

AUGUSTINE CHIHURI  
and  
ISOBEL HAKIMA KHAN CHIHURI  
and  
SAMANTHA HAMADZIRIPI CHIHURI  
and  
ETHAN TAKUDZWA AUGUSTINE CHIHURI  
and  
CROXILE INVESTMENTS (PVT) LTD  
and  
ADAMAH ENTERPRISES (PVT) LTD  
and  
MASTERMEDIA (PVT) LTD  
and  
MASTAW INVESTMENTS (PVT) LTD  
and  
RASH MARKETING (PVT) LTD  
versus  
PROSECUTOR GENERAL  
and  
REGISTRAR OF DEED (NO)  
and  
REGISTRAR OF MOTOR VEHICLES  
and  
MINISTER OF JUSTICE, LEGAL AND  
PARLIAMENTARY AFFAIRS (N.O)  
and  
MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT (N.O)  
and  
THE ATTORNEY-GENERAL OF ZIMBABWE (N.O)

HIGH COURT OF ZIMBABWE  
KWENDA J  
HARARE, 19 January, 24 March and 21 June 2022

Judgment

*A B C Chinake*, for the applicants  
*C Mutangadura*, for the 1<sup>st</sup> respondent

*C S Musingwini*, for the 2<sup>nd</sup> & 6<sup>th</sup> respondents

#### KWENDA J: Background

[1] This judgment deals with two court applications. They are Case nos HACC 21/20 and HACC 20/20. The parties requested the court to hear argument in both cases at the same sitting because the matters are identical for all intents and purposes. I acceded to the request. It was convenient to adopt that approach because the two matters involve the same parties who are contesting two identical unexplained wealth orders issued against them jointly and severally at the instance of the 1<sup>st</sup> respondent which they want set aside.

[2] On the 11<sup>th</sup> of June 2020 this court issued granted an Unexplained Wealth Order (UWO) against Augustine Chihuri, Isobel Hakima Khan Chihuri, Samantha Hamadziripi Chihuri, Aitken Khan, Netsai Khan, Ethan Takudzwa Augustine Chihuri, Croxile investments (Pvt) Ltd, Adamah Enterprises (Pvt) Ltd, Mastermedia (Pvt) Ltd, Mastaw Investments (Pvt) Ltd, Rash marketing (Pvt) Ltd, The Registrar of deeds (NO), The Registrar of Motor Vehicles (NO). The order which was granted at the instance of the 1<sup>st</sup> accused person under Case no HACC16/20 reads as follows: -

1. The 1<sup>st</sup> applicant to explain his relationship with Nodpack Investments (Pvt) Ltd. Croxile Investments (Pvt) Ltd, Mastaw Investments (Pvt) Ltd, Rewstand Enterprises (Pvt) Ltd Rash Marketing (Pvt) Ltd, Adamah Enterprises (Pvt) Ltd.
2. The 1<sup>st</sup> and 2<sup>nd</sup> applicants to explain their roles, if any, in the engagement of Nodpack Investments (Pvt) Ltd, Croxile Investments (Pvt) Ltd, Mastaw Investments (Pvt) Ltd, Rewstand Enterprises (Pvt) Ltd, Rash Marketing (Pvt) Ltd, Adamah Enterprises (Pvt) Ltd by the Zimbabwe Republic Police during the period between 2 July 2014 and December 2017.
3. The 2<sup>nd</sup> applicant to explain the nature of Nodpack Investments (Pvt) Ltd contractual relationship with the Zimbabwe Republic Police (ZRP) which led to ZRP transferring US\$5 766 251.31 from ZRP Revolving Fund to Account Number 001103706513801 held by Ecobank Borrowdale between 28 July 2012 to 11 December 2017.
4. The 2<sup>nd</sup> applicant to produce documentation showing a breakdown of services and goods supplied to ZRP by Nodpack Investments (Pvt) Ltd including delivery notes and payment vouchers.
5. The 2<sup>nd</sup> and 5<sup>th</sup> applicants to explain the nature of Croxile Investments (Pvt) Ltd with the Zimbabwe Republic Police (ZRP) which led to ZRP transferring the sum of US\$1 915 644.13

between 19 July 2016 and 30 December 2017 to the 5<sup>th</sup> applicant's bank account Number 6196007270156 held by FBC Bank Graniteside.

