PROSECUTOR GENERAL
versus
FRANK CHITUKUTUKU
and
NYASHA CHITUKUTUKU
and
HOTSPIKES (PVT)LTD
and
REGISTRAR OF DEEDS
and
REGISTRAR OF MOTOR VEHICLES

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE,14 September 2022 & 24 July 2023

Opposed Application

C Mutangadura, for the applicant
J Dondo and E Nyakunika, for the 1st, 2nd & 3rd respondents
No appearance for the 4th &5th respondents

CHIKOWERO J:

INTRODUCTION

1. This is an application for a civil forfeiture order brought in terms of SS 79 and 80 of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*](" the Money Laundering Act" or simply " the Act").
2. The targeted property includes motor vehicles, shares and immovables.

THE APPLICATION

3. The applicant contends that the first respondent acquired the property using proceeds of serious offences which he committed when he was the Chief Executive officer of the Zimbabwe National Road Administration ("Zinara''). The futher contention is made that he then registered some of the property in his name, some jointly with the second respondent (who is his spouse) and the rest as belonging to the third respondent. The first and second respondents are the directors of the third respondent.
4. The serious crimes allunded to are fraud, bribery and criminal abuse of duty as a public officer as defined in SS 136, 170 and 174 of the Criminal Law(Codification and Reform)

Act [*Chapter9:23*](" the Criminal Law Code").The other crimes are the money laundering offences set out in S 8 of the Money Laundering Act.

5. The applicant's case is that the first respondent engaged in some conduct constituting or associated with any one or more of the offences that I have mentioned and, as a consequence, obtained money which he then used to acquire and in some cases develop the property that is the subject of this matter. Put differently, the applicant urges me to find that the first respondent abused his office as Chief Executive Officer of Zinara by handpicking three companies- without going through tender procedure- to provide road rehabilitation services within the jurisdictions of some rural district Councils in this country. Having identified those companies, he then exerted pressure on some officials of the local authorities to sign contracts on behalf of their respective councils.

   Representatives of the companies appended their signatures on behalf of the latter. The first respondent then signed numerous requisition and funds transfer documents authorising Zinara's bankers to pay huge sums of money to each of the companies in question. The applicant asks me to find that the companies returned the favour to the first respondent in the form of what was referred to as " kickbacks"- which the first respondent then used to acquire and develop the property that is sought to be forfeited.

6. On his part the first respondent denies that he handpicked any of the three companies. He says the various officials of the local authorities ,knowing very well that they contravened the criminal laws of the land by entering, on behalf of the local authorities, into road rehabilitation contracts with Notify Enterprises(Pvt) Ltd ("Notify"), Twalumba Civils (Pvt) Ltd ("Twalumba") and Fremus (pvt) Ltd ("Fremus") without complying with the law relating to tender, are now all singing from the same hymn book, namely raising the false allegations that it is the first respondent who handpicked and imposed Notify on Bubi and Umzingwane Rural District Councils, Twalumba on Goromonzi Rural District Council and Fremus on Gutu, Zaka, Buhera and Mhondoro-Ngezi Rural District Councils. He says his wealth, in the form of the property that I have alluded to, was lawfully acquired by him. He earned money while employed not only by the Air Force of Zimbabwe ,as Chief Executive Officer of Zinara, but also from his farming activities at subdivision 1 of Ruwonde Farm in Goromonzi carried out through the third respondent as well as interest free loans and dividends paid to him as a shareholder of Champions Insurance (Pvt)Ltd.

THE LAW

7. This Court had occasion, in the matter of *The Prosecutor- General* v *Chidemo and Ors* HH 416/22, to discuss the pertinent legal provisions in an application for an order for civil forfeiture of property said to be tainted.

8. I think it necessary to highlight the provisions of s 80 of the Act. They read:

> "80. Civil forfeiture Orders
>
> (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.
>
> (2) The Court, on an application by the Prosecutor – General shall grant a 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…..
>
> (3) In order to satisfy the Court under Sub-section (2)-
>
> (a) That property is proceeds of a serious offence …… 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 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…..
>
> (b) that property is tainted property ….. it is not necessary to show that the property-
>
> (i) Was derived from a specific serious offence as long as it is shown it was derived from some serious offence….."
>
> (the underlining is mine)

9. I shall explain these provisions as I apply them to the facts of this matter.

10. In the Kenyan case of *Erad Supplies and General Contractors Ltd* v NCPB [2012] eklr the following sentiments were expressed:

> "(79) Under Section 55 (2) of the ACECA [Anti- Corruption and Economic Crimes Act of 2003] the theme in evidentiary burden in relation to unexplained assets is prove it or lose it. In other words, an individual has the evidentiary burden to offer satisfactory explanation for legitimate acquisition of the asset or forfeit such asset. The cornerstone for forfeiture proceedings of unexplained assets is having assets disproportionate to known legitimate source of income. Tied to this is the inability of an individual to satisfactorily explain the disproportionate asset. A forfeiture order under ACECA is brought against unexplained assets which is tainted property; if legitimate acquisition of such property is not satisfactorily explained, such tainted property risk categorisation as property that has been unlawfully acquired……"

11. I have referred to the Kenyan case of Erad Supplies (Supra) in light of the framework of our own Act as a whole, and being mindful of the history of the matter before me. SS 37 B and 37C of the Act, among others, deal with unexplained wealth orders. This application was preceded by a successful application for an unexplained wealth order.

12. I pause to highlight that I am aware that the burden remains with the applicant to satisfy me that it is more probable than not that the targeted property is tainted. In other words,

that the onus is on the applicant to prove its case on a balance of probabilities, for that is what is meant by the phrase "it is more probable than not". See *British American Tobacco Zimbabwe* v *Chibaya* SC 30/19.

13. If I have to draw an inference, I am mindful of the requirements that such an inference must be consistent with all the proved facts, but it need not be the only reasonable inference. It suffices that it be the most probable inference. See Madefit Investments (Private) Limited v Prosecutor General SC 139/21.
14. The unexplained wealth order is a standard against which the first respondent's explanation of his wealth is measured. That explanation, together with everything else that has been placed before me, ultimately determines whether the applicant has proved that the assets are tainted property.

