

REPORTABLE (19)

- [1] PROSECUTOR GENERAL
v
MIRIAM CHIBA
- [2] LOCADIA SIKWILA
v
THE PROSECUTOR GENERAL & ORS
- [3] ISAACK MANITHO & ANOR
v
THE PROSECUTOR GENERAL & ORS
- [4] MTU FAMILY TRUST
v
THE PROSECUTOR GENERAL & ORS
- [5] TAPUWA CHIDEMO
v
THE PROSECUTOR GENERAL

**SUPREME COURT OF ZIMBABWE
UCHENA JA, MATHONSI JA & CHITAKUNYE JA
HARARE: 24 FEBRUARY 2023 & 29 FEBRUARY 2024**

SC 326/22, *M Mutangadura* for the appellant and *C Kwaramba* for the respondent
SC 344/22, *G.R.J Sithole* for the appellant and *C Mutangadura* for the first respondent
SC 313/22, *T.W. Nyamakura* for the appellants and *C Mutangadura* for the respondent
SC 321/22, *T. Zhuwarara* for the appellant and *C Mutangadura* for the first respondent
SC 341/22, *T.L Mapuranga* for the appellants and *C Mutangadura* for the second- fifth respondent.

UCHENA JA

- [1] The appellants appealed against parts of the judgment of the High Court dated 29 June 2022 wherein it dismissed the Prosecutor General’s application for civil forfeiture leading to his appeal in SC 326 /22 and upheld the Prosecutor Generals applications for civil forfeiture against the appellants in SC 344/22, SC 313/22, SC 321/22 and SC 341/22, made in terms of s 79 as read with s 80 of the Money Laundering and Proceeds of Crime Act

[Chapter 9:24] (the Act).

THE FACTS

- [2] Tapuwa Chidemo, who will be referred to as Chidemo in this judgment is the main character whose conduct led to the Prosecutor General’s applications to the court *a quo* for the forfeiture of properties which are the subject of the disputes in these appeals.
- [3] Chidemo, who was the first respondent in the court *a quo*, and is the appellant in SC 341/22 was on 1 February 2010 employed by the Zimbabwe Revenue Authority (ZIMRA) as an Accounting Officer. He resigned from his employment with ZIMRA on 26 February 2016. He, was employed by ZIMRA for 6 years. He earned a total amount of US\$76 279.29 during the period of his employment. According to the Prosecutor General, (the applicant in the court *a quo*), one of Chidemo’s duties was to effect Value Added Tax refunds, using the Paynet System facility, to ZIMRA’s clients.

- [4] Taking advantage of his access to the Paynet System facility, Chidemo is alleged to have, on nine occasions, diverted money due to ZIMRA's clients to bank accounts of persons linked to him, a company in which he was a director and various other companies whose directors were persons connected to him. The funds would thereafter be withdrawn, in cash, by these persons and handed over to him.
- [5] The Prosecutor General alleged that Chidemo used the money defrauded from ZIMRA to purchase the properties for which he sought forfeiture orders in the court *a quo*.
- [6] At the criminal trial, before the Regional Magistrate's Court Chidemo was charged with nine counts of fraud as defined in s 136 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and one count of money laundering as defined in s 8 (1) and (4) of the Act.
- [7] The Regional Magistrate's Court acquitted him on 8 counts and convicted him on two counts. It treated the two counts as one for the purposes of sentence and sentenced him to 6 years imprisonment of which 1 year imprisonment was suspended for 5 years on the usual conditions of good behavior. Another 2 years were suspended on condition he paid restitution to ZIMRA in the sum of US\$460 538.61 through the Clerk of Court on or before 30 April 2018.
- [8] Dissatisfied by that decision, he appealed against the convictions to the High Court. The High Court dismissed his appeal.

- [9] Thereafter the Prosecutor General, in terms of the Money Laundering Act, filed an application for civil forfeiture of the properties Chidemo had bought and developed using the money he stole from Zimra. The application included properties he had recently sold to third parties in sales the Prosecutor General alleged were simulated.
- [10] The court *a quo* made findings in respect of the claims raised by the Prosecutor General.
- [11] In respect of SC 326/22 the Prosecutor General applied for the forfeiture of 280 shares in Parklane (Pvt) Ltd bought by Chidemo from Island Hospice Trust on 20 October 2011 who subsequently sold them to Miriam Chiba on 26 January 2017.
- [12] Chiba raised a preliminary issue in terms of s 79 (2) to the effect that the section prohibits the forfeiture of property bought or used before the Act came into effect.
- [13] The nub of her defence was that Chidemo bought the shares on 20 October 2011, before the Act came into force on 28 June 2013.
- [14] The court *a quo* interpreted s 79 (2) as prohibiting the forfeiture of property used or bought before the Act came into effect.
- [15] It thus dismissed the Prosecutor General's application for the forfeiture of Chiba's 280 shares in Parklane (Pvt) Ltd.

- [16] In respect of the forfeiture of Stand Number 3036 Shawasha Hills, in SC 344/22 which had purportedly been sold to Locadia Sikwila, by Chantlong Pvt Ltd, a company which the court *a quo* held to be Chidemo's *alter ego*, it found that the stand was bought in 2007, before his employment by ZIMRA and that the only development on that stand was a cottage.
- [17] Locadia Sikwila was the sixth respondent in the court *a quo* and is the appellant in SC 344/22
- [18] When Chidemo resigned from ZIMRA in 2016, a main house had been constructed, increasing the value of the property to USD\$ 250 000.
- [19] Stand 3036 Shawasha Hills was registered in favour of Chantlong Investments (Pvt) Ltd in 2007, long before Chidemo was employed by ZIMRA.
- [20] The court *a quo* held that Locadia Sikwila was linked to Chidemo through number 352 Chishawasha Street Mabvuku which address appears on a CR 14 form for an entity called Armeline Investments which Chidemo used to siphon US\$414 656-01 from ZIMRA. The same address was also used by Kanyasa, Chidemo's wife, to open her personal bank account in December 1997.
- [21] The cost of erecting the main house on stand 3036 Shawasha Hills was held to have been funded by the proceeds of the crimes committed by Chidemo.
- [22] The court *a quo* found that Chidemo is the *alter ego* of Chantlong Investments (Pvt) Ltd, and that the sale agreement between it and Locadia Sikwila was a façade and that the lease agreement between these parties was a sham.

- [23] Stand 3036 Shawasha Hills was therefore forfeited to the state.
- [24] In respect of SC313/22 the Prosecutor General applied for the forfeiture of stand 215 FolyJon Glen Lorne Harare.
- [25] Chidemo bought the vacant stand on 2 April 2012 for USD\$ 85 000-00 from The KIPC Trust.
- [26] By September 2016, a 90 percent complete double storey house had been constructed on the property. It was the court a *quo*'s further finding that, by the time Chidemo was charged with the nine counts of fraud and one count of money laundering he had purported to sell the now double storey property to Margret Misha Trust represented by Isaack Manitho on 7 July 2017 for US\$150 000.
- [27] When Chidemo applied for a Capital Gains Tax Clearance Certificate, he submitted a different agreement of sale reflecting the purchasers as Isaack Manitho and Daesiree Manitho who were the third and fourth respondents in the court a *quo* and are the appellants in SC 313/22.
- [28] According to Mr Mupindu the legal practitioner who drafted the agreements of sale, the original agreement of sale was cancelled and substituted by the one dated 11 July 2017 in which the purchasers were Isaack Manitho and Daesiree Manitho.
- [29] In his explanation of the cancellation Isaack Manitho told the court a *quo* that after the initial agreement he realised that he had changed his name from Isaack Manitho Mhlanga which was the name in terms of which he was a trustee of the Magret Misha Trust through which his family could benefit from the Trust.

[30] He further explained that he had recently been married to Daesiree Manitho whom he wanted to be a co-owner of 215 FolyJon. He therefore requested that the agreement in the name of Magret Misha Trust be cancelled and substituted by one in which he and his wife would be the purchasers.

[31] He submitted proof of his change of name and of the trust in which he, as Isaack Manhitho Mhlanga, was a trustee.

[32] He narrated how he had been looking for a property to buy and eventually engaged the services of Klipcrunt Estate Agents who brought No 215 FolyJon Glen Lorne to his attention. He liked it and offered to buy it for USD\$150 000-00.

[33] He submitted proof of how he made the payment from his bank account and obtained a mortgage bond from MBCA Bank in the sums of USD\$65 000-00 and USD\$13 000-00 through which he made further developments on the property.

[34] He told the court *a quo* that he did not know Chidemo till they met at the signing of the agreement of sale.