6. The 2<sup>nd</sup> and 5<sup>th</sup> applicants produce documentation showing a breakdown of services and goods supplied to ZRP by Croxile Investments (Pvt) Ltd including delivery notes and payment vouchers.
7. The 2<sup>nd</sup> and 6<sup>th</sup> applicants to explain the nature of Adamah Enterprises (Pvt) Ltd's contractual relationship with the Zimbabwe Republic Police (ZRP) which led to ZRP transferring US\$10 575 732 from ZRP Revolving Fund to account Number 68961277640019 held by the CBZ Bank Limited Newlands Branch between 14 August 2015 and 18 May 2017.
8. The 2<sup>nd</sup> and 6<sup>th</sup> applicants to produce documentation showing a breakdown of services and goods supplied to ZRP by Adamah Enterprises (Pvt) Ltd including delivery notes and payment vouchers.
9. The 1<sup>st</sup> and 7<sup>th</sup> applicants to explain the nature of Mastermedia (Pvt) Ltd's contractual relationship with the Zimbabwe Republic Police (ZRP) which led to ZRP transferring the sum of US\$2 417 138.79 from ZRP Revolving Fund to the 7<sup>th</sup> respondent's CBZ Borrowdale Account Number 002923544700012 between 25 March 2013 to 1 January 2018.
10. The 2<sup>nd</sup> and 7<sup>th</sup> applicants to produce documentation showing a breakdown of services and goods supplied to ZRP by Mastermedia (Pvt) Ltd including delivery notes and payment vouchers.
11. The 2<sup>nd</sup> and 8<sup>th</sup> applicants to explain the nature of Mastaw Investments (Pvt) Ltd contractual relationship with the Zimbabwe Republic Police (ZRP) which led to ZRP transferring US\$3 823 285 from ZRP Revolving Fund to the 6<sup>th</sup> applicant's CBZ Kwame Nkrumah Bank Account Number 00112327290010 between 8 July 2015 and 7 June 2017.
12. The 2<sup>nd</sup> and 8<sup>th</sup> applicants produce documentation showing a breakdown of services and goods supplied to ZRP by Mastaw Investments (Pvt) Ltd including delivery notes and payment vouchers.
13. The 2<sup>nd</sup>, 10<sup>th</sup> and 11<sup>th</sup> respondents explain why Mastaw Investments transferred US\$764 370 between November 2016 to December 2016 to 9<sup>th</sup> applicant's (Rash Marketing (Pvt) Ltd) CBZ Borrowdale Branch account.
14. The 2<sup>nd</sup>, 3<sup>rd</sup> applicants, one Aitken Khan, Netsai Khan, Ethan Takudzwa Augustine Chihuri, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> applicants explain their source of capital and engagement with any of the above cited corporate entities and the 1<sup>st</sup> and 2<sup>nd</sup> respondent and what financial rewards they received from that engagement.
15. The 1<sup>st</sup> and 2<sup>nd</sup> applicants or any of the above mentioned applicants with an interest or once had an interest with the following motor vehicles explain in detail the extent and scope of his or her interest and dealings with the following motor vehicles:
  - (a) The vehicle with registration number AEF7365 first registered under the Zimbabwe Republic Police (ZRP) and changed to ACM3300 and later AEF7365 in the name of the 2<sup>nd</sup> respondent.