    WAS THE FIRST RESPONDENT, ON A BALANCE OF PROBABILITIES, INVOLVED IN SOME KIND OF CRIMINAL ACTIVITY DURING HIS TENURE AS CHIEF EXCUTIVE OFFICER OF ZINARA?
15. I am satisfied that he was.
16. He was at the centre of what clearly were irregularities in the engagement of Notify, Twalumba and Fremus. All three companies were favoured with highly lucrative road rehabilitation contracts without going through tender procedures. This is common cause. All that the first respondent says is that he was not involved in the handpicking of these companies. There is overwhelming evidence to the contrary. Notify received some direct payments from Zinara, which were authorised by the first respondent, before it had even signed any contracts with Umguza and Bubi Rural District Councils. The first respondent was not a simpleton. He had been employed as auditor by the Airforce of Zimbabwe for many years before he left to join Zinara. He was then employed by Zinara in the same capacity before rising through the ranks to be its Chief Executive Officer. He served close to two terms before he resigned. He was a director and shareholder of two companies. He could not be authorising payment to Notify without any supporting paperwork. To conceal the irregular engagement of Notify, the Chief Executive Officers of the two local authorities were caused to place notices in the print media purportedly inviting tenders for the rehabilitation of a stretch of road within Bubi Rural District Council's area of jurisdiction and a bridge in Umguza district. Yet Notify had already been paid, by Zinara, under the first respondent's hand, when the farcical notices were published. As if this was not enough, Notify later proceeded to sign contracts with both Bubi and Umguza Rural

District Councils. It did not render any services. The projects reflected in the contracts were fictitious. Despite this, the first respondent put pen to paper authorising Zinara to pay Notify, not on one but twenty-nine divers occasions, an amount totalling US$ 3 199 250-00. He could not have been taking such a huge risk for no reward. I reject his explanation that he authorised the payments, which sailed through, in good faith. He connived with the Managing Director of Notify and the Chief Executive Officers of Bubi and Umguza Rural District Councils in perpetrating some kind of criminal conduct the result of which was the loss by Zinara of the amount that I have mentioned. These were public funds. The road rehabilitation and bridge construction contracts, the notices calling for tenders as well as the twenty-nine requisitions to pay Notify all amounted to documentation designed to facilitate and conceal the kind of criminal activity that the first respondent was involved in. I am not required to pronounce myself on the kind of criminal activity in question.

17. The late Nkululeko Sibanda and his wife were not only the directors of Notify. They were also the only directors of Twalumba. The Chief Executive Officer of Goromonzi Rural District Council, Trust Madhovi, deposed to an affidavit stating the date that Nkululeko Sibanda and the first respondent appeared at the former's offices. Trevor Magwaza, the Council Engineer, was present. The first respondent explained that Central Government, through Zinara, had come up with a special project to carry out road works throughout the country and that Goromonzi Rural District Council was earmarked to benefit from the same. Zinara would provide both the funding and the contractors. The first respondent directed Council to open an account with the nearest branch of a named bank to handle the funds, as Zinara was a customer of the same bank. The first respondent introduced Nkululeko Sibanda as the Director in the Office of the President and Cabinet in charge of spearheading special projects in the Country.
18. I have before me a letter written by Madhovi in his capacity as the Chief Executive Officer of Goromonzi Rural District Council. It was addressed to the Chief Executive Officer of Zinara for the attention of the first respondent. It referred to the meeting, confirmed the items covered, furnished the bank account details and requested that the funds be released. Having received the contract document reflecting the parties as Council and Twalumba on the same day, Madhovi attached it to his letter. He and the Council Chairperson had signed the contract on behalf of Council with the Finance Chairperson appending his signature as a witness. Lameck Ruzvidzo, Twalumba's Projects Manager, had already

signed the contract, as had two witnesses, when the document was received by Madhovi. From the date- stamp on the face of the letter the correspondence was received at Zinara on the following day. Thereafter, the first respondent authorised Zinara's bankers to transfer US $ 70 000 into Council's account, which was in turn further transferred to Twalumba on the same date. The same transpired in respect of a payment of US$ 108 000. The Twalumba contract became a topical issue resulting in the Roads and Works committee of Council holding a meeting to discuss it, among other items on the agenda. The material part of the minutes, copy of which is part of the founding papers, reads as follows:

> "…… He [E.O Technical Services] told members that under the Zinara funded special projects the following roads were regravelled and were at 50% completion.
> - Atlanta 50%.
> - Vhuta 50%
>
> The E.O Technical services reported that Zinara had sent contractors on site. He told members that it should be noted the contractor's payments were being managed by Zinara, and that Council staff would supervise the works done by the contractor. Members were of the opinion that although contractors were being appointed by Zinara, Council had no choice but to proceed with the arrangement as the district roads were in urgent need of rehabilitation…."

The meeting was attended by five councillors, three staff members with a P Chinomona from the District Development Fund as an invitee. There were no absentees, with or without apology. The minutes were, on a later date, confirmed as a correct record of the deliberations.

19. The first respondent denies appearing in Madhovi's chambers. I have no difficulty in rejecting that bare denial. Madhovi gives a detailed account of the incident and attaches his letter and the minutes of the Roads and Works Committee. These documents substantiate the contents of his affidavit. Indeed, the first respondent does not dispute that he authorised payment to Council in the sum already indicated. What he says is that he did not know, then, that council had not complied with tender processes and that what Madhovi and his peers at Council are doing is fighting to save their own skins by falsely claiming that he, the first respondent, was involved in the appointment of the Contractor. I agree with Mr Mutangadura that it is improbable that the eight persons who attended Council's Roads and Works Committee meeting all ganged up against the first respondent. In fact ,neither the first respondent's office nor name appears in the minutes of that meeting. Madhovi, not being a member of the Committee, did not attend the meeting.

20. Again, I find that the first respondent was rewarded by Twalumba for having been favoured with a road rehabilitation contract without going through the rigours of a tender process. That I cannot make a finding on the quantum of the " kickback" is besides the point. That is hardly surprising in light of the kind of Criminal activity involved, which is suggestive of criminal abuse of duty as a public officer, among other apparent crimes.
21. On being appointed to act as the Chief Executive Officer of Gutu Rural District Council, so says Alexander Mtembwa, he noted that there was a contract in terms whereof Fremus was to rehabilitate a 30km stretch of road in Gutu. He caused the convening of a full Council meeting to afford councillors the opportunity to deliberate on the contract among other issues. The material portions of the minutes is in these words:

> "…… There was a long debate on the issue of the roads to be funded by Zinara . The house wanted to know the criteria used to select the roads because Council has an annual plan which clearly spells the roads to be funded first. The second issue was on the already signed contract without going through tender. The Council Chairman explained that the contractor was contracted by Zinara and this was done to all provinces. The house argued that the engagement of the contractor was to go through tender. The A/DA intervened pointing out that the right procedures were to be followed on the engagement of the contractor. He pointed to the house that he had a covering letter written by the Council Chairman pointing out that there was a Council resolution to this effect and yet the resolution was to be formulated today……..and the contract was already in place and signed. He went on saying that the ADA'S office has since written a letter to the PA's office on this issue and the response was that the funds were to be frozen until proper procedures were followed. Council Chairman argued that, if decisions were to take so long, the funds, were going to be diverted to other provinces and this was going to hinder development in this district and the district will be disadvantaged. The ADA stood firm with his point that everything was to be at halt until proper procedures were followed. After these deliberations, Council adopted other RWP recommendations and left out the once pertaining roads to be funded by ZINARA until proper procedures were followed.
>
> Proposer : Cllr Zambara
> Seconder:Cllr Madzingo…….
>
> Closure of Meeting
> Council Chairman thanked all those who attended the meeting but was not happy because of the issue of freezing of ZINARA funds. He pointed out that development was hindered by this situation and the funds will be diverted to other provinces if Gutu was not serious in terms of development ……"

The minutes were confirmed.