[35] During his submissions before the court *a quo* Mr *Mutangadura* who represented the Prosecutor General submitted that the Manithos case appeared to him to be that of genuine purchasers and legitimate owners. He described it as different from that of other appellants.

His actual words were as follows:

“We are asking this honourable court to consider the situation of these respondents differently in that the other one’s acquisition of title (sic) in my view the 3rd respondent and 4th respondent looks innocent.”

- [36] He however seems to have had a change of mind on being questioned by the court *a quo* as he resiled from what he had said about the third and fourth appellants.
- [37] The court *a quo* held that the sale was a simulated one because the purchase price of US\$ 150 000-00 did not make business sense.
- [38] It reasoned that the vacant stand having been bought for US\$ 85 000-00 it did not make any business sense that the property, which now had a double storey house, could be sold for US\$ 150 000-00.
- [39] It, further reasoned that this means the development of the double storey was valued at only USD\$ 65 000-00 which it held to be nonsensical.
- [40] It for these reasons and despite evidence proving that their circumstances were different from the other purchasers, and the views of counsel for the Prosecutor General, that the court *a quo* forfeited No 215 FolyJon Glen Lorne to the State.
- [41] In respect of SC321/22 the Prosecutor General applied for the forfeiture of shares acquired by Chidemo on 28 July 2017 for US\$45 000 from the Estate Late Mary Gwendoline Peter in respect of Flat No 19 Dewernt Lodge.
- [42] Chidemo allegedly sold the shares to MTU Family Trust for US\$ 40 000-00 which was later alleged to have been US\$ 36 000-00.

- [43] The purchase price was supposed to be paid to the Legal Practitioners but was paid to Chidemo who issued an acknowledgement of receipt for US\$ 35 312-00 an amount lower than the alleged purchase prices of US\$ 40 000-00 or US\$ 36 000-00
- [44] In its defence the MTU Family Trust did not disclose nor prove any movement of funds from any source to finance the acquisition.
- [45] The court *a quo* found that the discrepancies on the selling price, the actual amount paid being less than the lower of the two purchase prices, the acknowledgment of receipt by Chidemo instead of the Legal Practitioners and the confusion on who drafted the agreement of sale, exposed the sham.
- [46] The court *a quo* was of the view that MTU Family Trust had not demonstrated its source of funds and that, taken together with the fundamental contradictions in its papers, established that the agreement of sale put before it was simulated.
- [47] It held that Chidemo connived with the MTU Family Trust, the ninth respondent in the court *a quo* and the appellant in SC 321/22 in an endeavour to put the shares beyond the ambit of civil forfeiture by purporting to create a legitimate owner in the form of the Trust.
- [48] It held that the Trust did not buy the shares in question and was not their legitimate owner.
- [49] The shares were forfeited to the State.

[50] In respect of the appeal in SC 341/22 Chidemo appeals against the forfeiture of the properties he had sold to purchasers who are also appellants in SC 344/22, SC 313/22 and SC 321/22 and that of his Mercedes Benz Registration Number AND 5756 to the State.

[51] He sold stands 3036 Shawasha Hills Glen Lorne, 215 FolyJon Glen Lorne, shares in respect of No 19 Derwent Lodge and shares in No12 Parklane.

[52] He sold these properties in the circumstances already narrated in respect of each property.

[53] In respect of the forfeiture of the Mercedes Benz on 5 August 2014 Chidemo applied to “Be Forward”, a Japanese company, for the purchase of the motor vehicle.

[54] On the same day Be -Forward responded and issued an invoice for the purchase of the motor vehicle, in the sum of USD\$2 080-00 which amount the appellant relied on in subsequent proceedings.

[55] After considering the Prosecutor General’s applications for forfeiture the court *a quo* granted the following order:

1. The following property being tainted property be and is hereby forfeited to the State:
 - (a) Stand 215 Glen Lorne Township 8 of Lot 40 A Glen Lorne measuring 4 517 square metres held under Deed of Transfer Registered Number 2898/2017 in favour of Isaac Manitho (born 10 November 1985 - I.D NO. 29-232890 -E-66) and Daesiree Manitho (born 2 August 1988 - 1.D No 63-2149472-Q-42).
 - (b) Stand 3036 Shawasha Hills, Glen Lorne.
 - (c) Mercedes Benz C Class 1997 Model Registration Number AND 5756.

- (d) 2500 Ordinary shares of \$ 2 each in Derwent Lodge (Pvt) Ltd giving rights of occupation of Flat number 19 Derwent Lodge situated at Number 9 Josiah Chinamano Avenue, Harare (Share Certificate number 417 in Derwent Lodge (Pvt)Ltd).
2. The fifth respondent's preliminary point be and is hereby upheld.
 3. The application for a civil forfeiture order in respect of 2800 shares being share number 32301 to 35100 in Park Lane Court (Pvt) Ltd be and is hereby dismissed.
 4. Each party shall bear its own costs.

[56] Aggrieved by the decision of the court *a quo*, five appeals were noted by five different appellants.

[57] The Prosecutor General who was the applicant in the court *a quo* noted the first appeal under SC 326/22 on the following grounds of appeal.

- i. The Honourable Court *a quo* misdirected itself and made an error of law after finding for a fact that the Zimbabwe Revenue Authority (ZIMRA) had lost US\$ 1 119 833,96 as a result of theft/fraud and refused to invoke section 39(4) as read with section 78(2) of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*] which provide that:

“Where any property that would have been liable to seizure or confiscation cannot be located or identified or; for whatever reason it is not practical or convenient to seize or confiscate the property; a competent court may order the seizure or confiscation of property equivalent in value from the defendant whether or not such property is tainted property or represents proceeds of crime.”

- ii. The Court *a quo* erred at law when it construed s 79 (2) of the Money Laundering and Proceeds of Crime Act as prohibiting civil forfeiture orders in circumstances where a person who committed theft from ZIMRA had been prosecuted and convicted.

[58] The second appeal was noted by Locadia Sikwila who was the sixth respondent in the court *a quo*. The appeal was filed under SC 344/22 on the following grounds of appeal.

- i. Deciding that the corporate veil of Chantlong Investments (Private) Limited should be lifted when no litigant had asked for such a finding or order.
- ii. Finding that Stand 3036 Shawasha Hills ('the property') belonging to the appellant could be forfeited because it had been sold to her by Chantlong Investments (Private) Limited which was Second Respondent's *alter ego* when the case pleaded by the First Respondent was that it was the Second respondent who had sold the property to her.
- iii. Ordering the forfeiture of the property which appellant had acquired from a company called Chantlong Investments (Private) Limited and not from the second respondent who was the one alleged to have committed a serious offence.
- iv. Ordering the forfeiture of the property when it was acquired by Chantlong Investments (Private) Limited prior to the commencement of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*].
- v. Finding that a mistake on the date of signing on a lease agreement was proof that the lease was a simulated transaction.

- vi. Finding that a transaction in which the property was sold to Appellant by Chantlong Investments (Private) Limited and subsequently leased to a director of that company was an irregular and unusual transaction which was cause to forfeit the property.
- vii. Not finding that the non-joinder of Chantlong Investments (Private) Limited was fatal to the first respondent's case for forfeiture of the property.
- viii. Finding that the property was developed using proceeds of crime by the Second respondent when there was no such proof furnished to the court by any litigant and the property had been acquired by Chantlong Investments (Private) Limited six (6) years prior to the coming into effect of The Money Laundering Act.
- ix. Finding that the Second Respondent and the Appellant connived to evade the forfeiture of the property when there was no such proof on record.
- x. Finding that the transaction between Chantlong Investments (Private) Limited and the appellant was entered into prior to both the filing of the proceedings *a quo* and the arrest of the Second Respondent for the serious crime giving rise to the alleged forfeiture.
- xi. Rejecting proof of payment of the purchase price by the Appellant to Chatlong Investments (Private) Limited through Second Respondent as a director of the company and yet demanding proof of payment of rentals by Second Respondent to Appellant for rentals which were paid in small sums monthly.