- (b) The vehicle with registration number AES2591 first registered under the Zimbabwe Republic Police (ZRP) under AEC6323 and changed to the 1<sup>st</sup> respondent, under registration AEN9071 then to 2<sup>nd</sup> respondent under a new registration number AES2591 and finally to 4<sup>th</sup> respondent under registration number AES2591.
  - (c) The vehicle with a personalized number “MUKURU888”, presently under the registered ownership of Charles White first registered under the Ministry of Transport as AEK6241 before changing ownership to 1<sup>st</sup> respondent under Registration number AEN9065, then to the 2<sup>nd</sup> applicant again ownership changed to Oliver Khan.
  - (d) The vehicle ABE4477 that is under the registered ownership of the 2<sup>nd</sup> applicant.
  - (e) The vehicle ADF1885 that is under the registered ownership of the 1<sup>st</sup> applicant.
16. The 1<sup>st</sup> applicant to explain how he acquired and funded the equipment which is installed on Subdivision E of Fishponds situate in the District of Lomagundi measuring 9.2579 hectares acquired on 8 May 1990 for US\$60 000 under DT 3177/90 before it was transferred to Ethan Takudzwanashe Augustine Chihuri under Deed of Transfer Number 5331/2013 through a donation valued at US\$46 000.00.
17. The 1<sup>st</sup> and 2<sup>nd</sup> applicants to explain the source and origins of the following notable equipment at Shamva Farm known as Inyika Farm.
- (a) Combine Harvester Class Lexion 5X51121
  - (b) Combine Harvester Case 3
  - (c) Massey Ferguson 2366 Aerial Floor Extra 440
  - (d) Massey Ferguson Extra 470 (tractor)
  - (e) Massey Ferguson 4240 (tractor)
  - (f) New Holland TD 95 (tractor)
  - (g) Fiat YTO Tractor (tractor)
  - (h) Ford 530 (tractor)
  - (i) MS Planter
  - (j) Lifan LFJ125L Motor Bicycle
  - (k) MB Nami Motor Bicycle
  - (l) Boom Spray
  - (m) Planter Monosem
18. The 1<sup>st</sup> and 2<sup>nd</sup> applicants or any of the above mentioned respondents with an interest on or once had an interest with the following immovable property explain in detail the extent and scope of his or her interest and dealings with the following immovable property:
- (a) Stand 814 Strathaven Township 11 Stand 970A Strathaven Township measuring 1239 square metres Deed of transfer DT 1474/2016 in the names of Aitken and Netsai Khan.

- (b) Subdivision E of Fishponds situate in the District of Lomagundi measuring 9.2579 hectares acquired on 8 May 1990 for US\$60 000 under DT 3177/90 which was then transferred to Ethan Takudzwa Augustine Chihuri.
  - (c) Stand 431 Quinington Township of Stand 188 Quinington Township 4 measuring 5500 square metres under Deed of Transfer 4638/2004 before the 1<sup>st</sup> applicant transferred his half share to the 2<sup>nd</sup> applicant under Deed of Transfer 5284/2014.
  - (d) A certain piece of land measuring 4 639 square metres, stand 231 Athlone Township 2 of Green Grove C situated in the District of Harare (Deed Number 1214/85).
  - (e) Stand 1411, 1352, 1452, 1454, 1455, 1792 and 1421 Gletwyn Township Harare under a special purpose vehicle styled True Hope Trust from Police Heights Housing Cooperative through a Notarial Deed of Donation and Notarial Deed of Trust Number M/A 283/2012.
  - (f) A certain piece of land called 571 Zengeza Township measuring 142 square metres situated in the District of Harare under Deed Number 6166/08.
19. An explanation be given by the 1<sup>st</sup> and 2<sup>nd</sup> applicants as to their interest in Mastaw Investments (Pty) Ltd registered in the Republic of South Africa under company number 2017/321656/07 whilst disclosing details of an FNB (First National Bank) account and its bank records, and source of funds held under South African account number 62725356457.
20. The explanation to be given in terms of paragraphs 1 to 18 of this order be made in writing individually by each applicant to the 1<sup>st</sup> respondent at his given business address on or before the lapse of the 15<sup>th</sup> day from the date of service of this order.
21. All the applicants, and any person with an interest in the property, be and are hereby interdicted from dealing with or disposing of the above mentioned movable and immovable property which shall be under the management and care of the Asset Management Unit from the date of this order.