22. Tempers flared in a Special full council meeting held a month later. I quote the Minutes of that meeting in extenso:

> "Chairperson's opening Remarks
>
> The Council Chairman welcomed all present and Councillor Machawira gave the opening prayer. The Council Chairman emphasised that he was not happy with what transpired in the last full council meeting pertaining development in Gutu that is freezing of ZINARA funds. He told the house that this meeting was urgently called in order to secure the ZINARA funds meant for Gutu not be diverted to other provinces as it was the case.

NEW BUSINESS

Disbursement of ZINARA Funds for Roads Maintenance and Rehabilitation

The Council Chairman told the house that the business of the day was to dwell on the disbursement of ZINARA Funds to Gutu and nothing else. He went on saying that the un procedurally signed contract was not the issue of the day. He gave the acting C.E.O the floor and the Acting C.E.O told the house that he had pressure from ZINARA Office that they were going to divert the funds meant for Gutu to Buhera RDC. He was only given one and a half days to put his house in order and failure to which a committee from Buhera RDC was going to sign for the Gutu funds on …….as per invitation by ZINARA. With that , the acting C.E.O quickly invited the contractor to be on site and by this time the graders were at work in ward 1. The Acting C.E.O apologised to the house for his quick actions without a Council resolution to which the house appreciated what he had done for that secured the Gutu meant funds.

The house wanted to know which roads were to be done but the Council Chairman emphasised that the business of the day was only to make sure that funds were reserved for Gutu R.D.C. All other questions and queries were to be dealt with later. He went on saying that development was to be done in Gutu so that we could have town status. After the above considerations, the house resolved that

- ZINARA funds for road maintenance and rehabilitation be disbursed to Gutu RDC and not diverted to other districts.

  Proposer: Cllr Chagwaza
  Seconder: Cllr Madondo

  The acting D.A asked the house on what basis they wanted funds to be disbursed to Gutu RDC, was the house basing on the unprocedurally signed contract? The basis of claiming funds was only through a contract and the contract which was in place was an illegal document. He asked the house whether they were going to accept all what they have done in this meeting. Some councillors were furious with the A.D.A. They accused D.A'S office saying that they were against development. It was finger pointing until the A/DA left the house. The house seeing that they have made a mistake by attacking the DA'S office and also wanting to map a way forward set a team to first apologise to the DA then find a way forward for the matter concerning the unprocedurally signed contract……..".

These minutes were also confirmed

23. The first respondent denies imposing Fremus on Gutu Rural District Council. He says he was not involved in the engagement of that company. He authorised payment by ZINARA to Fremus pertaining to the road rehabilitation works in Gutu on being satisfied with the interim payment certificates presented to him. Those documents were effectively invoices for work done.
24. There was no tender before Fremus was contracted to carry out road rehabilitation work within the area of Zaka Rural District Council. The Council's Chief Executive Officer says, in his affidavit, that it was the Council Engineer on returning from secondment to Gutu Rural District Council, who told the former of the availability of the Zinara special fund project for rural district Councils.

25. The Engineer, one Samuel Chivasa, prepared a project proposal which he submitted at the Zinara head office in Harare.
26. On a date mentioned in the Chief Executive Officer's affidavit the Council Engineer, the Council Chairperson (Peter Imbayaro) and the Roads Planning and Works Chairperson (Henry Chitapa) were invited by one Moses Juma and the first respondent to attend a special projects workshop on roads at Zinara's head office in Harare. They obliged.
27. There, Juma and the first respondent presented a prepared contract between Zaka Rural District Council and Fremus coupled with pressure that the three sign the document on behalf of Council on pain of Zinara roping in other councils as partners to the contract with Fremus. In those circumstances, the three affixed their signatures to the contract. So did one Freddy Chimbari on behalf of Fremus.
28. Thereafter, the first respondent instructed the Council Engineer to draft two letters, in retrospect, engaging Fremus to survey the condition of the roads for the purpose of producing a Bill of Quantities and to sign the contract (Fremus had already signed the contract.)
29. The first respondent and Juma also instructed Council to make a resolution, again in retrospect, awarding the road rehabilitation contract to Fremus.
30. Imbayaro, Chitapa and Chivasa all deposed to affidavits speaking to their appearance at Zinara's head office on the given date and the pressure exerted on them to sign the contract on behalf of council as well as the issuance of instructions to pen the retrospective correspondence and resolution aforesaid.
31. Indeed, Zaka Rural District Council held a Management Meeting to receive feedback on the trio's trip to Harare and to map the way forward. The meeting had a single item on the agenda. The document reads:

"AGENDA

1. Feedback on Zinara workshop

Feedback on ZINARA workshop

The CEO said that the purpose of the meeting was to have a briefing on the outcome of the meeting that was attended by the Council Chairman, Planning Roads and Works Committee Chairman and the Engineer with a roads Contractor as requested by ZINARA. The meeting was all about the maintenance of roads in the district by ZINARA. He went on to say that a contract document was signed between the council and a private contractor that was going to carry out maintenance works. He went on to read the contract agreement and he commented that part of the agreement seem missing. The CEO then requested Mr Chivasa to give details of what took place and is taking place.

Mr Chivasa said that the Council Chairman was supposed to brief the house but as he was away he had no way out. He said that they attended a meeting and had signed a contract document with Fremus Enterprises, a private company chosen by the Government to do maintenance of

roads in the country. He added that the programme is funded and monitored by ZINARA and payments are made directly by ZINARA after the Engineer certifies the completion of the works. He said that the condition was take or leave so they agreed and signed the contract but they were advised by ZINARA to write letters in retrospect requesting Fremus to come and survey the condition of the roads for the purpose of signing of the contract since this was already done. The two letters must be submitted to the company as well as to the CEO ZINARA today…….the council chairman was notified about the two letters and he concurred that they must be written. The house wanted to be clarified why such an important activity was not formally communicated to the CEO as well as why the CEO was not invited to the meeting to discuss and sign the contract documents. The A/ Engineer and the EO Finance clarified that this was because the concerned parties – ZINARA and the contracted company strictly want the Engineer as the focal person who knows about the works to be done so the Engineer represents management while the Council Chairman represents the Council in the whole process of work execution.

RECOMMENDED

- That the letters be written and Mr Chivasa submits them
- That Mr Chivasa request for part of the agreement that appear to be missing
- That the council Chairman should counter sign the letters as notation for having authorised them.

The CEO thanked the members and declared the meeting closed at 0900."

