⁴⁸ Such an order may also have effect against any other property of

144 Article 5(5)(a) of the Vienna Convention, Article 5(5)(b)(II) of the Vienna Convention, Article 14(2) of the Palermo Convention, Article 57(3)(a)(b)(c) of UNCAC.

145 Sections 10, 21 and 29 of the Forfeiture of Proceeds of Crime Act.

146 Section 8(2) of FPOCA.

147 See also Section 20(5)(6) of FPOCA, Stessens G *Money Laundering: A New International Law Enforcement Model* (2000) 31.

148 Section 15 of FPOCA.

similar value belonging to the convict.¹⁴⁹ Orders for confiscation or forfeiture generally apply to property that comprises the convict's estate or is in his possession.¹⁵⁰

Conviction-based confiscation and forfeiture came into the international arena *via* the Vienna Convention, although it was originally restricted to drug related offences.¹⁵¹ The convention provides for the enforcement of confiscation against objects, instrumentalities and proceeds of crime. Ironically, it does not promulgate *in rem* procedures, which means a legal action against the thing itself, but at the most advocates for a reversal of the onus of proof.¹⁵² This basically encourages the use of legal presumptions.

Criminal forfeiture is problematic and untenable when the alleged perpetrators of criminal conduct still hold government office, exercise control over organs of the State and are immune from prosecution because of their official status.¹⁵³ The death or flight of a suspect is a bar to conviction-based asset recovery, especially in most common law countries where a suspect may not be tried in his absence.¹⁵⁴

UNCAC has addressed these challenges of criminal forfeiture by encouraging States Parties to consider enacting laws which allow for confiscation or forfeiture without a criminal

149 Section 38 of the Narcotic Drugs and Psychotropic Substances Act.

150 Van Der Walt AJ 'Civil Forfeiture of Instrumentalities and Proceeds of Crime and Constitutional Property Clause' (2000) 16 *SAJHR* 4.

151 Article 5(1)(a)(b) of the Vienna Convention, Article 12(1)(a)(b) of UNTOC, Article 31(1)(a)(b) of UNCAC, Article 16(1)(b) of the AU Convention, Article 8(1)(a) of the SADC Protocol.

152 Article 5(7) of the Vienna Convention, Article 31(8) of UNCAC, Article 12(7) of UNTOC.

153 Claman D 'The Promise and Limitations of Asset Recovery under UNCAC' in Pieth M (ed) *Recovery Stolen Assets* (2008) 346 347.

154 Claman (note 153) 347.

conviction where the prosecution of the suspect is not possible, undesirable or frustrated due to a number of procedural impediments.¹⁵⁵

Non-conviction-based forfeiture is an action against the thing itself, *in rem*, and it is not dependent on a criminal conviction. Proceedings in *rem* are usually civil proceedings, with the state having to discharge the burden of proof on a balance of probabilities, which is less stringent than the “proof beyond a reasonable doubt” required for a conviction in criminal proceedings. However, it is restricted to the actual property alleged to be tainted and does not allow for value-based forfeiture or substitute property. It is normally used in instances where a prosecution is either impracticable or impossible. It should not in any event be used as a substitute for prosecution.¹⁵⁶



These two forms of asset recovery have evolved over the centuries and were primarily practised within domestic jurisdictions.

In view of the foregoing, UNCAC is responsible for elevating the status of non-conviction based asset recovery and acknowledging its importance in international criminal law.¹⁵⁷ It undeniably tips the scales of power in favour of the state. Both forms of asset recovery are prescribed with a reservation in favour of domestic law.

155 Article 54(1)(c) of UNCAC.

156 Greenberg TS et al *Stolen Asset Recovery: A Good Practice Guide for Non-Conviction Based Asset Forfeiture* (2009) 29.

157 Claman (note 153) 347.

3.2.4 Domestic asset recovery

Domestic asset recovery forms part of all the aforementioned processes of asset recovery, except when it comes to the question of repatriating the assets.¹⁵⁸

As a means of concealing or disguising assets from detection, perpetrators usually take all necessary steps to convert the proceeds of crime into other forms or intermingle them with legitimate earnings. Such assets, depending on the law of the country, are generally not exempted from recovery.¹⁵⁹ Also, any income or other benefits generated by such assets may be liable to confiscation.¹⁶⁰ The regional instruments are uncomfortably silent on this matter. Confiscation or forfeiture of assets is to be done without prejudice to the rights of third parties holding the assets in good faith.¹⁶¹

Asset management is part and parcel of domestic asset recovery.¹⁶² If recovered or seized assets are mismanaged or misappropriated, asset recovery will be rendered ineffective and it will lead to the loss public confidence in the institutions of justice. Mismanagement of preserved assets will also expose state coffers to the risk of claims by property owners. It is thus pertinent to adopt comprehensive measures to ensure that the assets preserved or forfeited are managed properly.¹⁶³

158 Articles 31(1)(2) of UNCAC.

159 Article 5(6)(a)(b) of the Vienna Convention, Article 12(3)(4) of UNTOC, Article 31(6) of UNCACA.

160 Article 5(6)(c) of the Vienna Convention, Article 12(5) of UNTOC.

161 Article 5(8) of the Vienna Convention, Article 12(8) of UNTOC, Article 31(9) of UNCAC.

162 Article 31(3) of UNCAC.

163 Article 31(3) of UNCAC.

3.2.5 International asset recovery

The importance of transnational asset recovery cannot be overstated nor its priority deferred, especially by developing countries and transitional states. It is internationally agreed that asset recovery is a fundamental process and states should provide the widest measure of cooperation and assistance to one another in this regard.¹⁶⁴ This places a shared responsibility in the recovery of assets by States Parties.¹⁶⁵ Consequently, shared responsibility is an essential principle of asset recovery.¹⁶⁶ It is noteworthy that the core of transnational asset recovery is not merely its potential to facilitate *restitution in integrum* (restoration of the original condition) but also its aim for posterity through accountability as discussed above.¹⁶⁷ Accountability would undergird the rule of law.¹⁶⁸

Direct asset recovery by victim States Parties through the courts of other States is a unique solution to the protracted and bureaucratic procedures that are typical to transnational asset recovery.¹⁶⁹ This may be done by means of the following: the victim State instituting civil proceedings in the domestic court of another State Party;¹⁷⁰ a domestic court order for restitution to the victim State by the convicted person or judgment debtor;¹⁷¹ and domestic confiscation proceedings recognising the legitimate claim of the victim State Party or public international organisation.

164 Article 13(1) of UNTOC, Article 8(4) of the SADC Protocol.

165 Claman (note 153) 346-347.

166 Claman (note 153) 345.

167 Vlastic MV & Noell JN Fighting Corruption to Improve Global Security: An Analysis of International Asset Recovery Systems (2010) *5Yale J. Int'l Aff.* 111.

168 Vlastic & Noell (note 167).

169 Vlastic & Noell (note 167).

170 Article 53(a) of UNCAC.

171 Article 53(b) of UNCAC.

Irrespective of the fact that the civil proceedings deal with assets gained from illicit criminal activities, and regardless of the fact that they share the same advantages as non-conviction based forfeiture, one must not confuse the two, for both offer avenues for asset recovery.

England demonstrated its utmost commitment to such proceedings not only by permitting the Zambian government to sue its former President, FTJ Chiluba and his associates in its court but by also partially funding the litigation.¹⁷² The judgment was rendered in favour of the Zambian government to the tune of \$ 46 million. However, Zambia was bereft of statutory provisions to enforce such a foreign judgment.¹⁷³

Another means of asset recovery is assisted asset recovery through mutual legal assistance. The requesting State formally asks another State to assist it in the recovery of assets within the territory of the requested State. In order to ensure mutual legal assistance is effectively rendered, States have to enforce foreign freezing or confiscation orders,¹⁷⁴ make domestic freezing and seizure orders with regard to assets subject to confiscation on request of another State, and consider measures necessary to conduct non-conviction based asset recovery.¹⁷⁵

Some challenges of international asset recovery are averted by making confiscation orders based on money laundering charges as opposed to predicate offences.¹⁷⁶ To assert objective territorial jurisdiction, a less complicated avenue, States may also resort to making default

172 *AG of Zambia v Meer Care & Desai and Others* [2007] EWHC 952 (Ch).

173 *AG of Zambia v Dr. Fredrick Jacob Titus Chiluba and Others* (2007) HP/F/J/004.

174 Article 8(5) of SADC Protocol.

175 Article 54(1) of UNCAC, UNODC (note 134) 213.

176 Article 54(1) (b) of UNCAC, UNODC (note 134) 212.

preservation orders.¹⁷⁷ Property may be preserved on the basis of a foreign arrest or criminal charge related to the acquisition of tainted property for the sole purpose of ensuring that an anticipated request for mutual legal assistance is complied with. Switzerland did so for 10 years in the case of the money looted by the infamous kleptocrat of the former Zaire, Mobutu Sese Seko.¹⁷⁸

In addition, states may intensify cooperation by rendering spontaneous mutual legal assistance in the absence of a formal request if the information would be essential in the investigation, prosecution, and other judicial proceedings, or if it will prompt the receiving State Party to make a formal request for mutual legal assistance.¹⁷⁹

Interestingly, under Article 54 of UNCAC, seizure and freezing of assets is mandatory while requested States Parties are merely encouraged to consider preservation of property for confiscation.¹⁸⁰



Article 58 of UNCAC reiterates UNTOC's crusade for the establishment of Financial Intelligence Units to enhance national and transnational cooperation, information sharing, prevention and combating the flight of tainted property, and to act as national organs that interface between all relevant institutions and law enforcement agencies.