[59] The third appeal was filed by Isaack Manitho and Daesiree Manitho, the third and fourth respondents in the court *a quo*, and the appellants in SC 313/22 with the following grounds of appeal

- i. The High Court erred in failing to find as it should have that it had no jurisdiction to grant a civil forfeiture order by reason of s79 (2) of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*] in respect of Stand No. 215 Glen Lorne Township 8 of Lot 40A Glen Lorne as it was acquired by the second respondent on 2 April 2012 before the Money Laundering and Proceeds of Crime Act came into force.
- ii. The High Court erred in failing to find that the appellants acquired Stand No. 215 Glen Lorne Township 8 of Lot 40A Glen Lorne from the second respondent for fair value in July 2017 in circumstances where they did not and could not have known of any criminal conduct on the part of the seller.
- iii. *A fortiori* the High Court should have found that the appellants were legitimate owners in terms of section 85 (1) of the Money Laundering and Proceeds of Crime Act, who purchased the property for fair value and in addition had incurred personal costs including legal costs, tax costs, and executing a mortgage bond, all of which prove legitimate acquisition of title.
- iv. The High Court erred in law, in failing to find that Stand 215 Folyjon Crescent, Glen Lorne, Harare ceased to be tainted property upon its sale to the appellants for fair value in July 2017, and that the proceeds of crime henceforth became the money acquired by the second respondent consequent to the sale.

- v. 5. The High Court misdirected itself in failing to find that the initial agreement dated 7 July 2017 was cancelled, and in its place an agreement dated 11 July 2017 incorporating the second appellant, the first appellant's wife as co-purchaser and owner was drawn up by Counsel in circumstances devoid of criminality, or doubt.
- vi. 6. The High Court misdirected itself in failing to pronounce upon the affidavit deposed to by Mr Simon Mupindu, a Senior Legal Practitioner and Officer of the court in which he detailed uncontested evidence or circumstances leading to the transfer of title in favour of the appellants by the way of deed of transfer number 0002898/2017 dated 26 July 2017.

[60] The fourth appeal was noted by MTU Family Trust, the ninth respondent in the court *a quo* and the appellant in SC 321/22 on the following grounds of appeal;

- i. The court *a quo* erred in granting the first respondent relief he never sought, as the applicant *a quo* the first respondent prayed for the forfeiture of flat 1997 Derwent Lodge yet in its order the court *a quo* forfeited the appellant's shares in Derwent Lodge (Pvt) Ltd.
- ii. Furthermore, the court *a quo* also erred in holding that the appellant is not the legitimate owner of the shares in Derwent Lodge (Pvt) Ltd. Such finding is anomalous in that the court *a quo* ignored evidence substantiating that the appellant had acquired the said shares in good faith and for fair value, well after the alleged criminal conduct of the second respondent.

- iii. Concomitantly, the court *a quo* erred in concluding that the appellant's purchase of the aforesaid shares had been illusory and was a fraud. Such a finding constitutes a misdirection as it is incongruent with the uncontroverted evidence that the appellant had led *a quo* proving the bona fides of the aforesaid purchase.
- iv. The court *a quo* misdirected its self in its evaluation of whether the appellant's shares were tainted property. The court *a quo* improperly imposed an onus on the appellant to prove its source of funds as regards the purchase of the shares yet it was the first respondent who bore the burden of proving that the shares were proceeds of crime.

[61] The fifth and final appeal was filed by Chidemo. He was the first respondent in the court *a quo*. The appeal was filed under SC 341/22 on the following grounds of appeal.

That the court *a quo* erred in:

- i. Effectively shifting the burden of proof to the appellant as well as the second to the sixth respondents to prove that their properties were not liable to be forfeited instead of requiring the first respondent to prove that the properties were liable to forfeiture.
- ii. Deciding the application on the basis of the papers when every material fact required to be proven by the first respondent to obtain judgment was disputed and alternative evidence was provided disputing the first respondent's factual averments.

- iii. Making an order for the forfeiture of properties without any finding that the properties in question were actually proceeds from some conduct constituting or associated with the serious offence in question.
- iv. Treating an application for an order of civil forfeiture as if it was an application for an order of restitution such that all and any properties associated with the appellant were liable to forfeiture without any sign that these properties were in any way connected with the serious offenses alleged.
- v. Ignoring findings of the Magistrates court showing that the first respondent had, in a trial, failed to prove on a *prima facie* basis, that the appellant's wife had accessed the funds deposited in her account.
- vi. Utilizing witness statements drafted in preparation of a criminal trial as evidence that the appellant had committed the serious offence alleged and thereby denying the appellant a right to challenge such evidence.
- vii. Treating any mistake or omission in documentation furnished by the appellant as corroboration of the first respondent's case while going out of its way to explain away every inconsistency in the first respondent's case.
- viii. Factoring only the appellant's income at the Zimbabwe Revenue Authority as the only source of his resources to purchase and develop properties when the record showed that the appellant had significant financial and proprietary resources prior to being employed by the Zimbabwe Revenue Authority.
- ix. Accepting mere allegations by the first respondent on issues of valuation of properties and developments made to properties even though such valuations were in dispute and required that sworn evidence be furnished to the court on them.

- x. Forfeiting properties which the appellant acquired prior to the commencement of the statute under consideration without any proof that they had any connection or association with the serious crime after commencement of the statute.

[62] The five appeals were consolidated and were heard by this court one after the other.

SUBMISSIONS BEFORE THIS COURT

[63] In the appeal between *Prosecutor General v Miriam Chiba* SC 326/22 the parties made the following submissions at the hearing of the appeal.

[64] Mr *Kwaramba*, counsel for the respondent raised a preliminary objection. He submitted that the appeal was not properly before the court due to failure by the appellant to cite all respondents *a quo*. Counsel submitted that this was prejudicial to the other respondents as they had a right to challenge the appeal.

[65] Mr *Mutangadura*, counsel for the appellant submitted that it was not prejudicial to the other respondents that they had not been cited as they were already before the court as appellants in their own appeals against the Prosecutor General. Counsel also submitted that it had been cited against all other respondents therefore making it unnecessary for them to be cited.

[66] The court dismissed the preliminary objection and proceeded to hear the appeal on the merits.

[67] On the merits, counsel for the appellant submitted that once the Magistrates' court convicted the respondent *a quo*, this triggered the application to recover proceeds of the stolen property.

Counsel submitted that by virtue of the conviction, the appellant had a cause of action to recover the flat.

[68] Counsel averred that s 79 (2) of the Act prohibits civil forfeiture of property acquired or used prior to the coming into effect of the Act but in the present case, the court *a quo* should have invoked ss 39 (4) and 78 (2) of the Act.

[69] He further submitted that the court *a quo* should have considered the intention of the legislature as it did not matter whether the crime was committed before the coming into effect of the Act when there was criminal conviction.

[70] Counsel further submitted that the use of the words “**may not**” in the section meant the court *a quo* had a discretion in determining whether or not to order the civil forfeiture of the property.

[71] *Per contra*, Mr Kwaramba, counsel for the respondent argued that ss 39 (4) and 78 (2) were not the basis of the appellant’s cause of action. He submitted that there was nothing in the founding papers *a quo* which indicated that the matter was brought in terms of ss 39 (4) and 78 (2) as this was not pleaded before the court *a quo*.

[72] Counsel further submitted that the Act had many causes of action but the appellant chose to use s 80. The court *a quo* could not have granted relief that was not sought in the pleadings.

[73] He further averred that the words “may not” are peremptory as they are in the negative.

[74] The second appeal to be heard was *Sikwila v Prosecutor General* SC 344/22. The following submissions were made.

[75] Mr *Sithole*, counsel for the appellant, argued that the matter turned on the question of whether or not the property fell within the ambit of s 79 (2) of the Money Laundering and Proceeds of Crime Act.

[76] He further argued that the court *a quo* having found that the property had been acquired by Chantlong Investments (Pvt) Ltd in 2007, fell into error by finding that the property could be forfeited to the state.

[77] He further argued that the money used to develop a house on the stand was not from proceeds of Chidemo's crimes but from proceeds of Chantlong Investments (Pvt) Ltd's chemical making business.

[78] It was further argued that, Chantlong Investment (Pvt) Ltd was never the subject of any criminal offence nor was it made a party to the proceedings and as such there could be no link to Chidemo in respect of the agreement of sale between the appellant and Chantlong Investments (Pvt) Ltd.

[79] Counsel maintained that the first respondent failed to lead evidence that the property was acquired using proceeds of crime.

[80] He further argued that, assuming that s 79 (2) of the Act allows for forfeiture of developments on the property to the state, it would mean that the state could recover the value of the improvements only and not the whole stand.

[81] Mr *Sithole* further argued that if the court was to accept that the property was developed with tainted money then the issue of proportionality and the fair value of the improvements had to be taken into consideration. With that, counsel argued that the value of the improvements would equate to the portion of the value of the property which could be forfeited to the State.

[82] *Per contra*, Mr *Mutangadura*, counsel for the first respondent, argued that although the property had been acquired in 2007, before the coming into effect of the Act, the property became tainted when Chidemo developed it using proceeds of crime.