32. The meeting was held in the Chief Executive Officer's office. He chaired the meeting. Alongside him, the other persons who were in attendance were the EO Finance, Planning Officer, Acting Engineer, EO Community Services, Internal Auditor and P /Secretary (Minuting). These were Messrs Majaura, Machemedze, Ndawi and Chivasa as well as Mesdames Mudhugu, Dzingiso and Muchena. The minutes were confirmed as a correct record of the deliberations and resolutions made.
33. The contract itself is headed "ZAKA RURAL DISTRICT COUNCIL" as if to compensate for not having been prepared on that local authority's stationery. It was not prepared on Council's letterhead. It records the names of the parties thereto, their physical addresses and sets out the preamble with the opening statement:

    "Whereas the employer is desirous that certain works be executed vis……."
34. It then lists the works as removal of in situ of 30km, gravelling of 30km roads, motorised grading of 30km, installation of drainage structures, compactions, repair of small bridges and construction of piped drifts and culverts.It records that the contract documents are the agreement , quotations submitted by the contractor and letter of acceptance. The scope of the contract is reflected as :

    "CHIVAMBA – CHIPFUNDE 14.4 KM in ward 27
    CHARUKA – CHIPFUTI 13.8 km in ward 24
    NDANGA LOOP RD 1.1KM in ward 3
    GUMBO LOOPRD 0.9 KM in ward 4"
35. Then comes the following:

"NATURE OF CONTRACT
The contract shall be a negotiated contract with reference being made to submitted rates on quotations. The contractor shall accept to work in the presence of the employer.
PAYMENTS
ZINARA shall make payments to the contractor upon presentation of certified certificates of work done"

36. Immediately after this comes the signature page with the execution clause reading thus:

"This Agreed and signed this 5th day of August in the year 2011"

37. The place where the contract, if such it be called, was entered into and signed is not recorded. The three Council Officials signed the agreement. So did Freddy Chimbari (according to the trio) for Fremus. Just below his signature date appears stamp bearing the name and Harare postal address of Fremus. No witnesses appended their signatures on the document. In fact, no provision was made for witnesses to append their signatures on the document.

38. I do not accept the first respondent's averment that he did not invite the three Council Officials to appear at Zinara head office. I reject his contention that he did not present the contract to them and, in the presence of Freddy Chimbari, pressurised them to sign it. To hold otherwise would be to make a mockery of the three official's detailed affidavits and the equally elaborate council minutes whose contents I have reproduced. I note also that there is no council resolution authorising its named officials to enter into the contract, on behalf of Council, with Fremus. I think the omission of the place of signature, in the contract document itself, was deliberate. It seems to me the document was hurriedly prepared hence its manifest shortcomings.

39. Looking at the bigger picture, I cannot agree that the officials of Goromonzi, Bubi Umzingwane, Gutu and Zaka Rural District Councils all connived to take the position that the first respondent imposed Notify, Twalumba and Fremus, as it were, upon these councils. I cannot accept that the minutes of the various Councils were doctored, for that would be the logical conclusion of the contentions taken by the first respondent.

40. I have not lost sight of the following evidence, which I have no reason to reject. Nkululeko Sibanda, then one of the two directors (the other being his wife) of Notify and Twalumba appeared at Goromonzi Rural District Council. He was falsely introduced, by the first respondent, as a Director for Special Projects in the office of the President and Cabinet. Freddy Chimbari, through Fremus, holds 40% shareholding in Champions Insurance. So does the first respondent, through the third respondent. Chimbari paid an amount of one hundred and fourteen thousand United States dollars to the first respondent at a time when

Fremus had been irregularly awarded contracts to carry out road rehabilitation work for Gutu and Zaka Rural District Councils. I will relate to this in much more detail later. I mention that the first respondent did not dispute that Fremus was also the beneficiary of road rehabilitation contracts pertaining to Mhondoro Ngezi and Buhera Rural District Councils. All he said was that he did not know that all these local authorities, scattered throughout the country, had not complied with tender requirements before contracting with Fremus. Why, one would ask, did Fremus alone end up "winning" road rehabilitation contracts, funded by Zinara, in all these local authorities? It is not insignificant, in all the circumstances, that the first respondent and Chimbari fellowshipped at the same ZAOGA assembly in Ruwa and held equal shareholding in Champions Insurance.

THE DRAFT ORDER

41. Having put together an application made up of nine affidavits and forty- one annexures, it appears the applicant could have been exhausted by the time he prepared the draft order. I think this explains why the draft order includes some things that fall outside the scope of an application for a civil forfeiture order as well as property that the applicant had conceded, in the founding affidavit, not to be tainted.

FARMPRIDE PVT LTD CHISIPITE ROAD 49 KENT ROAD CHISIPITE

42. This is a combination of the third respondent's trading name and its registered office. Third respondent was incorporated under the then Companies Act [*Chapter 24:03*] on 1 November 2000 as Hot Spike Trading (Private) Limited according to the certificate of incorporation copy of which appears on p 290 of the founding papers.
43. It is unnecessary for me to discuss the reasons for and against the application for forfeiture of this company. SS 79 (1) and 80 (1)(2), (3) and (4) of the Money Laundering Act make it clear that the Lawgiver intended tainted property, not a person, to be the subject of an application for an order for civil forfeiture.
44. Although it has 'neither a body to be kicked nor a soul to be damned'(see Ellison Kahn (1982) 99 SALJ 305, the third respondent is a juristic person. *See Salomon* v *Salomon and Co Ltd* [1897] AC 22 (HL)
45. In the circumstances, I cannot accede to an application for the civil forfeiture of a party to these proceedings, namely the third respondent.

NISSAN NP 200 ACN 0713

46. In his founding affidavit the applicant accepts the explanation tendered by the first respondent in the affidavit explaining the wealth that this vehicle was involved in an accident and was written off by
the insurer.

47. The applicant did not seek an order for the civil forfeiture of this vehicle, yet the property found its way into the draft order.

48. What the applicant said was that this property was acquired by the first respondent using proceeds of crime and was thus tainted. Therefore, the applicant deposed in his founding affidavit:

> "the applicant applies for the value of the vehicle which corresponds to the value of the written off car to be part of the forfeiture order."

49. I think the applicant was digressing. I say this for a variety of reasons.

50. Section 78(2) of the Money Laundering Act reads 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."

51. What is envisaged in s 78(2) is an order to confiscate property of equivalent value to tainted property or property which is the proceeds of crime. The property liable for seizure or confiscation would itself not be tainted. It would not be proceeds of crime. But because the tainted property or property which is the proceeds of crime cannot be located or identified or, for whatever reason, it is not practical or convenient to seize the tainted property or the property which is the proceeds of crime, the court is then empowered to order forfeiture of property not tainted. The court can only be called upon to determine whether to grant a s 78(2) order in an application brought under that statutory provision. The present is not such an application. Even if it were, and I say this in passing, what the applicant set out in the draft order and in that portion of the founding affidavit which I quoted does not constitute the relief intended in s 78(2) of the Act.