[3] On the 18<sup>th</sup> June 2020 this court issued another UWO under Case No: HACC 20/20 following another *ex parte* chamber application by the 1<sup>st</sup> respondent against Augustine Chihuri, Nicole Tawonga Chihuri, Rewstand Enterprises (Pvt) Ltd, Abigail Makono nee Billie, Beaular Billie and the Registrar of Deeds (NO). It reads as follows: -

**“IT IS ORDERED THAT:**

1. The 1<sup>st</sup> respondent explains the nature of his relationship with Rewstand Enterprises (Pvt) Ltd.
2. The 1<sup>st</sup> respondent explains his role if any in the engagement of Rewstand Enterprises (Pvt) Ltd by the Zimbabwe Republic Police between 12 October 2012 and 2 July 2014.

3. The 4<sup>th</sup> and 5<sup>th</sup> respondents explain the nature of Rewstand Enterprises (Pvt) Ltd's contractual relationship with the Zimbabwe Republic Police (ZRP) which led to ZRP transferring **US\$10 401 500** from its Revolving Fund to the 3<sup>rd</sup> respondent's CBZ Borrowdale Branch's account number **02923035930010**.
4. The 2<sup>nd</sup> respondent produces documentation showing a breakdown of services and goods supplied to ZRP by Rewstand Enterprises (Pvt) Ltd including delivery notes and payment vouchers.
5. The 4<sup>th</sup> and 5<sup>th</sup> respondents explain their source of capital and engagement with the 3<sup>rd</sup> respondent.
6. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents disclose documentation showing how the **US\$10 401 500** was disbursed from the CBZ Borrowdale Branch's account number **02923035930010** and what financial rewards they received from those disbursements.
7. The 2<sup>nd</sup> respondent discloses the nature of her interest in Stand 828 Mt Pleasant Township of Mt Pleasant measuring 4891 square metres under Deed of Transfer 2807/2017 in the name of the 2<sup>nd</sup> respondent, Nicole Tawonga Chihuri.
8. The 4<sup>th</sup> respondent discloses the source of money to acquire Stand 828 Mt Pleasant Township of Mt Pleasant measuring 4891 square metres under Deed of Transfer 2807/2017 in the name of the 2<sup>nd</sup> respondent, Nicole Tawonga Chihuri.
9. The 4<sup>th</sup> respondent discloses the nature of her interest in Lot 7A the Ranche measuring 638 square metres under Deed number 346/2014 in the name of Abigail Makono nee Billie.
10. The 4<sup>th</sup> respondent discloses the source of money to acquire Lot 7A the Ranche measuring 638 square metres under Deed number 346/2014 in the name of Abigail Makono nee Billie.
11. The 4<sup>th</sup> respondent discloses the nature of her interest in Stand 18848 Harare Township of Salisbury Township under Deed number 4439/2015 in the name of Abigail Makono nee Billie.
12. The 4<sup>th</sup> respondent discloses the source of money to acquire Stand 18848 Harare Township of Salisbury Township under Deed number 4439/2015 in the name of Abigail Makono nee Billie.
13. The 5<sup>th</sup> respondent discloses the nature of her interest Stand 5346 Mufakose Township of Stand 197 Mufakose Township under Deed number 945/2003 in the name of Beaular Billie.
14. The 5<sup>th</sup> respondent discloses the source of money to acquire Stand 5346 Mufakose Township of Stand 197 Mufakose Township under Deed number 945/2003 in the name of Beaular Billie.
15. The explanation to be given in terms of paragraphs 1 to 18 of this order be made in writing individually by each respondent to the applicant at his given business address on or before the lapse of the 15<sup>th</sup> day from the date of service of this order.

16. All the respondents be and are hereby interdicted from dealing with or disposing of the above mentioned movable and immovable property which shall be under the management and care of the Asset Management Unit from the date of this order.

17. The Head of the Zimbabwe Republic Police's Asset Forfeiture Unit or his lawful delegate effect service of this order on respondent's given addresses."