[83] He further argued that the court *a quo* did not err in lifting the corporate veil as there was fraud on the part of Chidemo who was in turn a director of Chantlong Investments (Pvt) Ltd which company sold the property to the appellant.

[84] Counsel also argued that there was a link between the appellant and Chantlong Investments (Pvt) Ltd as there was evidence that the appellant was closely linked to Chidemo and therefore the agreement of sale of the property was a simulated agreement.

[85] Mr *Mutangadura* further argued that proportionality could not apply in this case as proceeds of crime had been used to develop the property and therefore any forfeiture to the state would be for the whole property and not developments only.

[86] The third appeal to be heard was *Issack Manitho & Anor v Prosecutor General* SC 313/22.

The following arguments were made in respect of this appeal.

[87] Mr *Nyamakura*, for the appellants submitted that the court *a quo* could only have ordered the forfeiture of property held by the appellants, if the three conditions under s 78 (1) of the Money Laundering and Proceeds of Crime Act had been proven.

[88] The conditions are that:

- (i) the sale transaction was not for fair value,
- (ii) it was not in good faith, and
- (iii) the owners purchased the property with knowledge of the criminality by which the seller acquired the property.

[89] He submitted that, the appellants raised the legitimate owners defence. He therefore submitted that the first respondent failed to prove otherwise in its founding affidavit, such that the forfeiture was not justified.

[90] Mr *Nyamakura* further argued that the appellants were greatly prejudiced when the court *a quo* did not rely on the pleadings or the conduct of the appellants in finding that they were not legitimate owners.

[91] Counsel for the appellants argued that the court *a quo* only considered the facts which could lead to a conclusion that the appellants were not legitimate owners.

[92] In order to do so, the court *a quo* was alleged to have ignored the evidence before it and instead considered the record in HC 7353/17 and based its findings, which were adverse to the appellants, on this record without affording the appellants their right to be heard.

[93] It was thus submitted that the court misdirected itself in this regard as it went outside of the record to justify its conclusions.

[94] In response, Mr *Mutangadura* for the respondent argued that an order for civil forfeiture was an order *in rem* that is, it was against tainted property and not *in personam*. He therefore argued that it was neither here nor there whether the appellants were guilty or innocent because the order was targeted against the property in question.

[95] In respect of the appellants' submissions about the court *a quo*'s findings, he contended that this Court could not interfere with findings made by a lower court unless a misdirection was proven.

[96] The fourth appeal to be heard was *MTU Family Trust v Prosecutor General SC 321/22*. The following submissions were made.

[97] Mr *Zhuwarara*, for the appellant contended that the appellant is the legitimate possessor of the flat in question in the manner contemplated by the Money Laundering and Proceeds of Crime Act and hence should be protected as an innocent purchaser.

[98] He submitted that the sale of shares was not done in a collusive manner and that the appellant was not aware of the property's alleged tainted status.

[99] He further contended that the court *a quo* granted the first respondent relief that he never sought given that the first respondent prayed for the forfeiture of Flat 19 Derwent Lodge yet in its order the court *a quo* forfeited the appellant's shares in Derwent Lodge (Pvt) Ltd.

[100] Counsel further submitted that the court *a quo* also erred in holding that the appellant is not the legitimate owner of the shares in Derwent Lodge (Pvt) Ltd as such finding is contrary to the evidence led before the court *a quo*.

[101] Mr *Zhuwarara* further submitted that the court *a quo* ignored evidence substantiating that the appellant had acquired the said shares in good faith and for fair value, well after the alleged criminal conduct of the second respondent. He moved that the appeal succeeds with costs.

[102] Conversely, Mr *Mutangadura*, for the first respondent submitted that the second respondent connived with the appellant to put those shares beyond the ambit of civil forfeiture proceedings by purporting to create a legitimate owner in the form of the appellant.

[103] He further submitted that ownership of shares in a sectional title entails the right to occupy a specifically defined flat, in this case, flat 19 Derwent Lodge. In this light he submitted that the court *a quo* cannot be said to have granted relief that was not sought given that it is those shares that give one title to the flat in question.

[104] He further submitted that the court *a quo* made findings to the effect that the agreement of sale of the shares between the appellant and the second respondent was simulated, which findings could not be ignored.

[105] Mr *Mutangadura* further submitted that in terms of the Money Laundering and Proceeds of Crime Act, the first respondent was entitled to forfeit all tainted property.

[106] The last appeal to be heard was *Chidemo v Prosecutor General* SC 341/22. The following submissions were made.

[107] Mr *Mapuranga*, counsel for the appellant submitted that the appellant would suffer prejudice as he was not served with the notice of appeal and heads of argument pertaining to the first appeal.

[108] He submitted that the court *a quo* erred in granting the application for civil forfeiture when there is no link or association between the crime and the properties in question.

[109] He averred that the admission of affidavits which were used in criminal proceedings was irregular and the court *a quo* ought not to have relied on such evidence.

[110] Counsel further stated that since there were material disputes of fact, the court *a quo* should not have taken a robust approach and should have heard *viva voce* evidence.

[111] Mr *Mutangadura*, counsel for the first respondent submitted that the appellant was convicted on two counts of theft. He averred that the appellant's convictions could not be de-linked from the properties he bought with proceeds of crime.

[112] He submitted that stand 3036 Shawasha Hills owned by Chantlong Investment (Pvt) Ltd, though acquired in 2007 before the appellant joined the Zimbabwe Revenue Authority fell in the ambit of tainted property because stolen money was used to develop it.

[113] He submitted further that stand 3036 Shawasha Hills and all the properties in question belong to the appellant and the alleged sales of the properties to third parties were simulated.

THE ISSUES

[114] In the case of *Prosecutor General v Miriam Chiba* SC 326/22 the issue which arises for determination is: Whether or not s 79 (2) of the Act provides that a civil forfeiture order can be granted with retrospective effect to the period before the Act came into effect.

[115] In the case of *Locadia Sikwila v Prosecutor General* SC344/22, the following issues arise for determination:

1. Whether or not the forfeiture of the property which belonged to Chidemo's Company Chantlong (Pvt) Ltd, could be determined when the company was not a party to the proceedings.
2. Whether a company's corporate veil can be pieced when the company is not a party in those proceedings.

3. Whether or not the sale was simulated.
4. Whether the forfeiture can include part of the property which was bought before the Act came into effect and before Chidemo started working for ZIMRA.

[116] The issues which arise for determination in SC 313/22 *Isaac Manitho & Anor v Prosecutor*

General are;

1. Whether or not the appellants were innocent purchasers and therefore legitimate owners of the property.
2. Whether or not the court *a quo* erred in ordering the forfeiture of the property despite the improvements effected on the property by the appellants.

[117] In the case of *MTU Family Trust v Prosecutor General* SC 321/22 the issues which arise for determination are:

1. Whether or not the court *a quo* erred in holding that the appellant is not the legitimate owner of the shares in Derwent Lodge (Pvt) Ltd.
2. Whether or not the property could be forfeited to the State.

[118] In the case of *Chidemo v Prosecutor General* SC 341/22 the following issue arises for determination:

Whether or not the court *a quo* erred in granting an application for forfeiture when there was no link between the crime committed and the properties in question.

THE LAW

[119] The legal issues which arise for determination in these appeals are:

- (a) What is tainted property?
- (b) What does the law provide in respect of the civil forfeiture of tainted property?
- (c) What is the meaning of s 79 (2) of the Act in respect of tainted property acquired or used before the Act came into effect?
- (d) What does the law provide in respect of tainted property which has been transferred to a third party?
- (e) Can the corporate veil of a company be pierced when the company is not a party in those proceedings?
- (f) What does the Act provide in respect of forfeiture of property which is not tainted, in place of tainted property which cannot be found or can no-longer be forfeited to the State?

[120] **Tainted property.**

Section 2 of the Act provides for the definition of tainted property as follows:

“tainted property” means—

- (a) proceeds from or instrumentalities of the commission of a serious offence, other than a terrorist act; or
- (b) property which has been, is being, or is intended to be used to commit a serious offence, other than a terrorist act; or
- (c) property which has been, is being, or is intended to be used by an organised criminal group; or
- (d) property owned or controlled by, or on behalf of, an organised criminal group, or
- (e) property which has been collected for the purpose of providing support to an organised criminal group or funding a serious offence.”