Cardinal to asset recovery is mutual legal assistance. UNCAC has made brave strides in promoting mutual legal assistance to the extent of diminishing the importance that ordinary

177 Article 54(2)(c) of UNCAC.

178 International Service of the Swiss Broadcasting Corporation 'Mobutu Assets Stay Frozen as Legalities Begin' available at http://www.swissinfo.ch/eng/politics/Mobutu_assets_stay_frozen_as_legalities_begin.html?cid=7096426 (accessed 21 September 2013).

179 Article 56 of UNCAC.

180 Article 54(2)(c) of UNCAC.

extradition procedures attach to the principle of dual criminality. The principle of dual criminality can only be applicable if the request requires the use of coercive action.¹⁸¹

3.3 National legal framework

The main legislative enactments relevant to asset recovery in Zambia are the Constitution,¹⁸² the Prohibition and Prevention of Money Laundering Act (PPMLA),¹⁸³ the Forfeiture of Proceeds of Crime Act (FPOCA),¹⁸⁴ and the Financial Intelligence Centre Act (FICA).¹⁸⁵

3.3.1 Constitution of Zambia

The absence of principles of good governance in the Zambian Constitution hampers the fight against crime and its detrimental political, social and economic effects.

Article 34(5)(b) of the current constitution excludes a presidential candidate from taking part in the elections if he does not make a statutory declaration of his assets and liabilities.

An incumbent president is not legally obliged to make a statutory declaration during his tenure or prior to vacating office.

The Parliamentary and Ministerial Code of Conduct Act¹⁸⁶ (PMCCA) obliges persons holding ministerial office, as well as the speaker and deputy speaker of the National Assembly, to make a statutory declaration of their assets, liabilities and income. This declaration must be made within 30 days of assuming office and annually thereafter. Unjustifiable failure to

181 Article 46(9)(b) of UNCAC.

182 Chapter 1 of the Laws of Zambia.

183 Act No. 14 of 2001.

184 Act No. 19 of 2010.

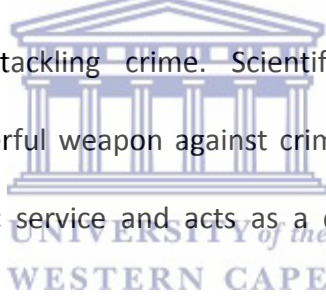
185 Act No. 46 of 2010.

186 Section 10 of Act No. 35 of 1994.

make such a declaration or falsifying it in a material way is a breach under the Act.¹⁸⁷ It is ironic that despite the title of this Act, ordinary parliamentary deputies (members of parliament) are not obliged to make a statutory declaration of their assets.

Employees of the Anti-Corruption Commission are the only civil servants legally required to make an asset declaration.¹⁸⁸ It is, however, a cosmetic provision without any enforcement mechanism. Also, the five-year period between declarations is so long that it defeats the purpose of such a measure. The spouses and children of politically exposed persons are equally not subject to any asset disclosure mechanism.

An effective asset disclosure system not only provides necessary statistics but also ensures a more scientific approach to tackling crime. Scientific knowledge wielded by law enforcement agencies is a powerful weapon against crime. This system is also crucial for promoting probity in the public service and acts as a deterrent to crime, which is the bedrock of good governance.



3.3.2 Prohibition and Prevention of Money Laundering Act

This law establishes and gives effect to the Anti-Money Laundering Investigations Unit (AMLIU),¹⁸⁹ the *de facto* Financial Intelligence Unit.

Its functions are primarily those of a financial intelligence unit and it has operated as such since its inception.¹⁹⁰ In addition to collecting and analysing financial information from regulated institutions, it is mandated to: investigate and prosecute money-laundering cases

187 Section 7 of the PMCCA.

188 Section 14 of Anti-Corruption Commission Act (ACCA) No. 3 of 2012.

189 Part II of PPMLA.

190 Section 6 of the PPMLA.

arising from this information; co-ordinate with other domestic and foreign law enforcement agencies in the investigation and prosecution thereof; supervise regulated institutions and assist in the development of training programmes for such institutions.

Zambia is a member of the Eastern and Southern Africa Anti-Money Laundering Group (ESSAMLG), which is a FATF-style regional body. It is, however, not a member of the Egmont Group of Financial Intelligence Units. The Egmont Group sets the benchmark for all FIUs and it defines an FIU as:

‘a central and national agency responsible for receiving (and as permitted, requesting), analysing and disseminating to competent authorities, disclosures of financial information: (i) concerning suspected proceeds of crime and potential financing of terrorism, or (ii) required by national legislation or regulation in order to combat money laundering and terrorist financing.’¹⁹¹

The Zambian FIU is an administrative prosecutorial hybrid and does not qualify to be a member of the EGMONT Group, *inter alia*, because the PPMLA does not mandate the FIU to receive suspicious transaction reports (STRs) on money laundering from FATF designated non-financial business professions. Terrorist financing does not even feature in the PPMLA.

Secondly, it is not operationally autonomous because it is affiliated with the Drug Enforcement Commission (DEC) and headed by the DEC Commissioner.¹⁹² Its funding and staffing is heavily dependent on the DEC. This has a negative impact on the independence of its functions. Additionally, if at the whim of the President a pusillanimous functionary were appointed as the commissioner of the DEC, the FIU’s effectiveness could be seriously undermined at the behest of the Executive. In any event, the allegiance of the

191 EGMONT ‘Statement of Purpose of Egmont Group of Financial Intelligence Units Guernsey , 23rd June 2004’ available at <http://egmontgroup.org/library/download/4> (accessed 27 September 2013).

192 Section 4 of the Narcotic Drugs and Psychotropic Substances Act, Section 5 of PPMLA.

Commissioner would be questionable.¹⁹³ Independence from the meddling of unscrupulous politicians is a crucial prerequisite for an effective and efficient FIU. Thirdly, ESAAMLG reported that the FIU does not meet the international requirements set for reporting institutions because of the way in which it collects, stores and processes suspicious transaction reports.¹⁹⁴ The reporting entities accused the FIU of highhandedness in its dealings with them and of failure to conduct an efficient and diligent analysis before taking further action.¹⁹⁵ This is attributable to the fact that the FIU does not recruit its own staff based on independent criteria to suit its peculiar needs.

The AMLIU, therefore, does not comply with Recommendation 29 of the FATF, making it ineligible as an FIU for EGMONT GROUP membership.

Given the proliferation of transnational crime, anti-money laundering and anti-terrorist financing measures are useless without governments making efforts to secure international information sharing, coordination and technical assistance.

3.3.3 Financial Intelligence Centre Act (FICA)

FICA provides for the establishment, functions and powers of the Financial Intelligence Centre (FIC); sets out the duties of reporting entities¹⁹⁶ and supervisory authorities. It came

193 First schedule of the Narcotic Drugs and Psychotropic Substances Act.

194 ESAAMLG 'Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism, Republic of Zambia' available at http://www.esaamlg.org/userfiles/Zambia_Mutual_Evaluation_Report.pdf (accessed 27 September 2013).

195 ESAAMLG (note 194).

196 Section 2 of FIC defines a reporting entity as 'an institution regulated by a supervisory authority and required to make a suspicious transaction report.'

into effect on 1 April 2011¹⁹⁷ and it is a milestone in Zambia's pursuit of anti-money laundering compliance. The Act represents government's efforts to adopt an integrated approach toward the fight against money laundering, terrorist financing and the misuse of the financial sector.

FICA places FATF-designated non-financial business professions on its list of supervisory authorities, thereby designating additional reporting entities.¹⁹⁸ This list is not exclusive.¹⁹⁹

The FIC is charged with the sole responsibility of receiving, requesting and analysing STRs and disseminating these disclosures of financial information to law enforcement agencies where there is a reasonable ground to suspect money laundering or terrorist financing.²⁰⁰ It is further mandated to receive currency threshold reports (CTRs) for cash transactions exceeding a prescribed amount, including an aggregate of several transactions beyond the threshold.²⁰¹ The AMLIU is ousted as an FIU and categorised as a law enforcement agency to which FIC must convey information for further action. However, until now this has not taken place. Unfortunately, the independence of the Financial Intelligence Centre, though guaranteed by the Act itself,²⁰² is watered down by the manner in which the board members are appointed, with the Act itself being silent on what the criteria and procedures are to terminate the incumbency of board members.²⁰³

197 Statutory Instrument No. 22 of 2011.

198 Section 2 of FICA.

199 Section 2 of FICA.

200 Section 5 of FICA.

201 Section 30 of FICA.

202 Section 6 of FICA.

203 Section 7 of FICA.

FICA prescribes comprehensive pre-emptive measures to be undertaken by reporting entities such as banks, non-financial businesses, certain professional persons,²⁰⁴ and other sectors of the economy such as companies in the fight against money laundering and terrorist financing. Prudential management is extended beyond the financial sector.