[4] The 1st respondent made the *ex parte* chamber applications which yielded the above quoted UWOs in his capacity as an enforcement authority. [See in terms of s 37B (1) as read with s 37A (1) of the Money Laundering and Proceeds of Crime [Chapter 9:24]]

[5] The applicants in case no HACC21/20 would like the UWO under HACC16/20 set aside on the grounds that it is unreasonable and unjustified; and alternatively that it infringes upon certain of their fundamental rights and freedoms. They also seek, in the same application, an order declaring the law under which the UWO was granted the constitutionally invalid. As an alternative remedy they seek referral of certain constitutional questions for determination by the Constitutional Court. Aitken Khan and Netsai Khan who are named in the UWO are not parties to the application. They are therefore not contesting the UWO granted against them. The applicants in case no HACC 22/ 20 are seeking similar remedies with respect to the UWO granted on the 18<sup>th</sup> June 2020 Case No: HACC 20/20. Rewstand Enterprises (Pvt) Ltd, Abigail Makono nee Billie and Beaular Billie who are named in the UWO have not done the same. They are not before me.

[6] The two court applications now before me were made in terms of s 37 B (7) of the same Act. S 37B (7) which entitles any person subjected to an UWO to apply to this court for the setting aside of the UWO on good cause shown. The completeness the applicants' draft orders are both and each worded as follows. The main relief: -

- i. "an order setting aside the unwanted wealth order; **combined with orders**
- ii. declaring the constitutional invalidity of s 37(B (1), 37(B)3, 37B (6), 37(C), 37D of the Money Laundering and Proceeds of Crime Act.
- iii. declaring the inconsistency of the aforestated sections of the Act with s 70(1)9, s56(1) of the Constitution of Zimbabwe.
- iv. declaring the constitutional invalidity of s 37(B)11 of the Act for being inconsistent with s 56(1) of a Constitution.

- v. declaring the constitutional invalidity of s 37(c), 1 of the Act for being inconsistent with s56(3) of the Constitution.
- vi. declaring the invalidity of ss 37B (1) and 37(1) for being inconsistent with s 72(2) of the Constitution; and that the orders of constitutional invalidity shall be subject to confirmation by the Constitutional Court of Zimbabwe.”

In the alternative, the applicants seek the referral by this court of the following constitutional questions to the Constitutional Court for determination: -

- i. “Whether ss 37(B), 37B (3), 37B (6), 37(C), 37(D) of the money laundering and proceeds of Crime Act [*Chapter 9:24*] are inconsistent with ss 70(1)19 and 56(1) of the Constitution.
- ii. Whether s 37(C) (i) of the Money laundering and Proceeds of Crime Act [*Chapter 9:24*] are inconsistent with s 56(3) of the Constitution.
- iii. Whether s 37(B) (i) and s 37(1) of the Act are inconsistent with s 72(2) of the Constitution.”

*The applications*

[7] The applications are both and each founded on affidavits deposited by the 1<sup>st</sup> applicant. The other applicants have filed very brief affidavits verifying, adopting and associating with the 1<sup>st</sup> applicant’s averments. This is not surprising because the targeted wealth is believed to have been ill-gotten through alleged criminal activities of the 1<sup>st</sup> and 2<sup>nd</sup> applicants. In other words, the properties held by the rest of the applicants were targeted because the 1<sup>st</sup> respondent believes the holders are all and each connected with either the 1<sup>st</sup> or 2<sup>nd</sup> applicant or both. The averments made by the 1<sup>st</sup> applicant in his founding affidavits are clearly intended to achieve the following on behalf of all the applicants; firstly, to lay a factual and legal basis for the setting aside of the UWOs, referred to in the Act as good cause; secondly to lay a basis for the constitutional *declarateurs* of constitutional invalidity; and thirdly, to explain their wealth. The averments are summarized below.

[7.1] The 1<sup>st</sup> respondent was not motivated, by the genuine desire to fight crime when he applied for the unexplained wealth orders. The UWOs are a culmination of personal and political animosity between the 1<sup>st</sup> applicant and the President of Zimbabwe which has been blown into a national ‘spectacle’. The hatred started during the war of liberation but the two managed to conceal it and worked together during the tenure of the immediate past late president of this country. It however, came to the fore and matters came to a head when the



current President ascended to be Head of State and Government in November 2017. The applicant, his family and relatives immediately became victims of harassment and targeted political persecution. 1<sup>st</sup> applicant gives a narration of events which he says constitute evidence of politically motivated victimisation and persecution.