[121] Tainted property can therefore be interpreted as follows:

- (a) the actual proceeds of a serious crime for example the actual money or property stolen by the offender or property into which such property has been added or used to buy or to improve.
- (b) property which has been used or is being or is intended to be used to commit a serious offence other than a terrorist act. This refers to what one can refer to as the serious crime offender's tools of trade. In a case where the offender uses a motor vehicle to commit serious crimes, such a motor vehicle.
- (c) property which has been used or is being or is intended to be used by an organised criminal group. The property is tainted by its use or intended use by the organised criminal group.
- (d) property owned or controlled by an organised criminal group. The property is tainted by its being owned or controlled by the organised criminal group.
- (e) property which has been collected for the purpose of providing support to an organized criminal group or funding a serious offence; This refers to property gathered to provide for or fund a criminal group. The property is tainted by the intention of those who collected or gathered it.

What does the law provide in respect of the civil forfeiture of tainted property?

[122] Sections 79 and 80 of the Act provide for the civil forfeiture of tainted property. Section 79

(1) and (2) provide as follows:

- “79 (1)** Orders for civil forfeiture can be sought in respect of property that is suspected to be tainted property or terrorist property whenever such property is identified by or comes into the possession of the Unit, a law enforcement authority or a competent supervisory authority.
- (2) Orders for civil forfeiture may not be granted with respect to property acquired or used before this Act came into force.

[123] In terms of s 79 (1) a civil forfeiture order can be sought in respect of property suspected

to be tainted. This means the Prosecutor General is entitled to apply for a forfeiture order

against property suspected to be tainted property. The issue of whether or not the property is tainted will be established during the trial on a balance of probabilities.

Does s 79 (2) of the Act authorise the granting of civil forfeiture orders in retrospect

[124] In terms of s 79 (2) a court cannot grant a civil forfeiture order in respect of property which was acquired or used before the Act came into effect on 28 June 2013. This simply means the law which provides for the civil forfeiture of tainted property does not have retrospective effect.

[125] In the case of *Sutter v Scheepers* 1932 AD WESSELS JA commenting on provisions couched in the negative at 173 (1) - 174 said:

“(1) If a provision is couched in a negative form it is to be regarded as peremptory rather than as a directory mandate. To say that no power of attorney shall be accepted by the Deeds Office unless it complies with certain conditions rather discloses an intention to make the conditions peremptory than directory; though even such language is not conclusive.”

[126] The issue of the retrospective operation of statutes was clarified in this jurisdiction in the Case of *Agere v Nyambuya* 1985 (2) ZLR 336 (S) at 338 G – 339A where GUBBAY JA (as he then was) stated the general rule as follows:

“It is a fundamental rule of construction in our law, dating probably from Codex 1:14:7, that there is a strong presumption that retrospective operation is not to be given to an enactment so as to remove or in any way impair existing rights or obligations unless such a construction appears clearly from the language used or arises by necessary implication. For instance, where it is expressly retrospective, or deals with past events, or concerns a matter of procedure, practice or evidence. The supposition is that the Legislature intends to deal only with future events and circumstances.”

[127] The position was restated by GUBBAY CJ in the case of *Nkomo & Anor v Attorney-General & Ors* 1993 (2) ZLR 422 (S) where, while commenting on a statute, which allows retrospective *application* of a provision, at 429 C he said:

“Care must always be taken to ensure that retrospectivity is confined to the exact extent which the section of the Act provides.”

[128] It is therefore clear that the use of the words “may not” in s 79 (2) being in the negative means courts cannot grant forfeiture orders in respect of tainted property acquired or used before the Act came into force on 28 June 2013.

Forfeiture orders, when they can be granted and the standard of proof.

[129] Section 80 of the Act provides for the nature of a forfeiture order, the right of the court to grant such an order, the circumstances under which a forfeiture order can be granted and the standard of proof required to obtain a forfeiture order. It provides as follows:

- “80 (1) An order for civil forfeiture is an order *in rem*, granted by a court with civil jurisdiction to forfeit to the State tainted property or terrorist property.
- (2) The court, on an application by the Prosecutor-General, shall grant a civil forfeiture order in respect of property within the jurisdiction of Zimbabwe, where the court finds, on a balance of probabilities, that such property is tainted property or terrorist property.
- (3) In order to satisfy the court under subsection (2) -
- (a) that property is proceeds of a serious offence or a terrorist act, it is not necessary to show that the property was derived directly or indirectly, in whole or in part, from a particular serious offence or terrorist act, or that any person has been charged in relation to such an offence or act; only that it is proceeds from some conduct constituting or associated with the serious offence or terrorist act;
 - (b) that property is an instrumentality of a serious offence or terrorist act, it is not necessary to show that the property was used or intended

to be used to commit a specific serious offence or terrorist act, or that any person has been charged in relation to such an offence or act; only that it was used or intended to be used to engage in conduct constituting or associated with the serious offence or terrorist act;

- (c) that property is tainted property or terrorist property, it is not necessary to show that the property –
 - (i) was derived from a specific serious offence or terrorist act, as long as it is shown it was derived from some serious offence or terrorist act; or
 - (ii) has been or is being or is intended to be used by an organised criminal group or terrorist organisation, or to commit a specific serious offence or terrorist act, as long as it is shown that it has been, is being or is intended to be used by some organised criminal group or terrorist organisation or to commit some serious offence or terrorist act; or
 - (iii) is owned or controlled by or on behalf of a specific organised criminal group or terrorist organisation, as long as it is shown to be owned or controlled by or on behalf of some organised criminal group or terrorist organisation; or
 - (iv) has been provided or collected for the purpose of supporting a specific organised criminal group or terrorist organisation or funding a specific serious offence or terrorist act, as long as it is shown to have been provided or collected for the purpose of providing support to some organised criminal group or terrorist organisation or funding some serious offence or terrorist act, or that any person has been charged in relation to such conduct.
- (4) An application for civil forfeiture may be made in respect of property into which original proceeds have been converted either by sale or otherwise.
- (5) For the purposes of making a determination under subsection (2) –
 - (a) proof that a person was convicted of any offence for conduct that is relevant to the determination of whether property is tainted property or terrorist property, is proof that the person committed the offence;
 - (b) the court may, on a balance of probabilities, find that property is tainted property or terrorist property, even if a person whose conduct is relevant to the determination of whether property is tainted property or terrorist

property was acquitted of an offence related to that conduct, or if the charge was withdrawn before a verdict was returned, or if the proceedings were stayed.”

[130] In terms of s 80 (1) a civil forfeiture order is an order *in rem* which is binding against a tainted property and all persons with an interest in the tainted property. It is an order granted by a court with civil jurisdiction to grant such an order. In terms of s 78 (1) of the Act the High Court has jurisdiction to grant civil forfeiture orders.

[131] Section 80 (2) provides that the standard of proof required to obtain a civil forfeiture order shall be on a balance of probabilities while s 80 (3) provides for how the balance of probabilities can be satisfied.

[132] For the purposes of determining this appeal, s 80 (3) provides for how the balance of probabilities can be satisfied. It can be satisfied if the following is established.

- (a) that the property is proceeds of a serious crime, whether or not it is directly or indirectly linked to a particular serious crime.
- (b) it is not necessary to prove that any person has been charged in relation to such an offence or act. It is established if it is proved that it was used to engage in conduct constituting or associated with the serious offence.
- (c) to establish that property is tainted it is not necessary to show that the property was derived from a specific serious offence or act, as long as it is shown that it was derived from some serious offence.

[133] In terms of s 80 (4) property can be tainted and be subject to civil forfeiture if original proceeds of crime are infused into it by sale or development using proceeds of a serious crime.

[134] In terms of s 80 (5) a conviction in respect of tainted property is evidence that the convicted person committed conduct linked to such tainted property. However, an acquittal, stay of criminal proceedings or withdrawal of charges is not proof that one did not commit conduct in respect of tainted property.

Forfeiture of untainted property in place of tainted property which cannot be found.

[135] Sections 39 (4) and 78 (2) of the Act provides for the right to seize or confiscate untainted property of an equivalent value in the place of tainted property which can no longer be found or be seized or confiscated. They in identical wording provide as follows:

“Where any property that would have been liable to seizure or confiscation cannot be located or identified or, for whatever reason, it is not practical or convenient to seize or confiscate the property, a competent court may order the seizure or confiscation of property equivalent in value from the defendant, whether or not such property is tainted property or represents proceeds of crime”.

[136] This means a court can, where the property which should have been seized or confiscated can no-longer be found, order the seizure or confiscation of the defendant’s any other property of equivalent value whether or not that other property is tainted. It is apparent that the un- availability of the tainted property and its substitution by the untainted property must be pleaded. Both properties must belong to the defendant. It does not justify seizure or

confiscation of property belonging to a third party. It must also be noted that the provisions relate to seizure and confiscation not civil forfeiture.