Anonymous accounts held under fictitious names are prohibited.²⁰⁵ All reporting entities are obliged to ensure diligently that their customers, whether natural or juristic, third parties acting on a customer's behalf and beneficial owners are identified and identifiable.²⁰⁶ Also, such identification and verification procedures are applicable to current customers and beneficial owners on a risk-sensitive basis, subject to the type and nature of the customer, business relationship, product or transaction, or as may be prescribed in the future.²⁰⁷

Generally, the reporting entity is obliged to be alert and ensure that it conducts ongoing due diligence in respect of all its customers.²⁰⁸

The Act also provides for the creation of appropriate risk management systems for high risk customers such as PEPs, as well as their close relatives and associates.²⁰⁹ High risk customers may include trusts holding personal assets, companies with nominee shareholders and non-residents. The Act further requires reporting entities to pay special attention to their business relations and transactions with individuals or companies from countries designated as high risk countries by the FATF.²¹⁰ The records pertaining to the

204 Section 2 of FICA, FATF Recommendation 22.

205 Section 15 of the FICA, FATF Recommendation 10.

206 Section 16(1) of FICA, Bank of Zambia Anti-Money Laundering Directives (BOZAML), 2004, 6-9.

207 Section 16(7) of FICA.

208 Section 24 of FICA.

209 Section 19 of FICA, FATF Recommendation 12.

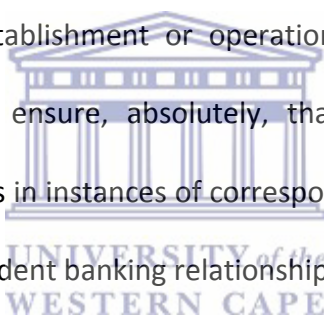
210 Section 25(a) of FICA. FATF Recommendation 19.

transactions of such clients must be made available upon request to the FIC, supervisory authorities or law enforcement agencies.²¹¹

If a reporting entity is unable to fulfil its customer due diligence obligations prescribed under Sections 16 to 20 of the Act, it is precluded from opening an account or doing business with such a customer.²¹²

Records of customers and transactions must be maintained by the reporting entities and kept for at least 10 years.²¹³ These records must be made available to FIC on a timely basis irrespective of legally prescribed secrecy obligations or other restriction on disclosure.²¹⁴

FICA expressly prohibits the establishment or operation of a shell bank in or through Zambia.²¹⁵ FICA endeavours to ensure, absolutely, that Zambia's financial institutions conduct due diligence procedures in instances of correspondent banking and do not directly or indirectly enter into correspondent banking relationships with shell banks.²¹⁶



3.3.4 Forfeiture of Proceeds of Crime Act

The confiscation and forfeiture of proceeds of crime in Zambia is regulated in a number of legislative enactments, the latest and most comprehensive of which is the Forfeiture of Proceeds of Crime Act.

211 Section 25(2) of FICA.

212 Section 21 of FICA, FATF Recommendation 10(d).

213 Section 22 of FICA, FATF Recommendation 11. The act goes beyond the recommended period of five years.

214 Section 22(2), 13 and 32 of FICA respectively.

215 Section 28 of FICA.

216 Section 20 of FICA.

Part III of the Act sets out the procedure for search, seizures and preservation of property liable to confiscation or forfeiture orders. The police are empowered to apply for a warrant to search named premises for tainted property and during the search are authorised to seize such property or any other thing that is reasonably believed to be of evidentiary value.²¹⁷ The Act also makes provision for the release of seized property if not of evidentiary value.²¹⁸ These provisions apply *mutatis mutandis* in case of a search and seizure conducted in relation to an offence committed abroad, albeit subject to section 14 of the Mutual Legal Assistance in Criminal Matters Act.²¹⁹ Such proactive measures would be a disincentive for persons wishing to launder their foreign ill-gotten gains in Zambia. These search and seizure powers are exercised under the watchful eye of the court and give accord to privacy considerations.



In order to preserve property liable to forfeiture or confiscation, either located domestically or abroad, the Act makes elaborate provision for judicial restraining orders.²²⁰ Such an order may be made irrespective of whether or not there are reasonable grounds to believe the existence of immediate risk that the property will be disposed of or dealt with in some other way.²²¹ A restraining order issued abroad may also be registered in Zambia pursuant to this Act.²²² The protection of *bona fide* third parties in possession of such tainted assets is enshrined in these provisions. A restraining order can only be made against property liable to confiscation if there are grounds to believe that it bears a nexus to the crime or that it is

217 Sections 35 and 37 of FPOCA, Sections 15, 23 of PPMLA, Section 54, 55, 56 and 58 of the ACCA.

218 Section 38 of FPOCA and Section 16 (1) of PPMLA.

219 Section 40 of FPOCA.

220 Sections 41-56 of FPOCA, Sections 60 and 61 of the ACCA provide for a restriction notice against property either held by the suspect or a third party.

221 Section 42(4) of FPOCA.

222 Section 53 of FPOCA.

under the effective control of the suspect.²²³ This preservation order may be granted by the court prior to charging the suspect.²²⁴

In instances where the court, in its discretion, considers it prudent to place the property under the custody and control of the Attorney General, the Attorney General may be required to make an undertaking as to damages or cost or both.²²⁵ These provisions are a fair attempt at avoiding the abrogation the suspect's right to property.

The court is further empowered to issue production and inspection orders. These orders compel a person to produce any property-tracking documents in his/her possession notwithstanding any law prohibiting disclosure.²²⁶ A monitoring order issued may also direct a particular financial institution to divulge information concerning transactions done by a named client holding an account with it to the police.²²⁷ The financial institution or any authorised third party is prohibited from disclosing the existence of a monitoring order outside the prescribed parameters and subject to penal sanctions in default.²²⁸ Financial institutions are further obliged to ensure that they retain all original documents or copies of the documents availed to the police for the duration of a prescribed retention period.²²⁹

The general pattern of the provisions mentioned above is that default attracts sanctions that are effective, proportionate and dissuasive.

223 Section 41(c)(d) of FPOCA.

224 Sections 38(3)(c) and 51(1) (a) of FPOCA.

225 Sections 43(1), 55 of FPOCA.

226 Section 57-63 of FPOCA, Section 19 of PPMLA.

227 Section 64 of FPOCA.

228 Section 65 of FPOCA.

229 Section 66 FPOCA.

The Act thus gives the investigating authorities enough power to prevent the targeted persons from denuding the assets or disposing of them. The restraint, forfeiture and confiscatory procedures are all executed by way of civil procedure, barring the prescribed offences, which are dealt with under the criminal law.²³⁰

The Forfeiture of the Proceeds of Crime Act also makes comprehensive provision for conviction-based confiscation and forfeiture. The law also allows the court to issue a forfeiture order in instances where the suspect has absconded.²³¹ Confiscation and forfeiture orders issued by foreign courts may be registered in Zambia.²³²

The property²³³ liable to forfeiture includes instrumentalities used to commit the offence, the direct or indirect proceeds of the crime, the proportionate value of any property into which the proceeds have been converted or intermingled, and income or any other benefit derived from the crime, whether committed in Zambia or elsewhere.²³⁴ Importantly, a court may infer that property is tainted if the convicted person acquired it after committing the offence. The court may infer this where the person's sources of income unrelated to the commission of the offence cannot reasonably account for the increase in the value of his property.²³⁵ This, too, is realisable property. In certain cases the court may, instead of issuing a forfeiture order, direct that the convicted person pays an amount which is equivalent to the entire value of the property by which he has been enriched.²³⁶

230 Section 33 and 78 of FPOCA.

231 Section 17 of FPOCA, Section 17 of the PPMLA.

232 Sections 18 and 26 of FPOCA.

233 Section 2 of FPOCA.

234 Section 2 of FPOCA.

235 Section 10(2)(c) of FPOCA, Section 62 of ACCA.

236 Section 15 of FPOCA.

A court is empowered to grant a confiscation order in cases where it is satisfied that the convict benefited from the commission of the offence.²³⁷ The value of the convict's benefits shall be assessed by the court and in so doing it may lift the corporate veil, which means that the court may extend the liability of the convict to legal entities under his effective control.²³⁸

The amount payable under a forfeiture or confiscation order shall be summarily recovered as a civil debt owed to the state by the convict.²³⁹

Division IV of the Act provides for the civil forfeiture of the tainted property. The prosecutorial authorities institute such forfeiture procedures through the court²⁴⁰ regardless of the status of the criminal investigations in progress or the outcome of the criminal trial itself.²⁴¹ However, a third party who is holding the property in good faith must first be heard by the court before the forfeiture order is made.²⁴²

FPOCA is truly a formidable weapon against perpetrators of crime generally but more so against those who derive economic gain. Unfortunately, Zambia has no asset management statute or institution. At most, FPOCA mentions the establishment of a forfeited assets fund.²⁴³ Asset management after seizure, confiscation or forfeiture is left to the law enforcement agencies. The DEC has a forfeiture account which is at the disposal of the

237 Section 19(1) of FPOCA.

238 Section 19(2) and 24 of FPOCA.

239 Section 16, 25 of FPOCA.

240 Section 31 of FPOCA.

241 Section 31(4) of FPOCA.

242 Sections 12, 30 of FPOCA.

243 Part V of FPOCA.

Commission and proven to be prone to plunder.²⁴⁴ Vehicles are kept on the premises of these agencies, while immovable properties are inadequately secured thus at the mercy of hoodlums, looters and poachers. These agencies have no asset management budgetary allocations and meagre amounts are institutionally allotted for the maintenance of motor vehicles, which gradually reduce in number due to fire outbreaks or through over-exposure to natural elements. Compensation suits naturally follow but the looming danger is the property lawyer's enthusiasm to undermine FPOCA on this basis.