[7.2] The 1<sup>st</sup> applicant avers that his wife (2<sup>nd</sup> applicant) and he, were productive A2 farmers for 25 years from 1997 to 2017. They were engaged in large scale commercial farming which included large scale paw paw production, not less than 300 hectares of maize, 150 hectares of soya beans and 100 hectares of wheat, rearing more than 100 herd of cattle, up to 80 sheep and 100 goats since 2001.

[7.3] The 1<sup>st</sup> applicant accepts that his family, relatives and he are linked to the companies targeted by the UWOs but contends that the companies engaged in legitimate business with the Zimbabwe Republic Police (ZRP) and their business dealings with the ZRP were above board. All payments received by the companies were due and payable for either goods sold [and delivered] or services rendered in the normal course of business. All the transactions companies were lawful and carried out under due observance of procurement procedures. There is no complaint by the ZRP of impropriety or prejudice. All records pertaining to the dealings between the companies and the ZRP were kept by the current Commissioner General of Police and ought to be still be in the custody of the State. The 1<sup>st</sup> applicant is now retired as Commissioner General and the current Commissioner General of Police was his deputy. There is therefore no need to call upon the 1<sup>st</sup> applicant or any of his co-applicants to explain the business dealings of the named companies with the ZRP because all the records are easily accessible which the 1<sup>st</sup> respondent can easily access speak for themselves. The companies linked to his relatives, family and he were not the only companies which did business with the ZRP. Other serving members did the same through their own companies.

[7.4] The main source of funding for procurement by the ZRP was what was known as the Retention Fund. The ZRP, like other government departments, was allowed to directly access and use a certain percentage of revenues, collected by it, before remitting the remainder to Treasury. Such retention and expenditure thereof was sanctioned and supervised by Treasury.

[7.5] The company known as Mastaw South Africa is now defunct. Nodpack (Pvt)(Ltd), Croxley (Pvt)(Ltd) and Mastaw (Pvt)(Ltd), provided the service of procuring tents for the ZRP. The income received by the companies appear to be huge, on the face of it, because the figures were expressed in Zimbabwean currency. The Zimbabwean currency did not fetch much when converted to United States dollars on the unofficial market which was the only source of foreign exchange.

[7.6] The companies did not make much profit because payments were, in most cases, delayed and the only source of working capital, being foreign currency, was the parallel market. The banks did not have the same. I note that the applicants make reference to USD currency because it is the currency of reference in s 37B of the Money Laundering Act. Adamah Enterprises (Pvt) (Ltd) supplied uniform fabrics to the Ordinance of the ZRP. The procurement was above board and adequately explained by the Quarter Master of the ZRP to a Board set up by the current Commissioner General. Master Media (Pvt) (Ltd) supplied most of the Billboards Signage at Police Stations throughout the country. All records of Master Media's dealings with the ZRP were burnt in an arson. All records of the dealings between the companies mentioned in the UWO and the ZRP were kept by the various departments of the ZRP and it is illogical and unreasonable that the applicants should be required to explain information which is in the State's possession.

The companies made a profit of amount 3 million Zimbabwean dollars among them and most of it was used to finance farming activities which included the installation of irrigation infrastructure, chemicals, fertilizers and salaries. The companies by and large, recorded losses because the ZRP delayed payment for the goods supplied.

The 2<sup>nd</sup> applicant was the vice president of Kumboyedza Women's club which ran several successful businesses. The successes were widely documented and publicised. The club's business dealings with the ZRP were above board just like the business of other State service chiefs.

[7.7] The 1<sup>st</sup> applicant explained that he acquired all the vehicles listed in the UWO through his conditions of service. He bought the vehicles ADF 1885 and AEF 7365 as part of his conditions of service. He acquired the Range Autobiography 2592 and Ford Ranger Wildtrack

AES 2591 vehicles as part of his retirement package. The vehicle ABE 4477 belongs to the company known as Kidsdale which purchased it from the ZRP for use by its company secretary. The ZRP ought to have all the records of these transactions and it is preposterous for the 1<sup>st</sup> applicant to demand any explanation from the 1<sup>st</sup> applicant.