[137] Section 50 provides for confiscation as follows:

- (1) “Where a person is convicted of a serious offence, the Prosecutor-General may apply to the court for a confiscation against property that is identified as tainted property or terrorist property in relation to that offence.
- (2) Except with the leave of the court, the Prosecutor-General must make an application under sub-section (1) within six months of the date upon which a person was convicted of the offence.
- (3) A court shall grant leave under subsection (2) only if it is satisfied that -
 - (a) the property to which the application relates was derived, realised or identified after the period referred to in subsection (1); or
 - (b) the application is based upon evidence that could not reasonably have been obtained by the Prosecutor-General before the period referred to in subsection (1); and it is otherwise in the interest of justice to do so.
- (4) The Prosecutor-General may amend an application for a confiscation order at any time prior to the final determination of the application by the court, provided that reasonable notice of the amendment is given to affected persons.
- (5) Where an application under this section has been finally determined, the Prosecutor-General may not make a further application for a confiscation order in respect of the same offence without the leave of the court.
- (6) A court shall grant leave under subsection (5) only if it is satisfied that—
 - (a) the property to which the new application relates was identified after determination of the previous application; or
 - (b) necessary evidence became available after the previous application was determined; and it is otherwise in the interest of justice to do so.
- (7) A further application under this section may not be made later than six years after the date of the final determination of the previous application under this section.

[138] It is apparent that confiscation must be specifically applied for by the Prosecutor General

within a specified time failing which an application for extension must be made and justified. The further procedures specified in s 50 clearly prove that confiscation cannot be confused with civil forfeiture nor be resorted to in order to justify civil forfeiture of property which was not the subject of the civil forfeiture application.

[139]Section 83 provides for seizure as follows:

- “(1) The court may, on application by the Prosecutor-General, make an order in conformity with sub-section (6) (called a “property seizure order”) to search for and seize specified property that is the subject of a property freezing order, if the court is satisfied that—
- (a) a property freezing order would not be effective to preserve the property; or ;
 - (b) there is a reasonable suspicion of risk of dissipation or alienation of the property if the order is not granted.
- (2) A property seizure order shall also grant power to a person named in the order to enter any premises in Zimbabwe to which the order applies, and to use all necessary force to effect such entry.
- (3) If during the course of a search under a property seizure order, an authorised officer finds any property or thing that he or she believes on reasonable grounds is of a kind which could have been included in the order had its existence, or its existence in that place, been known of at the time of application for the order, he or she may seize that property and the seizure order shall be deemed to authorise such seizure.
- (4) Property seized under a property seizure order, may only be retained by or on behalf of the Prosecutor-General for thirty days.
- (5) The Prosecutor-General may subsequently make application for a property freezing order in respect of such property.
- (6) If the authorised officer is an inspector who believes that the execution of an order under this section may give rise to a breach of the peace or other criminal conduct, the inspector may request that he or she be accompanied by one or more police officers who will assist in execution of the order.
- (7) A property seizure order shall specify—

- (a) the purpose for which the order is issued, including the nature of the relevant offence; and
- (b) the kind of property authorised to be seized; and
- (c) the date on which the order shall cease to have effect; and
- (d) the time during which entry upon any land or premises is authorised.”

[140] It is again apparent that seizure is subject to specified procedures which cannot be resorted to by a court after hearing an application for civil forfeiture. It cannot be relied on to justify the granting of a civil forfeiture order of property which was not the subject of the civil forfeiture application.

[141] **Legitimate owner**

Section 78 (1) (a) (ii) provides for a legitimate owner as follows:

“(1) In this Part -

“legitimate owner”, in relation to the owner of tainted or terrorist property or any interest therein, means -

- (a) in the case of such property that is the proceeds of a serious offence or terrorist act, a person who—
 - (i) ----
 - (ii) acquired the property in good faith and for fair value after the criminal conduct and did not and could not reasonably have known the property was such proceeds“.

[142] The factors which qualify one to be a legitimate owner are:

- (i) he or she acquired the property for fair value in good faith.
- (ii) after the criminal conduct which tainted the property had been committed.
- (iii) when he or she could reasonably not have known that the property was tainted.

These factors should be established by evidence led in the civil forfeiture proceedings and be carefully taken into consideration by the court to avoid forfeiting property genuinely and innocently acquired by third parties without realising that they are buying tainted property.

Simulated Sale.

[143] A simulated sale is not a genuine sale. It is a device through which the parties seek to place tainted property beyond the reach of forfeiture. The purchaser, unlike the legitimate owner, will be aware that the property is tainted and merely seeks to assist the defendant by pretending to have bought the property when in reality no sale will have taken place between the parties.

[144] In the case of *Zandberg v Van Zyl* 1910 AD 302, INNES CJ said:

“...the parties to a transaction endeavour to conceal its true character. They call it by a name or give it a shape, intended not to express but to disguise its true nature. And when a court is asked to decide any rights under such agreement, it can only do so by giving effect to what the transaction really is; not what it in form purports to be...”

[145] In the vein of simulated agreements, the court in the case of *Zandberg v Van Zyl supra* at 309, further said:

“The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstance, that the same object might have been attained in another way will not necessarily make the arrangement other than what it purports to be. The enquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down.”

[146] The court should, through a careful analysis of evidence proving the probabilities of a genuine sale or a simulated one, determine the truth from the probability or improbability of the parties having entered into a genuine sale or a simulated one.

APPLICATION OF THE LAW TO THE FACTS

Prosecutor General v Miriam Chiba SC 326/22.

[147] This appeal is premised on an argument that the court *a quo* erred when it, at paras 69, 70 and 71 of its judgment, held as follows:

- “69. In the present matter, since the undisputed fact is that the first respondent acquired the shares before the Money Laundering Act came into force, my view is that this Court has no power, duty or jurisdiction to grant an order for civil forfeiture of the shares”
70. Much the same can be said of s 79 (2) of the Act. The Lawmaker is clear that the Act came into effect on 28 June 2013. Equally manifest is the legislature’s intention that a court has no power to grant a civil forfeiture order with respect to property acquired before the Act came into force.”
71. The provision under consideration is couched in negative form. Of such a provision, WESSELS JA in *Sutter v Scheepers* 1932 AD provided the following guideline at 173 (1) -174:

‘ (1) If a provision is couched in a negative form it is to be regarded as peremptory rather than as a directory mandate. To say that no power of attorney shall be accepted by the Deeds Office unless it complies with certain conditions rather discloses an intention to make the conditions peremptory than directory; though even such language is not conclusive.’

My view is that the condition for court’s jurisdiction to determine an application for an order for civil forfeiture of a tainted property or terrorist property is that such property should have been acquired when the Act itself had come into force. To hold otherwise would mean the court would be exercising powers without any legal basis”.

[148] It is common cause that Chidemo bought the shares on 20 October 2011 before the Act came into force on 28 June 2013.

[149] Section 79 (2) prohibits the granting of civil forfeiture orders in respect of property acquired or used before the Act came into force on 28 June 2013. The court *a quo* therefore correctly held that a civil forfeiture order could not be granted in this case because the property was bought and used before the Act came into effect.

Whether or not the court *a quo* should have granted forfeiture in view of the provisions of ss 39 (4) and 78 (2) of the Act.

[150] Mr *Mutangadura* for the appellant argued that even though the property was acquired and used before the Act came into effect the court should have forfeited it to the State in terms of ss 39 (4) and 78 (2) of the Act.

[151] Mr *Kwaramba* for the respondent submitted that forfeiture on the basis of these sections was not pleaded and that the appellant's pleadings *a quo* did not rely on these sections. He further argued that ss 39 (4) and 78 (2) do not provide for forfeiture but for seizure and confiscation.

[152] As already stated in our analysis of the law ss 39 (4) and 78 (2) provide for a competent court's jurisdiction to order the seizure or confiscation of property equivalent in value from the defendant when property that could have been liable for seizure or confiscation cannot be found.

[153] We agree with counsel for the respondent that these sections relate to a situation different from the one which was before the court *a quo*. It is apparent from the record that the appellant applied for the forfeiture of the shares and not their seizure or confiscation.

[154] In our view ss 39 (4) and 78 (2) provide for different circumstances and could not have been relied on to grant an order of civil forfeiture by the court *a quo*. The appeal has no merit and should be dismissed.

Locadia Sikwila v The Prosecutor General SC 344/22

[155] The appellant bought stand 3036 Shawasha Hills from Chantlong (Pvt) Ltd a company registered in terms of the laws of Zimbabwe.