3.4 Conclusion

The asset recovery regime, which derives from UNCAC, has proven to be a very useful tool which developing countries, as well as countries undergoing political transition, can use to bring corrupt officials and private persons to book. It is a tool that will ensure that if preemptive measures fail, countries will not be permanently stripped of their scarce resources. This can only be done through an effective and comprehensive asset recovery legal regime, the effectiveness of which is heavily dependent on the cooperation of other states. Zambia still has to develop its co-operation with other states, for until now it has shied away from committing itself to international co-operation mainly because the powerful politicians who were able to promote such co-operation were the very ones who were embroiled in nefarious economic activities. However, with the recent initiatives being undertaken by the Southern African Development Community states in the area of combating economic delinquency, for example, through the establishment of Eastern and Southern African Anti-

244 *The People v Ryan Emmie Chitoba and Others* (2007). This is a case in which Mr. Chitoba, former DEC Commissioner, and two others are charged with over 20 counts of theft by public servant of over K345, 548, 486 million (\$ 64, 552) stolen between the years 2006 and 2007. Surprisingly these monies were kept at the Bank of Zambia.

Money Laundering Group, and because of an increasing civic awareness of the need to hold democratically elected governments to account, laws can no longer be enacted for the sake of being enacted; they will need to show that they have real bite. The FPOCA, therefore, represents a concrete and tangible effort to fight the impunity with which Zambia's resources have been mercilessly plundered in the past at the expense of an impoverished society and its approach to international legal commitments are at a minimum. However, the initiatives so far are a good step in the right direction.

If Zambia and other UNCAC States Parties do not fully utilise this essential arsenal at their disposal, it will be a victory well squandered.

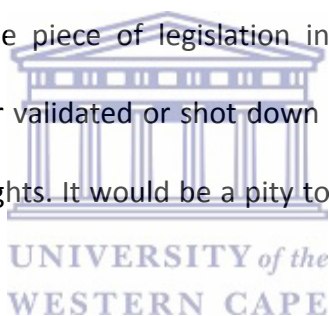


CHAPTER FOUR

THE CONSTITUTIONAL LEGITIMACY OF ZAMBIA'S ASSET RECOVERY REGIME IN COMPARATIVE PERSPECTIVE

4.1 Introduction

Asset recovery and particularly civil asset recovery has its genesis in UNCAC. UNCAC is infamous among critics for the very fact that most pertinent provisions are either hortatory or have an escape hatch. It is thus quite ironic that States Parties would resort to enacting legislation under UNCAC without much consideration being had to their domestic legal framework. The important single piece of legislation in this regard is the Constitution. Legislative enactments are either validated or shot down all too often on the basis of their incompatibility with the Bill of rights. It would be a pity to have a law that is worth more in litigation than results.



The effects of the invalidation of a cardinal piece of legislation such as the Forfeiture of Proceeds of Crime Act would have devastating effects on the fight against economic crimes, crimes that have over the years not only plagued Zambia but the world.

Civil and criminal cases have different procedural safeguards, each calculated to avert the erroneous imposition of legal penalties. Critics argue that civil forfeiture essentially bears a procedural nuance and is by no means the decision of a private dispute. It therefore has the same hallmarks as a criminal prosecution and as such certain rights accorded to an accused should equally apply to a respondent in such proceedings. Furthermore, the civil label

attached to these proceedings is a deliberate measure to circumvent criminal law guarantees.

These guarantees are prescribed under the bill of rights of the Constitutions of both Zambia and South Africa.²⁴⁵ Either constitution essentially guarantees the rights of all people and entitles them to human dignity, equality and freedom before the law. In order to uphold constitutional supremacy and the sanctity of the bill of rights, a limitation is placed on legislative authority. The Zambian High Court and South African Constitutional Court are clothed with the jurisdiction to review the conformity of legislative provisions to the constitution and override them for unconformity.²⁴⁶

An individual is not an autonomous entity detached from the society within which he lives but neither is he such an insignificant part of society that his values, goals and aspirations are secondary to communal ones. Constitutional rights are therefore prone to conflicts of interests and rights. This being said, the purpose of the bill of rights is not to recognize individual rights as they are, but 'to contextualise... [the rights] in relation to their prospective social benefits and effects.'²⁴⁷ Therefore these rights are not absolute and may be limited if to do so is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.²⁴⁸

245 Article 18 of the Zambian Constitution and Article 35 of the South African Constitution.

246 Article 28 of the Zambian Constitution and 167(3) of the South African Constitution. Unlike South Africa, Zambia does not have a Constitutional Court. An appeal from the High Court is thus lodged in the Supreme Court.

247 *Vryenboek and Others v Powell NO and Others* (1996) 1 SA 891 (CC) 1076 para. 152.

248 Article 36 of the South African Constitution. Under the Zambian Constitution each right contains permissible limitations clauses.

In an attempt to extricate themselves from forfeiture proceedings and save their questionably acquired wealth, respondents strive to discredit the process on the basis of its unconstitutionality. The constitutional rights often pleaded are the right to: privacy; the presumption of innocence; against self-incrimination; and property.²⁴⁹ This chapter will deal with the reliance on these rights in asset recovery proceedings in the said order.

4.1.1 The right to privacy

Historically, English common law attached paramount importance to the protection of an individual and his home from arbitrary government intrusion.²⁵⁰ This is aptly expressed in the English adage 'a man's home is his castle'.

Searches of the person of another were restricted and the search warrant saw its genesis.²⁵¹

A warrantless search of private dwellings was permitted subject to consent only on reasonable belief that stolen property was concealed therein.²⁵²

The Constitution of Zambia guarantees one's right of privacy by prohibiting the non-consensual search of his person, property or premises save, *inter alia*, by order of the court.²⁵³ The South African Constitution equally recognises this right with an addition of privacy in relation to information.²⁵⁴

249 Section 25(1) of the South African Constitution.

250 Swanepoel JP 'Warrantless Search and Seizure in Criminal Procedure: A Constitutional Challenge' (1997) 30 *The Comparative and International Law Journal of South Africa* 344.

251 Swanepoel (note 250) 345.

252 Swanepoel (note 250) 345.

253 Article 17 (2) (d) of the Constitution, Section 54 of the ACCA, *Beheersmaatschappij Helling INV and Others v Magistrate, Cape Town and Others* (2007) 1 SACR 99 (C). Consent without knowledge of the unlawfulness cannot validate an unlawful search and seizure.

254 Section 14 of South African Constitution.

The realm of privacy in all its facets may be reduced to three basic categories: first, the protection of one's property and home or territorial privacy; secondly, privacy of the person which entails the protection of human dignity; and lastly, privacy in information.²⁵⁵

The nature of this discussion is, however, restricted to the first notion of privacy.

A search may violate one's right to privacy. It is defined as a law enforcement officer's act of touching a person, his physical entry onto private premises or physical handling of documents and property.²⁵⁶ This includes electronic surveillance. However, if a suspicious item is publicly exposed for people to perceive with their primary senses, it does not amount to physical intrusion of a constitutionally protected area or article and cannot be said to be a search.²⁵⁷

The American notion of seizure extends beyond the interference with a person's possessory right to include interference with his liberty. The property physically taken may be both tangible and intangible and intangible property includes a person's private conversations.²⁵⁸

Though the definition of seizure may not be uniform in America, the golden thread in determining a violation of the right to privacy is a person's reasonable expectation of privacy.²⁵⁹

Statutes in both South Africa and Zambia clearly bequeath powers of search and seizure, identify the persons authorised to conduct a search and seizure but neither defined these

255 *R v Dymont* as discussed in Swanepoel (note 250) 344.

256 *Silverman v United States* (1961) as cited in Swanepoel (note 250) 341.