52. For the foregoing reasons, I cannot grant an order for the civil forfeiture of the Nissan NP 200 ACN 0713.

FARM HOUSE

53. The description of this property appears to be Subdivision 1 of Ruwonde Farm measuring 295 hectares situate in Goromonzi District, Mashonaland East Province.
54. It was common cause, although the parties placed not the offer letter before me, that the property was offered to the first respondent by the state under the Land Reform and Resettlement Programme on a date which is not at all clear on my reading of the papers. Be that as it may, land acquired under the national programme that I have referred to is owned by the state even after, as in this case, the state has gone on to offer the rights to occupy and use the land to the first respondent.
55. There was a heated debate on whether the first respondent proceeded to construct a mansion on top of the mountain which I was told is on that land. The first respondent argued that all that he did was to construct a modest farm house, using lawfully obtained income and natural resources available on the land itself. The applicant would have none of it, and asked me to grant an order forfeiting the farm house to the State.
56. I engaged counsel on whether it is competent, in any event, to order that the farm house be forfeited to the State. I am grateful to counsel for their assistance in this regard. My view is that the property is the piece of land itself. That property already belongs to the State. The farm house, an improvement, is affixed to the land. It is part of the land. The farm house, mansion or otherwise, is now part of the land. It cannot be separated from the land. It can only be demolished, which is not an issue before me. I have said the property, which is immovable, is the land itself. I do not read ss 79 and 80 of the Act as availing any jurisprudential basis to excise the farm house from the land and to forfeit the house to the State. I decline to so order. This conclusion renders it unnecessary to determine whether the first respondent used proceeds of crime in enhancing the value of property owned by the State.

THE PRADO ACP 9977 AND RANGE ROVER ACM 2555

57. In his founding affidavit, the applicant accepted the first respondent's explanation that the latter received these vehicles from Zinara as part of his conditions of service. The concession was there made that no order for civil forfeiture of these vehicles was being sought.
58. It was, in the circumstances, an anomaly to clutter the draft order by including what the applicant was not praying for.

RANGE ROVER DISCOVERY ADA 7621

59. The applicant, in his founding affidavit, accepted the first respondent's explanation that after using the condition of service vehicle, namely the Range Rover ACM 2555 for a few months the applicant then sold it and, using the proceeds of such sale, purchased a newer version of the same type of vehicle. That newer version was the Range Rover Discovery ADA 7621. Effectively, this appears to mean that the replacement vehicle became the first respondent's condition of service vehicle. The applicant urges me to order forfeiture of the same to the State in the event, firstly, that I find that the State lost huge sums of money pursuant to the first respondent's unlawful activities at Zinara and, secondly, that there is no other property to forfeit to recoup such monetary loss. I do not think this is the proper way to proceed. The present is not an application for damages. The vehicle sought to be forfeited is not damages. Neither is this an application for the civil forfeiture of property of equivalent value. Having conceded that the property called the Range Rover Discovery ADA 7621 is neither tainted nor proceeds of crime, it too ought not to have found its place in the draft order.

60. Resultantly, the relief sought, in respect of this property, cannot succeed.

61. REMAINDER OF LOT 1 OF LOT E OF COLNE VALLEY OF REINFONTEIN HARARE MEASURING 4552 sqm. ACQUIRED ON 18 SEPTEMBER 2009 FOR US$172 000 AND REGISTERED IN FAVOUR OF THIRD RESPONDENT ON 22 JANUARY 2010

And

62. SUBDIVISION A OF SENTOSA MABELREIGN MEASURING 9536 SQM REGISTERED IN TERMS OF S 15(2) OF THE TITLES REGISTRATION AND DERELICT LANDS ACT [*CHAPTER 20:20*] DEED OF TRANSFER REGISTERED NUMBER 1635/11

63. Both properties, although not fully described in these proceedings, belong to the third respondent. The third respondent owns the first in terms of a Deed of Transfer registered on 22 January 2010, having purchased the same on 18 September 2009 for the sum of US$172 000. As for the second, this court granted a default judgement on 23 March 2011 in an application brought by the third respondent against the seller, one John Fraser Bell. The application was brought in terms of s 15(3) of the Titles

Registration and Derelict Lands Act [*Chapter 20:20*]. The default judgement enabled the third respondent to obtain title to the property, under Deed of Transfer Registered Number 1635/11.

64. In *Prosecutor General* v *Chidemo & Ors* (*supra*) this court, after referring to a number of Supreme Court decisions and a judgement of the Appellate Division in South Africa, concluded that s 79(2) of the Money Laundering Act does not have retrospective effect. It reads:

"79(1) ……
(2) Orders for civil forfeiture may not be granted with respect to property acquired or used before this Act came into force."

65. I am aware of the provisions of s 37C of the same Act. They read, in relevant part:

"37C <u>Requirements for making of unexplained wealth order</u>
(1) In deciding whether to make an unexplained wealth order the High Court must be satisfied that there is reasonable cause to believe that –
(a) the respondent holds the property; and
(b) the value of the property is greater than one hundred thousand United States Dollars or its equivalent in any currency.
(2) The High Court must be satisfied that there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain or hold the property.
(3)The High Court must be satisfied that there are reasonable grounds for suspecting that –
(a) the respondent is, or has been, involved in serious crime (whether in Zimbabwe or elsewhere); or
(b) a person connected with the respondent is, or has been, so involved.
(4) It does not matter for the purposes of subsection (1)-
(a) whether there are other persons who also hold the property;
(b) whether the property was obtained by the respondent before or after the coming into force of this section."

66. Mr Mutangadura argued that a reading of ss 37(4)(a) and 79(2) of the Act must lead to a conclusion that it also does not matter, for the purposes of ss 79 and 80 of the Act, whether the property the subject of a civil forfeiture application was acquired or used before the Act itself came into force.

67. I cannot agree.

68. The intention of the legislature is to be discovered from the language employed by it. In so far as the granting of unexplained wealth orders is concerned, there can be no doubt, given the language used by it in s 37(4)(b), what the intention of the legislature is. At the stage of the granting of an unexplained wealth order the respondent is not losing any property. That is why the bar is so low – reasonable suspicion – and why

it matters not whether the property was acquired before or after the coming into force of the Act. An unexplained wealth order is a judicial tool fashioned by Parliament to facilitate investigation into cases of suspected illicit wealth. What the respondent is called upon to do by that order is to explain the source of his wealth. I agree with Mr Dondo that civil forfeiture of property is a completely different ball game, so to speak. That is why the lawgiver restricts it to property acquired or used after the coming into force of the Act. If the intention was otherwise I do not see any reason why Parliament did not enact the provisions of s 79(2) using the same language that it did in enacting s 37(4)(b) of the Act.

69. The Act came into force on 28 June 2013. The two properties were acquired before then. Therefore, ss 79 and 80 of the Act cannot be the legal framework for civil forfeiture of the two properties. The application, in this respect, fails.

HINO RANGER ACU 6845

70. The first respondent explained that he purchased the vehicle from lawful income derived from the sale of eggs produced at the Goromonzi Farm that I have already mentioned in this judgement. He stated that he purchased it in 2013, for US$7 500.
71. The need to discuss the merits of the matter in respect of this property does not arise because the documents placed before me by the applicant show that this vehicle was first registered in Zimbabwe on 9 January 2013. It was imported from Botswana. Its registration history reflects the first respondent as the first and only registered owner of the vehicle, in Zimbabwe, since 9 January 2013.
72. I therefore find that the first respondent indeed acquired the vehicle in January 2013, which was before the coming into force of the Act. On this basis, it is not competent to grant an order for civil forfeiture of this property. The application also fails in this respect.