[156] Chantlong (Pvt) Ltd had bought the stand in 2007 before Chidemo who is one of its Directors was employed by Zimra. The only development on the stand was a cottage.

[157] During the time Chidemo was employed by Zimra a main house valued at US\$250 000 00 was built on the stand.

[158] The first respondent (the Prosecutor General) believing that the property had been tainted by it having been developed using money stolen from Zimra applied for its forfeiture to the State.

[159] It however omitted to cite Chantlong (Pvt) Ltd, the alleged seller and current registered owner of the property, as a party to the proceedings.

[160] The court *a quo* pierced Chantlong's corporate veil and declared it to be the *alter ego* of Chidemo. It forfeited stand 3036 Shawasha Hills without affording its registered owner since 2007 an opportunity to be heard.

Can a company's corporate veil be pierced in proceedings in which it is not a party.

[161] The sale in this case was between Chantlong (Pvt) Ltd and Locadia Sikwila. Chantlong (Pvt) Ltd was not a party in the proceedings before the court *a quo*. Its corporate veil was pierced without it being given an opportunity to be heard.

[162] The *audi alteram partem* rule requires that a party be heard before a decision can be made against it. In a case where the corporate veil of a company is to be pierced because of the fraudulent activities of one of its Directors, both the company and the director should be cited. The veil that is to be pierced is the company's, therefore it must be heard before its status or assets are affected by the order sought against it or its assets.

[163] The *audi alteram partem* rule holds that a man shall not be condemned without being given a chance to be heard in his own defence. The rule is so basic to jurisprudence that, EBRAHIM J (as he then was) in *Dube v Chairman, Public Service Commission & Anor* 1990 (2) ZLR 181 (H) at p 188D, said:

“It is often termed a rule of natural justice”.

[164] The rule implores public officials, judicial and *quasi-judicial* officers, and anyone entrusted with the power to make decisions or the power to take action affecting others adversely, to exercise such powers fairly. Fairness is the overriding consideration.

[165] In the case of *Schmidt & Anor v Secretary of State for Home Affairs* [1969] 1 All ER 904 (CA), LORD DENNING MR at p 909 said:

“The speeches in *Ridge v Baldwin* (7) show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right

or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say” (emphasis added).

[166] Two years later in 1971, LORD DENNING had this to say in *Breen v Amalgamated Engineering Union & Ors* [1971] 1 All ER 1148, at p 1153:

“It is now well settled that a statutory body, which is entrusted by a statute with a discretion, must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand, or as administrative on the other hand, or what you will. Still, it must act fairly. It must, in a proper case, give a party a chance to be heard.”

[167] The doctrine is firmly entrenched in our jurisdiction. See the cases of *Health Professions Council v McGowan* 1994 (2) ZLR 329 (S) at 334, and *Taylor v Minister of Higher Education & Anor* 1996 (2) ZLR 772 (S), among others. In the *McGowan* case GUBBAY CJ at p 334B-C said:

“In short, the legitimate expectation doctrine, as enunciated in *Traub*, simply extended the principle of natural justice beyond the established concept that a person was not entitled to a hearing unless he could show that some existing right of his had been infringed by the quasi-judicial body. Fairness is the overriding factor in deciding whether a person may claim a legitimate entitlement to be heard.”

[168] In our view the court *a quo* committed an irregularity by proceeding with the hearing in the absence of Chantlong (Pvt) Ltd the registered owner of Stand 3036 Shawasha Hills.

[169] In view of this finding, there is no need to determine the other issues. The proceedings must be set aside and the case be remitted to the court *a quo* for a hearing *de novo* before the same judge after the joinder of Chantlong (Pvt) Ltd as a party to the proceedings.

Issack Manitho and Desiree Manitho v Prosecutor General SC 313/22.

[170] As explained in the facts of this case, the appellants narrated with the aid of documentary evidence how they purchased Stand 215 FolyJon Glen Lorne from Chidemo and had it transferred into their names.

[171] What remains for this Court's determination is whether or not they are legitimate owners of the property.

(i) Whether or not the appellants were innocent purchasers (Legitimate Owners).

[172] By the time Tapuwa Chidemo was charged with the nine counts of fraud and one count of money laundering he had by then sold the 90% complete double storey property at 215 FolyJon Glen Lorne to Margret Misha Trust represented by Isaack Manitho Mhlanga on 7 July 2017 for US\$150 000. Issack Manitho explained why the original agreement was cancelled and substituted by the one in which he and his wife are the purchasers. When Chidemo applied for a Capital Gains Tax Clearance Certificate, he submitted the subsequent agreement of sale dated 11 July 2017. The appellants were the third and fourth respondents in the court *a quo*.

[173] As already narrated under the facts of these appellants, the existence of two agreements was adequately explained and supported by Issack Manitho Mhlanga's change of name to Issack Manitho which was supported by documentary evidence. In the court's view the change of

name justified the cancellation of the original agreement and its substitution by the agreement dated 11 July 2017.

[174] In his address to the court *a quo* Mr *Mutangadura* for the Prosecutor General in appreciation of the circumstances of these appellants described them as innocent purchasers.

[175] That, in our view, is the correct assessment of the appellants in SC 313/22's position on the facts and the law.

[176] The following evidence proves that the appellants entered into a genuine sale with Chidemo.

1. The appellants had been on the property market looking for a property to buy since January 2017.
2. An Estate agent brought the property to their attention through a WhatsApp message which was produced as an exhibit.
3. There is evidence of transfer of the purchase price from their account with the MBCA Bank to the seller's conveyancers', Trust Account, Mupindu Legal Practitioners.
4. They subsequently obtained a mortgage bond from MBCA Bank through which they completed the development of the property they had bought as a 90% complete 4 bedroomed double storey house, proof of which was tendered as documentary evidence in the court *a quo*.
5. They will for a substantial period of their lives be paying US\$1055-27 per month towards mortgage repayments.

6. The property was transferred into their names.

[177] In our view, these factors make it improbable that the sale is simulated. The existence of two agreements was adequately explained and supported by documentary evidence. We are satisfied that the appellants entered into the agreement of sale with intent to genuinely buy the property.

[178] Mr *Mutangadura* for the first respondent correctly, as earlier indicated, stated that they were innocent purchasers.

[179] The court *a quo* held that the sale was a simulated one on the basis that the property was sold for USD\$150 000-00 after a double storey had been built on the property which had been purchased as a vacant stand for US\$85 000-00. It reasoned that it did not make economic sense for the property which had been developed by the building of a double storey which must have cost more than the US\$65 000-00 gained by the seller to be sold for USD\$150 000-00.

[180] While the purchase price does not make economic sense it must be appreciated that the seller had not used his own money to build on the property. He was therefore not making a loss but gaining the US\$ 150 000-00 from an investment made from stolen proceeds.

[181] The critical and careful assessment should have been on whether the price was so low as to establish in the minds of the purchasers that it could not pass as a fair value of the property.

The major factor the court *a quo* did not take into consideration is that the building of the house had not been completed. The appellants bought it when it was 90 percent complete.

[182] After taking all the relevant facts of this case into consideration, the court is satisfied that the appellants genuinely purchased the property. They used their savings to pay the purchase price. They obtained a mortgage bond to further develop the property. Payments were made through the conveyancers who deposed to an affidavit explaining how they paid the seller and various others from the payments made by the appellants.

[183] There is uncontroverted evidence that the appellants did not know Chidemo prior to their entering into a sale agreement with him. This is apparent from the WhatsApp messages with the Estate Agent which were produced as documentary evidence. The court *a quo* did not take some of these factors into consideration. It mainly relied on the purchase price not making economic sense. The court is satisfied that it misdirected itself.

[184] The appellants proved that they are legitimate owners. They are entitled to retain their ownership of the property. The appeal has merit and should be allowed.

MTU Family Trust v Prosecutor General SC 321/22

[185]The appellant contends that the court *a quo* erred in holding that it was not a legitimate owner of the shares in Derwent Lodge (Pvt) Ltd. It submitted that the court *a quo* ignored evidence

substantiating that it had acquired the said shares in good faith and for value, well after the alleged criminal conduct of Chidemo.

[186] The Prosecutor General, who is the first respondent in this case, argued that the discrepancies in the appellant's case prove that the transaction between the parties is a simulated sale.

Whether or not the court *a quo* erred in holding that the appellant is not the legitimate owner of the shares in Derwent Lodge (Pvt) Ltd.

[187] As was stated under the analysis of the law, a simulated sale is one which is intended by the parties to mislead authorities into believing that a sale has taken place for purposes of preventing the forfeiture of the property purportedly sold.