257 Swanepoel (note 250) 341.

258 Swanepoel (note 250) 342.

259 Swanepoel (note 250) 342.

terms nor set out the scope and limitation of such authority.²⁶⁰ They leave the determination to the arbiter who would naturally resort to a common sense definition and determine the acceptable parameters within which law enforcement officials exercise their search and seizure powers on a case by case basis. It is, however, clear that the physical intrusion upon person or property is indispensable in establishing a search.

The direction in which South African jurisprudence is heading in its determination of the scope and limitation of search and seizure is clear. In the case of *Bernstein and Another v Bester and Others NO*²⁶¹ the Constitutional Court stated that a court ought to base its decision 'on the sensible approach ... that the scope of a person's privacy extends *a fortiori* only to those aspects to which a legitimate expectation of privacy can be harboured.'

As pertains to searches and seizures conducted pursuant to a valid search warrant, the law is quite settled. One cannot successfully contend that his right to privacy has been violated after an inquiry has been concluded in favour of the state because what lies at the heart of such inquiry is the striking of a delicate balance between individual interests and the security and freedom of society as a whole.²⁶² Further, that contraband cannot be returned to the possessor irrespective of the unconstitutionality of a search and seizure.²⁶³

260 *Inter alia* CPC, Narcotic and Psychotropic Substances Act, PPMLA, FPOCA, Criminal Procedure Code Act No. 51 of 1977, South African Police Service Act No. 68 of 1995, Drug and Drug Trafficking Act No. 140 of 1992.

261 (1996) 2 SA 751 (CC) para. 77-78.

262 *Investigating Director: Serious Economic Crimes and Others v Hyundai Motors Distributors (PTY) Ltd and Others* (2000) 2 SACR 349 (CC), *S v Makwanyane* (1995) 3 SA 391 (CC). There has to be a pressing social need for the measure resorted to and such measure must be proportionate to the need or to its attainment. In *S v Coetzee and Others* (1997) 1 SACR 379 (CC) par 13. Langa J endorsed the requirement of a 'pressing and substantial social need or concern'.

263 *Sello v Grobler and Others* (2011) SACR 310 (SCA).

Unlawful searches and seizures are, however, an issue of growing concern. Section 35 (5) of the South African Constitution prohibits the admissibility of evidence obtained in violation of the bill of rights, if such admissibility renders the trial unfair or if otherwise detrimental to the proper administration of justice. It is thus that the unlawfulness or unconstitutionality of the search and seizure will entitle the nominal owner to restitution of derivative contraband.²⁶⁴ The invariable result will be a loss of evidence in the main criminal trial despite this in itself not being a bar to civil forfeiture proceedings.²⁶⁵

Conversely, in Zambia illegally obtained evidence is admissible.²⁶⁶ If evidence is obtained as a result of an illegal search and seizure or an inadmissible confession, if relevant, it is admissible because it is a fact irrespective of whether or not its acquisition contravenes constitutional provisions or any other law. Consequently, a person cannot contest forfeiture proceedings by relying on his right to privacy or incidental rights thereto. This approach, though effective in combating crime, reinforces impunity on the part of the police and exposes innocent citizens to victimisation. The situation is exacerbated by that fact that the forfeited money is sometimes used to supplement the budget of the Drug Enforcement Commission. Even the American jurisprudence heavily relied upon in arriving at this principle of limitation has long changed.

Another issue of contention is the issuance of authorisation to conduct a search and seizure administratively.²⁶⁷ The position in Zambia is that the Commissioner of the Drug

264 *Sello v Grobler and Others* (2011) SACR 310 (SCA).

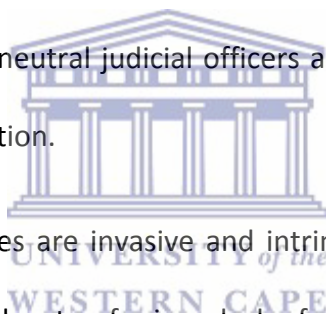
265 *S v Motloutsi* (1996) 1 SACR 78 (C).

266 *Liswaniso v The People* (1976) Z.R. 277.

267 Section 24 of the Narcotic and Psychotropic substance Act, Chapter 96 of the Laws of Zambia, Section 6(1) of the Investigation of Serious Economic Offences Act No. 117 of 1991 before its amendment by Act No. 46 of 1997.

Enforcement Commission may, on reasonable suspicion that forfeitable property is concealed therein or in an effort to preserve evidence, authorise an officer to conduct a search and seizure of named premises. The Commissioner is involved in the investigation of the offence and is inclined to serve the interests of his office rather than of the suspect. Therefore, the commissioner is not entirely neutral or impartial and the consequences of his decision are further compounded by the lack of an exclusionary clause in the Zambian Constitution. *Nemo iudex in causa sua* is completely disregarded.

In South Africa this issue was addressed in the case of *Park-Ross v Director: Office for Serious Economic Offences*.²⁶⁸ It was held that legal provisions that authorise the issuance of search warrants by persons other than neutral judicial officers are in contravention of the object, spirit and purport of the Constitution.



Warrantless searches and seizures are invasive and intrinsically a violation of the right to privacy. However, due to the high rate of crime, lack of advanced investigative techniques and resources, *inter alia*, investigations via search and seizure are necessary and indispensable in effective law enforcement. These powers may, however, be comprehensively prescribed and their scope and limitation set out. This will ensure that they are exercised in a socially and constitutionally acceptable manner with prior authorisation by an impartial arbiter, based on reasonable suspicion supported by reliable information. In cases where exigent circumstances prevail and the obtaining of a warrant prior to search and seizure would be rendered detrimental to the investigations, these circumstances must be supported by reliable and material evidence. In such circumstances

268 (1995) 1 SACR 530.

warrantless searches and seizures must only be resorted to when less intrusive measures have been explored.

Warrantless searches and seizure are legally authorised in a number of laws in both Zambia and South Africa.²⁶⁹ These provisions do not differentiate amongst dwellings, business premises and vehicles.²⁷⁰ However, one could argue that the Court in a common law country is obliged to address its mind to the sanctity of one's home, as alluded to earlier.

In America and Canada, the law strongly objects to warrantless searches and seizures being conducted in relation to immovable property. It is said that the expectation of privacy in respect of a search and seizure of an automobile is less than in respect of a dwelling house or business premises.²⁷¹ This is based on the premise that movable property is easily moved beyond the jurisdiction of the court. In America a search may be conducted without a warrant if it is: incidental to an arrest;²⁷² the property in question is abandoned; or in instances where the evidence is in 'plain view'²⁷³ or 'open fields';²⁷⁴ and if exigent circumstances to do so subsist.²⁷⁵

In *Florida v White*, the warrantless search and seizure of a motor vehicle for forfeiture was said to be analogous to the warrantless arrest of a person by the police on probable cause

269 Sections 23 of the Criminal Procedure Code Chapter 88 of the Laws of Zambia (CPC), Section 15 of the PPMLA, Section 24 of the Narcotic and Psychotropic Substances Act Section 33 of the Anti-Terrorism Act, Sections 20, 22, 25(3), 26, 27 of the Criminal Procedure Act No. 51 of 1977, Section 13(8) of the South African Police Service Act.

270 Section 1 of the Criminal Procedure Act, Section 2(1) of the Anti-Terrorism Act.

271 *Florida v White* (1999) 526 U.S. 559, *R v Belliveau and Losier* (1986) 30 CCC (3d) 163 (NBCA).

272 Herz M E 'Forfeiture Seizure and Warrant Requirements' (1981) 48 *University of Chicago Law Review* 964. See also Section 22 of the CPC.

273 *Harris v United State* (1968) 390 U.S. 234, 236, Herz (note 272) 965.

274 *Hester v United States* (1924) 265 U.S. 57, 59, Herz (note 272) 965.

275 Herz (note 272) 965. See also Section 33 of the Anti-Terrorism Act regarding the existence of a risk to public order or safety. See also Article 17(2)(a) of the Zambian Constitution.

that he has committed a felony. As long as such an action is taken against movable personal property found in a public place it can hardly be said to be an invasion of privacy.

The law in Zambia and South Africa readily accepts warrantless searches and seizures as lawful intrusions in their struggle against crime. The fight against crime is a legitimate objective of the state. It is, however, threatened by lack of comprehensively set out, well defined and harmonised search and seizure provisions. The laws as they stand may be perceived as a means to justify an end, but may also erode public confidence in the law enforcement agencies.

It is a paramount societal interest that equal and certain justice is achieved through legislation other than costly and unsuccessful litigation.

4.1.2 The right to be presumed innocent

Civil forfeiture is heavily criticised as being a blatant violation of the right to the presumption of innocence because the proceedings are not premised on the lawful origin of the property. The parties are placed on an equal footing and the alleged perpetrator of the crime bears the burden of proving the lawful origin of the assets. If the person is unable to prove the lawful origin of the assets, this may result in forfeiture.