HINO DUTRO ABI 2738

73. The documents issued by the Central Vehicle Registry and placed before me by the applicant prove that this vehicle was imported from Botswana and was first registered in Zimbabwe, with the first respondent as the registered owner, on 30 April 2009.

74. The first respondent himself, in opposing the application for its forfeiture, had averred that he acquired the same in 2010 for US$6 000. In light of the official records I have referred to, I proceed on the basis that the first respondent made a marginal error *vis-à-vis* the year that he acquired this property.
75. All the same, since it is not competent to order the civil forfeiture of property acquired before the Act came into force, the application, in so far as it pertains to this property, is dismissed.

MAZDA T 3500 ACN 2758

76. Having been manufactured in 1999, the vehicle was first registered in Zimbabwe on 25 August of the same year. Official records reflect that the vehicle was registered in the first respondent's name before the Act came into force. He says he acquired ownership thereof in 2012. Either way, it is not competent to order civil forfeiture of this property. The prayer to do so is declined.

10 TONNE UD TRUCK

77. It is true that the applicant did not furnish the registration number of this vehicle.
78. In applying for the unexplained wealth order the applicant made it clear that the motor vehicle, as was the case with five tractors comprising three John Deeres and two Kias, a trailer, four 200 litre PVC water tanks, a multi-million dollar thatched durawalled house, six fowl runs and several buildings was at Belmont Farm (Ruwonde Farm) in Goromonzi.
79. That application also listed nine other motor vehicles, complete with registration numbers, as well as a motor cycle, whose registration number was not furnished. To cap it all, two more immovable properties were mentioned. The court granted the order, which clearly indicated that the registration number of the 10 tonne UD truck was yet to be identified.
80. The respondent, in reacting to the unexplained wealth order, tendered an explanation on how he acquired the property, minus one of the tractors, down to the motor cycle. He also decided not to say anything in respect of the 10 tonne UD lorry. He deposed to that affidavit on 17 June 2019. On 8 August 2019 he filed another affidavit, as an addendum to the first, but again chose not to say anything about the fifth tractor and the 10 tonne UD lorry. It was only on 24 September 2021, in deposing to the affidavit opposing the application for a civil forfeiture order, that the first respondent tersely remarked:

"**10 Tonne UD Truck**
This vehicle was never owned by me. No details have been given for the vehicle."

81. It must be remembered that there is an extant order of this court relating to this vehicle, which the first respondent, on two occasions, chose not to comply with. Indeed, he has never complied with that order in respect of the truck. If it be the position that he never owned that huge vehicle that is what he should have said on either 17 June 2019 or 8 August 2019 and not merely ended by explaining how he acquired less valuable property such as a motor cycle. Right from the word go, the applicant has always made it clear exactly where the vehicle is, as well as its tonnage and type. Even as he deposed to the opposing affidavit, the first respondent did not dispute the existence of the vehicle, choosing to limit himself to the contention that it was never owned by him. For all these reasons, I find that the first respondent's position, as recorded in his opposing affidavit, was an afterthought. The vehicle is presumed to be tainted. It is forfeited to the State.

THE OTHER PROPERTY: THE MERITS

82. The applicant also prayed for an order of civil forfeiture of some other property, namely two motor vehicles, five tractors, four water tanks, shares in an insurance company and certain pieces of land .
83. Asked to explain how he raised the funds used to acquire the property in question, the first respondent fell back principally on his salary when he was still employed by Zinara; dividends he received by virtue of his shareholding in Champions Insurance Company (Pvt) Ltd; interest- free loans received from the same company ;overdraft facilities received by third respondent from CBZ Bank Limited used to fund the third respondent's farming operations at Subdivision 1 of Ruwonde farm in Goromonzi and the earnings realised from the sale of such agricultural produce, principally eggs.
84. Documents placed before me reflect that CBZ Bank Limited availed overdraft finance to the third respondent, covering the period from 7 December 2015 to February 2019, totalling US$ 443 000.00. The first respondent apparently received dividends from Champions Insurance for the period from 2012 to 2018 amounting to US $ 619 498.38.Such dividends were said to have been paid by virtue of the first respondent's 40% shareholding in Champions Insurance, held through the third respondent. The documents suggest also that for the period from 2012 to 2018 the first

respondent received interest free loans, totalling US$1406 088.08, from Champions Insurance. The first, second and third respondents also produced a schedule of the income that they said they received, in cash, from the egg sales for the period from 2011 to 2016, totalling US$ 2841 009.90. The first, second and third respondents also attached documents indicating that the third respondent was registered as an exporter of fresh farm produce.

85. Despite the first, second and third respondents' efforts, I am satisfied, on a balance of probabilities that these respondents laundered the proceeds of Criminal activities, through Champions Insurance, the farming activities at subdivision 1 of Ruwonde farm and the acquisition and improvement of the property that I am now dealing with.
86. I have already found that the first respondent, at a time when he was the Chief Executive Officer of Zinara , was involved in the unlawful awarding of road rehabilitation contracts to Notify, Twalumba and Fremus. I have recorded the huge amount paid to Notify despite it not having rendered any service at all as the projects pertaining to it were fictitious. In other words Notify was simply used as a vehicle to syphon funds from Zinara.The first respondent authorised disbursement of huge amounts of money in favour of Notify, Twalumba and Fremus. The most probable inference that I draw from these proved facts is that the first respondent was handsomely rewarded for his dual role of hand- picking the three companies and authorising Zinara to pay them. Fremus received US$ 1902 902 .85 from Zinara in respect of the Zaka road rehabilitation project alone.
87. Documents speaking to payment of dividends and loans by Champions Insurance, in my judgment, reflect layering, being the creation of reasons and the accompanying paper trail for the movement of proceeds of crime from Champions Insurance to the first and third respondents. The first respondent averred that the US$114 033 that he received from Chimbari through Fremus was for the 40% shareholding that Fremus acquired in Champions Insurance. He attached correspondence and an agreement of sale suggesting that this was the case. But the extent of Fremus' benefit from the unlawful award of road rehabilitation contracts by the first respondent must not be forgotten. The sum of US$114 300 paid to the first respondent by Chimbari, was, to me, associated with the favour shown to Fremus in obtaining the road rehabilitation work in Gutu, Zaka, Buhera and Mhondoro-Ngezi. Of the US$114 033, an amount

of US$40 000 was paid on 4 July 2013, into the first respondent's personal bank account towards the purchase price of property loosely referred to as lot 3 of subdivision C of subdivision B of subdivision D of Nthaba of Glen Lorne. It is not only the sum of US$40 000 which makes this immoveable property the proceeds of crime but also that the first respondent used funds received from Champions Insurance towards payment of the purchase price and to develop the property. I do not accept his explanation that the funds which he received from Champions Insurance were loans. No loan agreement was placed before me. There was no evidence indicating when the supposed loan was repaid, or was to be repaid. No documentation was placed before me tending to indicate that the first respondent was entitled to the amount which he said was a dividend. A company is a juristic person and does not just pay out money as dividend in the absence of documents demonstrating that it made a profit and declared a dividend to be paid to shareholders. That the first respondent says this particular immoveable property was developed partly from funds realised from the agricultural activities carried out at the Goromonzi farm is an additional reason why the property is tainted. Those farming activities were partly funded by proceeds of unlawful activities carried out by the first respondent. That the first respondent stated that he purchased the immoveable property itself in 2011, does not, in these circumstances, save it from forfeiture.