[188] A perusal of the record establishes that in the agreement of sale dated 15 February 2019, Chidemo sold shares to the appellant for US\$ 40 000-00 through an agreement prepared by Mapaya and Partners Legal practitioners.

[189] The appellant also produced an agreement of sale prepared by Rawson Properties Estate Agents which records the purchase price of the shares was US\$36 000.

[190] The appellant attached a copy of the Mapaya and Partners Legal Practitioners agreement of sale of the shares reflecting the purchase price as US\$40 000 in the application for joinder.

[191] They also attached the “Rawson Properties” agreement of sale of shares to their opposing affidavit against the application for civil forfeiture, in which the purchase price of the same shares is stated as US\$36 000).

[192] The court *a quo* found that there was no proof that either amount was deposited directly into the law firm’s trust account or otherwise paid to Rawson Properties.

[193] Instead, the appellant relied on an acknowledgment of receipt as proof that it paid the purchase price for the shares to Chidemo.

[194] The acknowledgment of receipt issued by Chidemo indicates that he received a total sum of US\$35 312 which is below the purchase prices of US\$ 40 000-00 and US\$36 000-00.

[195] The purchase price was in terms of the Mapaya & Partners Legal Practitioners agreement of sale supposed to be paid to those Legal Practitioners who were the seller’s conveyancers. The departure from the agreed terms of the agreement signifies that the sale is simulated.

[196] The position is strengthened by the fact that the seller (Chidemo) who apparently issued a fictitious receipt purporting to have received the purchase price had a motive to enter into a simulated sale to conceal his tainted property.

[197] There is no explanation as to why he accepted an amount below the prices mentioned in the two agreements of sale.

[198] The two agreements, the departure from to whom the purchase price was to be paid, the payment to the seller whose fraudulent activities tainted the property, the payment of a price lower than those mentioned in the agreements of sale completely destroyed the credibility of the sale of the property.

[199] The court is satisfied that this can be nothing but a simulated sale.

[200] The appeal has no merit. It should be dismissed with costs.

Chidemo v Prosecutor General SC 341/22.

Whether or not the court *a quo* erred in granting an application for forfeiture when there was no link between the crimes and the properties in question.

[201] In this appeal the appellant challenges the forfeiture of the properties he sold to persons who are also appellants in SC 344/22, SC 313/22 and SC321/22.

[202] He, in his grounds of appeal, claims that there is no link between the crimes and those properties.

[203] As already stated Chidemo is the main character in the five appeals. He was convicted on two counts of fraudulently transferring money into his wife's bank account and into their company's account.

[204] He had been charged with nine (9) counts of fraud and one (1) count of money laundering.

He was acquitted on the other counts. In terms of the law as provided in s 80 (5) (b) an acquittal as narrated under the analysis of the law does not absolve one from civil forfeiture.

[205] The court *a quo* held that the properties he bought or developed, after the Act came into force on 28 June 2013 were tainted property. It made that decision after considering the convictions and other evidence pointing to his having stolen a total sum of US\$1 239 083.93 from ZIMRA.

[206] In respect of the convictions on the two counts against which his appeal to the High Court was dismissed he had stolen a total of USD\$460 538.61. In respect of this amount the court *a quo*'s decision was in terms of s 80 (5) (a) on the basis that Chidemo's conduct which tainted the properties he bought and subsequently sold was confirmed by the convictions.

[207] In respect of the counts on which he was acquitted the court *a quo* believed the evidence led and was satisfied on a balance of probabilities that he bought or developed the properties involved in these appeals from the proceeds of his fraudulent activities.

[208] It therefore held that the properties were tainted and subject to civil forfeiture. We agree with the court *a quo*'s findings that Chidemo's fraudulent activities tainted the properties he bought with proceeds of the fraud. We also agree with its finding that the proceeds of Chidemo's frauds also tainted the properties he developed using the money he stole from ZIMRA.

[209] Therefore the civil forfeiture of the properties he bought with proceeds of the frauds or that of the properties he developed with such proceeds will not depend on his protestations in this appeal.

Whether the Mercedes Benz Registration Number AND 5756 is tainted property and was correctly forfeited to the State.

[210] When the Prosecutor General applied for an interdict against the disposal of this motor vehicle the appellant's response in an affidavit he deposed to on 31 August 2017, was that it did not belong to him and he had no direct or indirect interest in it.

[211] When the Prosecutor General applied for its civil forfeiture the appellant changed his position and admitted that it was his motor vehicle which he bought on 5 August 2014 through Be-Forward from Japan.

[212] He claimed to have bought it through his savings from his Barclays Bank account. He claimed that the savings he used had nothing to do with the money allegedly illegally transferred from Zimra.

[213] He claimed to have bought it for US\$2 080-00. He, however, did not produce any proof of the Barclays Bank transaction he used to buy the motor vehicle.

[214] In determining the application for forfeiture the court *a quo* at para (149) of its judgment said:

“The explanation that he has now placed before me should have been the very same one proffered in resisting the application for an interdict. The first respondent has not placed a copy of his Barclays Bank account statement before me. He has decided to simply claim that the account was funded by savings from his hard earned money. If that is so, why did he deny ownership of the vehicle on 31 August 2017? Why did he then, not say what he is saying now? Why has he not furnished his Barclays Bank statement of account to enable the court to appreciate his banking history relative to that account? What is he afraid of? What is he hiding?”

[215] The series of questions the court *a quo* asked should have been answered by the appellant’s evidence. They were not. This means the appellant’s story could not be believed. It was unbelievable.

[216] It is inconceivable that a person who lawfully bought a motor vehicle can in a law suit deny that he owns it, but months later in a different law suit change and say he owns it. He cannot be believed.

[217] The court *a quo* did not believe him. It correctly held that the Mercedes Benz motor vehicle, C Class Model Registration Number AND 5756 was proceeds of crime. It correctly forfeited it to the State.

[218] The appeal has no merit and should be dismissed with costs.

COSTS IN THE APPEALS

[219] In respect of the appeals in which the appellants appealed and succeeded against the Prosecutor General we hold the view that each party should bear its own costs. We hold the view that the Prosecutor General makes these applications in the process of fighting crime and should not in those circumstances be lightly mulcted with costs.

DISPOSITION

[220] In light of the above, the court finds as follows:

- (i) The appeal in SC 326/22, should be dismissed with each party bearing its own costs.
- (ii) The appeal in SC 344/22 should be allowed with no order as to costs and the decision of the *a quo* be set aside and the case be remitted to the court *a quo* for a hearing *de novo* before the same judge after the joinder of Chantlong (Pvt) Ltd.
- (iii) The appeal in SC313/22 should be allowed with each party bearing its own costs.
- (iv) The appeals in SC 321/22 and SC341/22 should be dismissed with costs.

[221] It is therefore ordered as follows:

1. The appeal in SC 326/22 be and is hereby dismissed with no order as to costs.
2. The appeal in SC 344/22 be and is hereby allowed with no order as to costs.
 - 3.1 The judgment of the court *a quo* be and is hereby set aside.
 - 3.2 The case is remitted to the court *a quo* for a hearing *de novo* before the same judge after the joinder of Chantlong (Pvt) Ltd.
3. The appeal in SC 313/22 be and is hereby allowed with each party bearing its own costs.

(2.1) The judgment of the court *a quo* be and is hereby set aside and is substituted as follows:

“The application be and is hereby dismissed with no order as to costs.”

4. The appeal in SC 321/22 be and is hereby dismissed with costs.
5. The appeal in SC 341/22 be and is hereby dismissed with costs.

MATHONSI JA : I agree

CHITAKUNYE JA : I agree

SC 321/22, Wintertons legal practitioners, appellant’s legal practitioners

National Prosecuting Authority, 1st respondent’s legal practitioners

Rubaya & Chatambudza, 2nd respondent’s legal practitioners

Parklane Court for the 3rd respondent

Mbidzo Muchadehama & Makoni, 6th respondent legal practitioners

Mafadza & Associate,s 7th respondent’s legal practitioners

SC 344/22 *Mafadza & Associates*, appellant’s legal practitioners

National Prosecuting Authority 1st respondent's legal practitioners

Wilmont & Bennet, 3rd & 4th respondents' legal practitioners

Mbidzo Muchadehama & Makoni, 2nd respondent's legal practitioners

Wintertons, 6th respondent's legal practitioners

SC 326/22, *National Prosecuting Authority*, appellant's legal practitioners

Mbidzo Muchadehama & Makoni respondent's legal practitioners

SC 313/22, *Wilmont & Bennett* appellant's legal practitioners

National Prosecuting Authority respondent's legal practitioners