It is further argued that the success of civil forfeiture as an enforcement tool is partly attributable to the fact that civil proceedings preclude the application of certain procedural safeguards such as those found in criminal proceedings.²⁷⁶ Irrespective of such characterisation, civil forfeiture has the effect of depriving the criminal of a lavish lifestyle

276 Rosenberg JA 'Constitutional Rights and Civil Forfeiture Actions' (1988) 88 *Columbia Law Review* 391.

and of the objects that he used to commit crimes.²⁷⁷ This is undeniably an act of retribution exacted by the state.²⁷⁸

Courts in the United States have thus held that civil forfeiture is 'quasi-criminal' in nature.²⁷⁹

Despite this cautionary approach to civil forfeiture, the American Supreme Court has consistently affirmed its position that civil forfeiture is neither a criminal proceeding nor does it exact 'punishment.' In deciding whether civil forfeiture violated the double jeopardy clause of the American Constitution, the Supreme Court held that '*In rem* NCB asset forfeiture is a remedial civil sanction, distinct from potentially punitive *in personam* civil penalties such as fines, and does not constitute punishment under the Double Jeopardy Clause.'²⁸⁰



Despite the general understanding that civil forfeiture is quasi-criminal, the right to a presumption of innocence does not apply because it is a civil action and does not involve a criminal charge. The European Court of Human Rights in the case of *Phillips v UK*²⁸¹ held that an explicit criminal charge is indispensable in triggering the presumption of innocence.

In Zambia and South Africa, all forfeiture proceedings are expressly said to be civil and the standard of proof is proof on a balance of probabilities.²⁸² The question of whether or not the proceedings abrogate the respondent's right to a presumption of innocence has not

277 Godhino JAF 'Civil Confiscation of Proceeds of Crime: A View from Macau' in Young SNM (ed) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* 331, Rosenberg (note 276).

278 Rosenberg (note 276), Godhino (Note 277).

279 *Boyd v United State* (1886) 166 U.S. 616, 634 cited in Rosenberg (note 276)

280 *United State v Ursery* (1996) 518 U.S. 267, 268 cited in Greenberg TS *et al Stolen Asset Recovery: A Good Practice Guide for Non-Conviction Based Asset Forfeiture* (2009) 31. See also *Walsh v Director of Asset Recovery Agency* [2005] NICA 6.

281 Application No. 41087/98, 5 July 2001 cited in Godhino (note 277).

282 Sections 33, 34 and 78 of FICA and Section 33 of POCA respectively.

been addressed in either jurisdiction. Such a challenge is conceivable but the probability of success is zero.

The judgment of the European Court of Human Rights in *Phillips* was on firm territory. The presumption of innocence cannot be relied upon in civil forfeiture or confiscation proceedings because it is not invoked in connection with a particular offence charged. Confiscation proceedings are analogous to the sentence of a properly convicted person, thereby precluding the application of the presumption of innocence. In civil forfeiture, it is true that an assertion of the unlawful origin of the property subject to forfeiture is an implicit accusation of the respondent's involvement in crime and the proceedings are premised on the establishment of facts underlying a criminal offence. The purpose, however, is not to establish the guilt of the respondent but to vest the State with title to the property in issue.²⁸³



Both the Constitutions of Zambia and South Africa clearly preserve this right for an accused who is being tried for allegedly committing an offence. In deciding such a constitutional challenge the court should also address its mind to the genesis of forfeiture law and its intended purpose. The objective:

‘purpose of the legislation is essentially preventive because it aims at reducing crime by removing property that can be shown to have been obtained unlawfully from circulation thereby diminishing the productive efficiency of such conduct and rendering less attractive the ‘untouchable’ image of those who have resorted to it for the purpose of accumulating wealth and status.’²⁸⁴

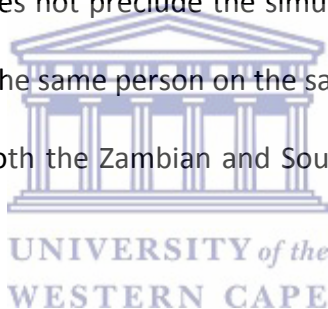
283 *Attorney General v Southern Industries Trust Limited and Others* (1960) 94 ILTR 161 (SC), cited in McKenna FJ & Egan K ‘Ireland: A Multi-Disciplinary Approach to Proceeds of Crime’ in Young SNM (ed) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* 81, Herz (note 272) 963.

284 *The Director of the Asset Recovery Agency v Cecil Steven Walsh* [2004] NIQB 21 cited in Dayman S ‘Is the

If the presumption of innocence were to be applied to civil forfeiture there would be no basis upon which the State would make its case because then it would be required to prove not the involvement of the chattel in the offence but the guilt of its owner. In essence, if civil forfeiture were to be done away with, this would be detrimental to the social and economic interest of developing and transitional societies.

4.1.3 The right against self-incrimination

The American position that civil forfeiture does not violate the double jeopardy clause in the US constitution would undoubtedly prevail in South Africa and Zambia. There is no decided case on the issue but the law does not preclude the simultaneous institution of criminal as well as civil proceedings against the same person on the same facts.²⁸⁵ The right against self incrimination is guaranteed in both the Zambian and South African Constitution albeit not absolutely.²⁸⁶



The respondent is faced with the overbearing decision of electing to remain silent and relinquish his proprietary rights to the state or defend his cause and risk disclosing self-incriminating evidence.²⁸⁷ On the other hand, the state will be bound to disclose all relevant information to the respondent at the discovery stage and this may expose the state's witnesses to intimidation and may jeopardise the State's case.²⁸⁸

patient expected to live? UK civil forfeiture in operation in Young SNM (ed) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (2009) 243.

285 *Prophet v National Director of Public Prosecutions* (2007) 6 SA 169 (CC). This case, however, indicates that the respondent is neither precluded from showing that the civil proceedings would be unfair with regard to parallel prosecution nor obtaining a stay in the civil proceedings.

286 Article 18(7) of the Zambian Constitution, Section 35(3)(h)(j) of the South African Constitution.

287 Greenberg *et al* (note 280) 30.

288 Greenberg *et al* (note 280) 30.

There appears to be no international consensus on whether or not the right against self-incrimination is derogated by civil forfeiture. On the one hand, it is contended that the right against self-incrimination does not even arise.²⁸⁹ It is not uncommon in any other civil proceeding for the respondent to refrain from adducing favourable evidence in his own cause for fear of self-incrimination.²⁹⁰ The respondent is therefore free to elect his course of defence unlike if he were bound by a statutory compulsion to adduce evidence.²⁹¹

The Zambian and United Kingdom's forfeiture laws have sought to evade the challenge premised on the right against self-incrimination by prohibiting the use of information obtained *via* compulsory disclosures in civil proceedings from being used in criminal proceedings.²⁹²

It is further argued that the right against self-incrimination is not infringed because, contrary to popular belief, forfeiture law does not prescribe a reversal of the burden of proof but merely a lesser standard of proof.²⁹³ Naturally, in such cases the State will start by establishing a *prima facie* case that the assets in contention are tainted.²⁹⁴ As in ordinary civil cases the State is bound to prove its averments positively.²⁹⁵ However, this burden does not continue to rest upon the shoulders of the State. The evidence produced by the State

289 *Murphey v M (G.)* [2001] IESC 82 at para. 133.

290 *Murphey v M (G.)* [2001] IESC 82 at para. 133.

291 *Murphey v M (G.)* [2001] IESC 82 at para. 133.

292 Sections 57 and 59(1) of FPOCA. Save for criminal proceedings connected to the respondents failure to comply with the production order. Sections 357 and 360 of POCA (UK), except as rebuttal evidence or by a co-accused. *Saunders v United Kingdom* [1996] 23 EHRR 313.

293 McKenna FJ & Egan K (note 40) 79, *Miller v Minister of Pensions* [1947] 2 ALL ER 372. Lord Denning J. States ' [T]he degree of cogency required to discharge a burden in a civil case is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If evidence is such that the tribunal can say: 'We think it is more probable than not,' the burden is discharged, but, if the probabilities are equal, it is not.'

294 Section 34 of FPOCA.

295 *Abrath v North Eastern Railway Co.* (1883) 11 Q.B.D. 440.

will have to be answered or rebutted, shifting the burden to the respondent. Therefore, the issue of burden or onus of proof is basically a rule used in deciding who bears the obligation of going further in order to win.²⁹⁶ One can hardly contend that the burden of proof unfairly lies on the respondent, thereby denying him the right to remain silent or against self-incrimination. Given that, that civil forfeiture proceedings are in fact civil, it would be highly inappropriate to impose a higher standard of proof than in ordinary civil actions. These proceedings are designed to recover tainted property and not to establish the guilt of its nominal owner.²⁹⁷

American jurisprudence on the issue relies on the categorisation of civil forfeiture as quasi-criminal and the protection against self-incrimination equally applies to nominal property owners in civil forfeiture cases.²⁹⁸ This right may, however, only be constitutionally burdened if the defendant's reliance on it attracts an automatic penalty.²⁹⁹ The right against self-incrimination cannot be relied upon in a civil forfeiture case based on the mere fact that the State has instituted a parallel criminal prosecution. However, the US Federal Government itself conceded that a stay of civil proceedings in such instances is required in order to preserve a claimant's 5th Amendment rights, *inter alia*, the right against self-incrimination.³⁰⁰ The defendant could not, therefore, in proper circumstances, be forced to surrender his privilege against self-incrimination by adducing evidence in support of his claim to the property.³⁰¹

296 *Abrath v North Eastern Railway Co.* (1883) 11 Q.B.D. 440.