88. Lot 1 of Lot 3 of Lot 56A Borrowdale Estate is also forfeited to the state. I have no difficulty in accepting that the first respondent acquired this property in 2011. He obtained a mortgage bond for the full purchase price of US$200 00.00. He said, without demonstrating it, that he used his salary, before he left Zinara, towards paying off the mortgage bond. He said also, again without any documentary evidence to substantiate his explanation, that he also used income from his business activities towards liquidating the mortgage bond, when he left employment. That means he failed to explain his wealth which, in this instance, is the immoveable property in question. This is a property situated in Borrowdale, of all places. Borrowdale is one of the low density suburbs in Harare, the capital city of Zimbabwe The costs incurred in repaying the mortgage could not have been undocumented. That is most improbable.
89. On 17 June 2019 the respondent deposed to an affidavit seeking to explain that his wealth, namely the immovable property in question, was not proceeds of crime. The

unexplained wealth order, granted on 22 May 2019, required him to depose to such an affidavit. In addition to whatever explanation pertaining to his acquisition and the source of the financing of the costs of such acquisition, I think that he should have disclosed that, as at the date of that deposition, he had long since sold the property. He did not do so. It was only on 24 September 2021, in an affidavit opposing the present application, that the first respondent, for the very first time, averred that he sold the property to Luke Teketeke on 18 December 2018 for the sum of US$300 000. If that were so, he should have said so in his unexplained wealth affidavit because the alleged sale predated the making of that affidavit. Copy of the supposed agreement of sale was not even attached to the unexplained wealth affidavit. The only persons who appended their signatures to the supposed agreement of sale, copy of which was attached to the first respondent's opposing affidavit, were Luke Teketeke (as purchaser) and the first respondent (as seller). The document reflects that the latter signed the same at Harare on 18 December 2018. Provision was made for a single person to sign the document as the seller's witness. Neither the name nor signature of such a person appears thereon. The witness, as I write this judgment, is yet to affix his or her signature to the "agreement of sale". Although separate provision was also made for Luke Teketeke to fill in the date that he signed the agreement of sale, he is yet to do so. The names of his two witnesses and their signatures are yet to find their way into the agreement of sale. Although it was a term of the "agreement of sale" that Teketeke would pay the full purchase price within seven days of the first respondent signing that document, the first respondent is silent on whether the purchase price was paid. Certainly, no proof of such payment was placed before me. Perhaps more fundamentally, it was never explained why the first respondent, if he sold the property, is the person resisting the forfeiture of the same. Teketeke did not file an affidavit supporting the first respondent's averments pertaining to the sale. US$300 000 is, I think, a huge amount. Indeed, I think it only logical that if it be probable that Tekekete purchased this Borrowdale property, the subject of an application for a civil forfeiture order filed on 10 September 2021, he should have applied for an order to be joined as an interested party. I heard the present application on 14 September 2022. That was almost a year from the date of its filing. No application for the joinder of Teketeke was filed either by him or by the first respondent. The "agreement of sale" is a sham. It is a document hurriedly prepared,

after the first respondent realised that his unexplained wealth affidavit, as it pertained to this property, had found no favour with the applicant. Hence it miraculously surfaced as an annexure to the first respondent's affidavit. The shortcomings in and circumstances surrounding the making of that document satisfy me that this is so. Title in the property has not been transferred to Teketeke. The first respondent is still the registered owner of the property.

90. I am satisfied also that the Mazda T 3500 ACN 0695 and the Toyota Land Cruiser ADF 8240 are tainted property. Without any documentation, the first respondent averred that he used income raised from farming activities at subdivision 1 of Ruwonde Farm to purchase the same. What it means is that the first respondent failed to explain the source of funds used to acquire these assets. Even if I had found that the acquisition was funded by those farming activities I would still order forfeiture on the basis that the farming itself was partly financed by proceeds of unlawful activities. The same finding, for the same reasons, is made in respect of the three John Deere tractors, the two Kia tractors and trailer and the four 200 litre PVC water tanks at subdivision 1 of Ruwonde Farm. The respondents, in respect of the two motor vehicles, tractors, the trailers and the four water tanks simply plucked figures from the air and threw them around. The three respondents did not even indicate where they purchased the property. These are valuables assets the purchase of which would have a paper trail in the form of agreements of sale, change of ownership, and proof of payment of the purchase prices and, among others, licence fees receipts in respect of the motor vehicles as well as delivery notes and receipts reflecting the purchase prices paid on acquisition of the water tanks. All these documents would be dated. The three respondents decided to conceal the documents. That means they failed to explain the source of funds used to acquire the property. I add that the respondents chose not to respond to the application as it pertains to the fifth tractor. They avoided traversing the subject, as did the first respondent in his two unexplained wealth affidavits.

91. The applicant disputed the first respondent's explanation on how the latter, together with the second respondent, acquired 40% shareholding in Champions Insurance. The shareholding was acquired through the third respondent. The first respondent explained that he purchased the shares from Jabulani Shoko in 2009 for US45 000. He sold his immoveable property, situate in Damafalls, for US$45 000. The purchaser

was Benson Chitukutuku, brother to the first respondent. This was in July 2009. The first respondent then transmitted the money raised from the sale of the house to Shoko. Hence the acquisition of the shares. I have seen the agreement of sale between the first, second respondents and Benson Chitukutuku. I have seen the agreement of sale between the first and second respondents and Damafalls Investments (Pvt) Ltd in terms whereof the latter sold to them the property called stand number 16898 situate in Ruwa – which property was said to have been later sold to Benson. I have also seen Shoko's affidavit, deposed to on 17 July 2019. It is necessary that I go into that affidavit in some detail.

92. Shoko is a director of Momentum Insurance Brokers (Pvt) Ltd, Harare. As one of the directors (he was the founding director) and 40% shareholder of Champions Insurance, he was requested by the Ministry of Finance to pay US$300 000 for capitalization of Champions Insurance. This was in 2009. I pause to record that this appears to have been the minimum capital requirement which the insurance company had to comply with.
93. At the same time, Shoko was also required to pay US$100 000 minimum capital requirement for Momentum Insurance Brokers (Pvt) Ltd. The net effect was that Shoko had to raise US$400 000 to meet the capital requirements for Champions Insurance and Momentum Insurance Brokers (Pvt) Ltd.
94. In the circumstances, Shoko said he decided to sell his 40% shareholding in Champions Insurance to the first respondent, which he did, received his US$45 000 but has no record of the transaction due not only to lapse of time but also because the transaction was effected through Champions Insurance.
95. The first respondent, in his opposing affidavit, also stated the following. Shoko later approached him, still in 2009, and broke the news that the other Champions Insurance shareholders intended to dispose of 40% of their shareholding. The first respondent purchased the same, again through the third respondent, for US$40 000.00. Since he did not have the money to pay for these shares the agreement reached was that the purchase price would be liquidated over a period of time. This meant that the third respondent then held 80% shareholding in Champions Insurance.
96. In January 2010, the first respondent then received correspondence from the Managing Director of Champions Insurance advising that it was impermissible at law

for a single shareholder to hold more that 40% shareholding in an insurance company. The letter was placed before me.