297 *Walsh v Director of the Asset Recovery Agency* [2005] NICA 6.

298 *Boyd v United States* (1886) 111 U.S. 616.

299 *Gerrity v New Jersey* (1967) 385 U.S. 493, *Baxter v Palmigiano* (1976) 425 U.S. 308.

300 *United States v United States Currency* (1980) 449 U.S. 993.

301 *United States v United States Currency* (1980) 449 U.S. 993.

The consensus to be found in the forgoing is that evidence produced in civil forfeiture cases under legal compulsion is inadmissible in criminal cases.

4.1.4 The right to property

One's right to property is the most contentious right in the crusade against confiscation and forfeiture. Confiscation has found support in the argument that it is not aimed at punishment but is rather a means to prevent people from benefiting from their crimes.³⁰² It is also used to combat crime by preventing the re-investment of the proceeds of crime and depriving the criminal of the financial wherewithal to maintain his criminal enterprise.³⁰³ In so doing, the stature of criminal elites is reduced from being 'wealthy untouchables' to being highly vulnerable, thus making crime unprofitable. This deters future offenders.

If the Court has broad powers conferred on it under confiscation legislation, the risk of it being practically punitive is high. Besides, prevention and reparation have a punitive purpose. The European Court of Human Rights in the case of *Welch v United Kingdom*³⁰⁴

held as follows on this matter:

'The sweeping statutory presumptions that all property passing through the offender's hands over a six-year period is the fruit of drug trafficking unless he can prove otherwise; the fact that the confiscation order is directed to the proceeds and not limited to actual enrichment or profit; the discretion of the trial judge, in fixing the amount of the order, to take into consideration the degree of culpability of the accused; the possibility of imprisonment in default of payment by the offender are all elements which, when considered together, provide a strong indication of *inter alia* a regime of punishment.'

302 De Koker L and Pretorius JL 'Confiscation Orders in Terms of the Proceeds of Crime Act: Some Constitutional Perspectives' (1998) *TSAR* 277.

303 De Koker and Pretorius (note 302) 279.

304 (1995) 20 EHRR 247. The applicants claim that his right to be presumed innocent was declared inadmissible.

In both Zambia and South Africa the law provides for statutory presumptions which go beyond merely depriving the criminal of his illicit profit.³⁰⁵ The issue of presumptions finds justification in the legal position that presumptions serve a legitimate aim in the public interest and that they are proportionate in their measure because they relate to issues that are in the peculiar knowledge of the accused and, as such, rebuttable by him at a hearing on the balance of probabilities before a judge.³⁰⁶ In this age of the proliferation of clandestine crime it is difficult or even impossible to hold accountable the perpetrator without such legal recourse. The public interest served in resorting to these presumptions is justified by the nature of the crimes they address and their general effects. South Africa might attract some litigation based on the punitive nature of confiscation because the powers of the court in assessing the convict's benefits from the crime are wide enough to consider the culpability of the convict.³⁰⁷ Further, failure to comply with a confiscation order or any other order incidental thereto is punishable by a fine or 15 years' imprisonment.³⁰⁸

In order for confiscation to be beyond legal reproach, confiscation legislation should aspire to be non-punitive.

Unlike conviction based confiscation or forfeiture in *personam*, civil forfeiture is not regulatory but acquisitive.³⁰⁹ Furthermore, it extends its reach to instrumentalities and proceeds of crime regardless of whether these are owned or possessed by the

305 Section 20 of FPOCA.

306 *McIntosh v Lord Advocate* (2001) 2 ALL ER 638 at 652, *S v Zuma* (1995) 2 SA 642 (CC), *Fanwell v R* (1959) R. & N. 81, *Maseka v The People* (1972) ZR 9 (CA), *Sydney Zonde, Aaron Sakala and Edward Chikumbi v The People* (1980) ZR 337.

307 Section 18(6) of POCA.

308 Section 75(2)(4)(a) of POCA.

309 Van Der Walt (note 150) 3.

respondent.³¹⁰ This premise, among others, seeks justification in the euphemistically termed ‘personification’ or ‘guilty-property’ fiction. Consequently, the guilt or knowledge of a person other than the respondent is immaterial in ascertaining the effects of forfeiture. This position would no doubt find support in cases where the property involved is contraband. Conversely, its application to instrumentalities and proceeds of crime calls for prior consideration of constitutional implications.

The South African Constitutional Court conceded that despite civil forfeiture being remedial and not punitive, its indiscriminate enforcement by the State may violate constitutional rights, particularly the protection against the arbitrary deprivation of property.³¹¹ Arbitrary deprivation occurs when ‘the law allowing for such deprivation does not provide sufficient reasons for the deprivation or allows deprivation that is procedurally unfair.’³¹²

In upholding procedural fairness in the administration of justice, the Zambian and South African legislative approach to the justification of forfeiture has led to the demise of the ‘personification’ fiction. The law is couched in such a way that innocent third-party interests are recognised and may be excluded from forfeiture. This indicates that other than adopting the guilty-property fiction, these states have opted for a pragmatic or public policy approach.³¹³ When forfeiture laws are justified with reference to their social function, public interest in upholding a constitutional guarantee and its interest in the protection against arbitrary deprivation of property will come into conflict. Consequently, every forfeiture action will be vulnerable to an assessment of its compatibility with constitutional

310 Van Der Walt (note 150) 5.

311 *Prophet v National Director of Public Prosecution* (2007) 6SA 169 (CC).

312 *Prophet v National Director of Public Prosecution* (2007) 6SA 169 (CC).

313 Van Der Walt (note 150) 59.

guarantees based on the proportionality test.³¹⁴ This will ensure that the means resorted to are rationally linked to the purpose served and that their effects are proportional to such purpose.³¹⁵

The Constitutional Court of South Africa has resorted to such an approach in two landmark cases.³¹⁶ *Prophet* clearly sets out that the initial step is to establish that the property is an instrumentality of crime.³¹⁷ The court would then proceed to conduct a proportionality enquiry. This entails weighing the harshness of meddling with the individual's right to property against the extent of the property's involvement in the crime. In establishing the integral role fulfilled by the property in the commission of the crime, it is necessary for the court to consider whether the forfeiture will prevent the future commission of the crime and its social consequence. The Court also has to consider the applicability of the innocent-owner defence, and the effect of the forfeiture on the applicant.



This approach will validate the effects of forfeiture.

The right to property in civil forfeiture cases may also be guaranteed by the exclusionary rule in the South African Constitution. This rule is prophylactic and keeps law enforcement

314 *S v Makwanyane* (1995) 3 SA 391 (CC), *S v Coetzee and Others* (1997) 1 SACR 379 (CC) par 13. Langa J endorsed the requirement of a 'pressing and substantial social need or concern'.

315 Van Der Walt (note 150) 9.

316 *Prophet v National Director of Public Prosecution* (2007) 6SA 169 (CC), *Mohunram v National Director of Public Prosecutions* (2007) 2 SACR 145 (CC), *United States v Bajakajian* (1998) 524 U.S. 321. Though America strongly holds that its lack of the innocent owner defence promotes anti-crime laws and ensures that innocent owners exercise diligence in their transfer of their possessions to others, it has to a certain extent applied the proportionality test under the excessive fines clause. It was held in this case that it is unconstitutional if the amount forfeited is grossly disproportionate to the gravity of the defendant's offence.

317 *Prophet v National Director of Public Prosecution* (2007) 6SA 169 (CC). In order for the property to be adjudged as being 'concerned with the commission of the offence' the link between the property and the crime committed must be reasonably direct and the use of the property must be functional to the commission of the offence. It must either facilitate or make the commission of the offence possible.

officer in check. Law enforcement officers cannot be allowed to evade constitutional compliance by resorting to the 'device' of civil forfeiture.³¹⁸ Therefore the criminal undertones of civil forfeiture entitle the respondent to be protected against the arbitrary loss of his property. In *Playmouth Sedan v Pennsylvania*³¹⁹ the American Supreme Court reiterated the position in *Boyd* and held that the exclusionary rule applied to any civil forfeiture based on the determination that a criminal law had been violated. This approach aims to avoid the creation of double standards in regard to the admissibility of illegally obtained evidence. Conversely, it also empowers the applicant to apply for the exclusion of evidence and assets illegally obtained, thereby suppressing vital evidence. This does not bar forfeiture proceedings from being initiated in relation to other legally obtained evidence. However, the re-initiation of the process poses a serious risk of dissipation of the property and flight of the suspect.



Due to Zambia's peculiar position on illegally obtained evidence, this issue would seldom arise. It is, however, unfortunate that beyond being threatened by legislation, the right to property in Zambia is equally threatened by the lack of administrative institutions equipped to manage assets prior to and after confiscation or forfeiture. The option to have an undertaking given for damages and costs or either by the Attorney-General for preservation purposes will be the order of the day albeit to the detriment of the respondent because judgments against the state cannot be executed. The exercise of asset recovery therefore risks being rendered ineffective and more costly to the State and accused or respondent.

318 *Boyd v United States* (1886) 111 U.S. 616.

319 (1965) 380 U.S. 693.

4.2 Conclusion

Forfeiture laws should not be enacted while turning a blind eye to domestic legal realities. The law is intended to serve an objective purpose of the State in ensuring restitution and guaranteeing the right to a crime-free society. In order for the law to achieve its objectives, its validity must be beyond legal and social reproach. This may be achieved by enacting legislation true to the civil nature of forfeiture or confiscation, thus making the proceeding remedial. It is also important that when the Court interprets these provisions it must apply its mind to the effects of the law and must consider other measures with a less detrimental effect.

The interests of society cannot be said to be upheld through endless constitutional challenges which will inevitably reveal the law to be oppressive and punitive rather than remedial.



CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The effects of economic crimes on the economy of developing and transitional jurisdictions cannot be ignored. They sometimes elude detection through economic indicators but are nevertheless reflected in the poor segment of the population's quality of life. Illicit capital flight, especially through multilateral corporations, has been recognised as the most prominent cause of Africa's impoverishment.

Asset forfeiture is a truly universal form of 'retribution' and reparation in this era of transnational criminality. It is, however, not a stand-alone measure and should not be a resort of first instance. UNCAC clearly indicates that pre-emptive measures are essential. This is true for all economic crimes.

UNCAC and other international instruments which prescribe asset recovery should not be domesticated mechanically. Asset recovery laws are an internationally contentious issue because they are perceived to be a technical means of stripping people of constitutional guarantees that are available to an accused person. The legislature should ensure that the law enacted is not subject to such admonishment and eventual repeal.

Prior to the enactment of legislation, the feasibility of a legal and administrative enforcement framework should be considered for the efficacy of the law envisaged. The cornerstone of asset recovery is reparation. Such reparation is of special concern to developing and transitional societies that have been scarred by the plunder of their treasury

and natural resources. This cannot be achieved if at the end of a successful asset recovery process, the value of the assets is less than the taxpayers' money used in litigation due to lack of asset management systems. In instances where the court does not find in favour of the state and the assets have depreciated, or been misappropriated, or simply lost for various reasons, the state will be subject to suits for compensation. The monies spent in litigation and compensation will cause the national treasury to suffer a further loss. Asset recovery laws need to be complemented by other legal enactments which provide for search, seizure and mutual legal assistance. These laws will ensure the effectiveness of the domestic asset recovery regime and enhance mutual legal assistance.

Non-conformity to the constitution, lack of complementary laws and asset management systems will render asset recovery processes a costly endeavour in futility. This will further erode public confidence in the administration of justice.



5.2 Recommendations

5.2.1 Pre-emptive measures

Zambia has made great strides in adhering to internationally set prescriptive measures. In fact, the Financial Intelligence Centre Act is largely premised on the FATF Recommendations. However, preventive measures are much more than a tool with which to fight economic crime. They are basically measures in good governance that ensure probity in public and private institutions. Good governance is the cornerstone of a society driven against crime. It is thus important that the Constitution spearheads the fight against crime by making provision for good governance measures. This will create a more binding obligation on Parliament, public and private institutions to ensure good governance.

Laws should be enacted to oblige the disclosure of assets and liabilities by politically exposed persons, their spouses and children. All civil servants should also be subject to disclosure laws. There are serious allegations that former president Rupia Banda and his two sons were involved in unscrupulous business transactions and they amassed colossal amounts of money. An effective disclosure system would have provided key evidence in either a prosecution or non-conviction based forfeiture.

The Parliamentary and Ministerial Code of Conduct must extend its disclosure provisions to ordinary members of parliament. The procedure of first constituting a tribunal to investigate allegations of a person's breach of the disclosure provisions is a waste of the taxpayer's money and an impediment to the efficient functioning of law enforcement agencies. This provision should be repealed.



A legally prescribed public disclosure system, with internal controls and regulations is cardinal in the fight against economic criminality.

5.2.2 Asset recovery laws

The power of search and seizure is essential in asset recovery cases. Laws with forfeiture provisions such as the Narcotic Drugs and Psychotropic Substances Act and the Anti-Money Laundering Act have their own search and seizure provisions. While appreciating the different foundations and objects of these laws, there is a need for uniformity in the application of the law. The law is intended to protect the community, not to undermine their fundamental rights.

Uniformity may be achieved by either harmonising the law or enacting a single piece of legislation dedicated to search and seizure. Whichever the approach, the law must generally require all searches and seizures to be conducted under a warrant duly issued by a court. The courts should not be granted untrammelled powers to issue search and seizure warrants based on a subjective intuition of a police officer. The law must specifically provide that the courts should apply the proportionality test because fundamental freedoms are at risk. The court must satisfy itself that all other possible sources of information or methods of obtaining such information were reasonably explored prior to the application for a warrant.

Administratively vetted searches and seizure must be abolished.

An exception to the warrant requirement would apply to the search and seizure of a person under arrest. A warrantless search and seizure may also be conducted in exigent circumstances involving imminent danger to a person, property or the public. The validity of such an action must be subject to the determination of the High Court within a 48-hour period.

The nature of confiscation and forfeiture make them susceptible to constitutional challenges. The repercussions may be averted if the prosecution develops a tradition of predominantly applying for restraining orders. The court should also only order that custody be relinquished to the Attorney-General in exceptional circumstances.

A thorough examination of the Forfeiture of Proceeds of Crime Act reveals the meticulous nature in which the Act was drafted. The Act does, however, require further refinement.

The sanctions prescribed under the Act for defaults are primarily criminal in nature. This is appropriate for natural persons, but other avenues remain open in cases involving legal entities. In order to avoid the cost and legal burden of obtaining a criminal conviction, civil or administrative measures would suffice. Soft law can at times be very persuasive, especially with regard to corporations because of their dependence on licensing and good repute.

Zambia should strengthen the Forfeiture of Proceeds of Crime Act beyond registration of orders issued by foreign courts to include all forms of direct asset recovery under UNCAC.

The Act has made commendable strides to align the Mutual Legal Assistance in Criminal Matters Act with international trends in asset recovery, but this is insufficient. The need to amend the Act is clear and as such, the legislature should consider amending it. Zambia should also be open to the idea of entering into bilateral mutual legal assistance treaties specially designed for asset recovery. This will help to further enhance asset recovery and the effectiveness of the law.

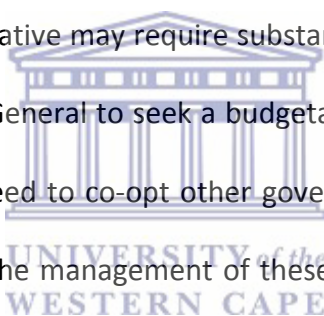
As a precautionary measure, the members of the Financial Intelligence Centre board should be appointed by the President and their appointment should be ratified by Parliament. The procedure for the termination of the tenure of board members should also be clearly provided for under the Act. The FIC is a crucial tool to combat economic criminality and should not be left at the disposal of an individual, especially not a politically exposed person. In order to be effective, the FIC has to be autonomous. One might attribute the delay in its establishment to political interference. The initially appointed director of the FIC has been

discharged from office before the conclusion of formalities for its operationalisation. This is a cause for concern.

5.2.3 Asset management

The Attorney-General is saddled with the heavy burden of managing seized and forfeited assets without comprehensive legal guidance, modes of accountability and an institutional framework. A law dedicated to asset management should be enacted and a multi-disciplinary institution set up to manage and dispose of these assets on behalf of the Attorney-General, who will, in turn, be subject to the supervision of the court.

Bearing in mind that such an initiative may require substantial resources and time, an initial step would be for the Attorney-General to seek a budgetary allocation specifically for asset management. He may also proceed to co-opt other governmental ministries with relevant personnel in assisting him with the management of these assets. This may be achieved by issuing detailed regulations on the role of each ministry identified. These regulations must mirror the principles of integrity, accountability and transparency.



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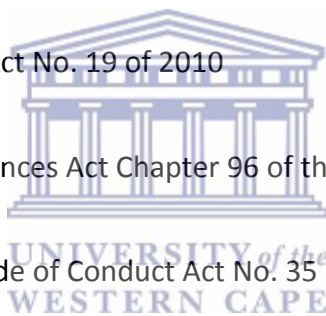
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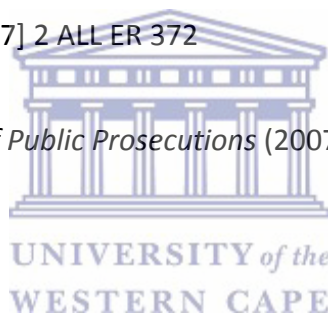
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