97. The first respondent then decided to dispose of 40% of third respondent's shareholding in Champions Insurance. He invited Chimbari, who, although not having the money to immediately pay for the shares, purchased the same. I have seen copy of the shareholders agreement entered into between the third respondent and Fremus in terms whereof the latter is reflected as having purchased the shares for US$100 000.00. Represented by the first respondent and Chimbari respectively, the shareholders' agreement is dated 10 February 2010.
98. Also placed before me by the first respondent is his letter dated 24 June 2011 wherein, in his capacity as director of third respondent, he wrote to the Managing Director of Fremus (Chimbari). He referred to a telephone conversation between them, on an undisclosed date, in terms whereof Chimbari is said to have indicated that he wanted to start making payments for the 40% shareholding. The letter directed Fremus to pay$30 000 into Mawere and Sibanda's trust account the banking details of which were provided, as these were the lawyers handling the transfer of an immoveable property purchased by the first respondent. As for the balance inclusive of interest, the first respondent instructed Fremus to pay the same directly into his personal bank account, the details of which were given. Indeed, on 28 June 2011, Fremus transferred the sum of US$30 000 into Mawere and Sibanda's trust account, the payment details of which read as follows:

    "purchase price of stand."

99. I have also perused a reconciliation table wherein Fremus is shown as having paid the sum of US$114 033 for purchasing 40% shareholding in Champions Insurance.
100. The applicant contends that the first respondent used tainted money to purchase the initial 40% shareholding in Champions Insurance. There seems to be an acceptance that those shares were purchased in 2009. Since the court cannot order the civil forfeiture of property acquired or used before the Act came into use, I proceed on the basis that I am not required to determine whether those shares were acquired using proceeds of crime.
101. However, what the first respondent did not explain was how he met the US$300 000 minimum capital requirements for Champions Insurance on acquisition of the 40% shareholding from Shoko. This is what the first respondent said:

"At the time the Company was not capitalized. It was basically a company in name with a small capital of about $100 000.
Through third respondent I took a risk to take up the shareholding with knowledge that it was possible to make a company capitalize itself without shareholders injecting funds into the company.

> By 2010 Champions Insurance was able to purchase a property in Eastlea, which property was converted into offices and Champions Insurance moved in from the rented offices it used to operate from its own property.
> The company's capital was immediately increased to $300 000.
> Through good business acumen and diligence by the Management and Board of Directors Champions Insurance Company has been able to recapitalize itself over the years and the company is now valued at between US$6 million US $ 7 million and not US$20 million as alleged by applicant.
> The figure of $17 230 000 quoted by applicant is a value in, RTGS dollars and not United States dollars.
> The assumption and speculation on the part of the applicant are totally without foundation. To that extend the averments made by applicant regarding how third respondent acquired the shareholding in Champions Insurance are devoid of merit."

102. I cannot accept that this is a satisfactory explanation of how the first respondent, through the third respondent, met the US$300 000 minimum capital requirements associated with its acquisition of 40% shareholding in Champions Insurance. US$3000 000 is such a huge amount the payment of which would generate a paper trail. The first respondent is a business person. He cannot expect the court, which ordered him to explain his wealth, to accept a story told without it being buttressed by any documents. The first, second and third respondents, again deliberately, have withheld vital material from the court. They have failed to rebut the presumption that they used proceeds of crime to pay the costs associated with the purchase of the 40% shareholding in Champions Insurance. As already mentioned, the minimum capital requirement was payment of the sum of US$300 000.00. This conclusion means that the 40% shareholding itself is tainted.

103. Having said this, I cannot, however, accede to the additional prayer to order the forfeiture of the unnamed assets of Champions Insurance. A company is a juristic person. Its assets are not the property of its members. Besides the fact that such assets were never specified and therefore not capable of being related to, no case was pleaded

nor established by the applicant that any such property, apart from the shares that I have already dealt with, contravened the law.

COSTS

103. The protagonists have roughly achieved an equal measure of success. Accordingly, it is just that each party bears its own costs.

ORDER

In the result, it is ORDERED THAT:

1. The application be and is granted in part.
2. The following property is forfeited to the State:
    a) 10 tonne UD truck
    b) Mazda T 3500 ACN 0695
    c) Toyota Land Cruiser ADF 8240
    d) Three John Deere tractors
    e) Two kia tractors
    f) One tractor trailer
    g) Four X 200 litre PVC water tanks
    h) Certain piece of land situate in the District of Salisbury called Lot 1 of Lot 3 of Lot 56A Borrowdale Estate Measuring 4048 square metres as will more fully appear from Deed of Transfer No. 588/70 with diagram annexed made in favour of Francis John Hamp-Adams on 28 January, 1970, and from the subsequent Deeds of Transfer the last of which was made in favour of Frank Chitukutuku (born 31st October 1973) on the 20th day of July 2011, (Registered No. 3232/2011.)
    i) Certain piece of land situate in the District of Salisbury called Lot 3 of subdivision C of subdivision B of subdivision D of Nthaba of Glen Lorne measuring 8853 square metres as will more fully appear upon reference to the certificate of Registered Title (Registered No. 2967/1967) dated the 25th day of September 1967 with diagram annexed thereto, issued in favour of ARTHUR VALENTINE CURWEN FORTESCUE HUBBARD, and to the subsequent Deeds of Transfer the last of which was made in favour of FRANK CHITUKUTUKU (BORN 31ST OCTOBER 1973) AND NYASHA

CHITUKUTUKU (BORN 25TH AUGUST 1975) (Registered No. 3885/2011.

j) Hot Spike Trading (Private) Limited's 40% shareholding in Champions Insurance (Pvt) Ltd.

3. The application for civil forfeiture of the following property be and is dismissed:
    a) Mazda T3500 ACN 2758
    b) HINO DUTRO ABI 2738
    c) PRADO ACP 9977
    d) NISSAN NP 200 0713
    e) Range Rover ACM 2555
    f) HINO RANGER ACU 6845
    g) Land Rover Discovery ADA 7621
    h) Subdivision A of Sentosa of Mabelreign measuring 9536 square metres held under Deed of Transfer (Registered No. 1635/2011) in favour of Hot Spike Trading (Private) Limited.
    i) Remainder of Lot 1 of Lot E of Colne Valley of Reinffontein measuring 4552 square metres
4. The application for civil forfeiture of Hot Spike Trading (Private) Limited Trading as Farm Pride (Pvt) Ltd, the farm house at subdivision 1 of Ruwonde Farm Goromonzi and Champions Insurance's assets be and is struck out.
5. Each party shall bear its own costs.

Dondo and Partners, first, second and third applicants' legal practitioners
The National Prosecuting Authority, respondents' legal practitioners