[7.8] The 1<sup>st</sup> applicant also explained how he acquired the various farming implements which he describes as 'now obsolete'. The implements were acquired by the 1<sup>st</sup> and 2<sup>nd</sup> applicants on diverse occasions, some at public auctions and others from different suppliers since the year 2000. It has been such a long time and he cannot possibly still have the receipts up to now.

[7.9] He explained the immovable properties as follows. The values of the properties were exaggerated by the 1<sup>st</sup> respondent. He gave what he said are the correct valuations to contradict the values put forward by the 1<sup>st</sup> respondent.

The 1<sup>st</sup> and 2<sup>nd</sup> applicants have between them only one farm known as Inyika farm.

1<sup>st</sup> applicant acquired the piece of land called 571 Zengeza Township measuring 142 square metres situated in the District of Harare and held under Deed Number 6166/08 in 2007.

Stand 431 Quinington Township of Stand 188 Quinington Township 4 measuring 5500 square metres is the property of the 1<sup>st</sup> and 2<sup>nd</sup> applicants and is held by them jointly under Deeds of Transfer 4638/2004 and 5284/2014. They acquired the property was acquired on the 4<sup>th</sup> March 199 as an undeveloped stand from the City of Harare. They completed the existing improvements in 2004.

The 1<sup>st</sup> applicant acquired the piece of land measuring 4 639 square metres, stand 231 Athlone Township 2 of Green Grove C situated in the District of Harare (Deed Number 1214/85) in 1985 after selling a house in Morningside in Mutare.

The 1<sup>st</sup> applicant bought stands 1411 and 1421 Gletwyn Township Harare from the State through a scheme for State employees manned by the Ministry of Local Government. He sold the stands after paying the full purchase price and paid all the taxes associated with the sale.

Stands 1454 and 1455 do not belong to the 1<sup>st</sup> applicant or his family. He surrendered them to the relevant ministry.

The values of these stands are exaggerated. They were acquired at subsidised prices available to State employees.

The 1<sup>st</sup> applicant accepts that, with his wife, they acquired stands 1352, 1353 and 1792 Gletwyn Township Harare which they consolidated to become a single property known as stand 1353. They acquired them through their membership of a Police Heights Housing Cooperative. They paid the full price to the State through the Ministry of Local Government and built a family home. Most of the land is wetland which the family uses for horticulture. They have installed green houses, keep geese and planted trees bought from the Forestry commission.

Subdivision E of Fishponds situate in the District of Lomagundi is held by Ethan Takudzwanashe Augustine Chihuri, who is a minor, under Deed of Transfer Number 5331/2013. The 1<sup>st</sup> and 2<sup>nd</sup> applicants assisted him to acquire it on 8 May 1990 for US\$60 000. The UWO in case no HACC 16/20 was improperly sought and granted to the extent that it subjects the minor child, Ethan Takudzwanashe Augustine Chihuri to its application. The 1<sup>st</sup> respondent erroneously sought the order in that he did not follow the mandatory procedure set out in r 249(1) (b) of the High Court rules, 1971 [applicable at the time] when it sued the minor child. The 1<sup>st</sup> respondent ought to have applied for the appointment of a curator *ad litem* before suing the minor. The 1<sup>st</sup> applicant who has submitted the minor's birth certificate as proof of his age and has moved this court to set aside the UWO issued against the minor because it was mistakenly sought and granted. The 1<sup>st</sup> respondent also erroneously sought and was granted the UWO against Nicole Tawonga Chihuri with respect to her property known as Stand 828 Mt Pleasant since she was also a minor and the correct procedure was not followed.

Stand 814 Strathaven Township 11 of Stand 970A Strathaven Township measuring 1239 square metres does not belong to the applicant or his family or relative but is the property of Aitken and Netsai Khan, held by them under Deed of transfer DT 1474/2016. The court notes that Aitken and Netsai Khan are not part of this application.

With respect to the properties listed in the UWO granted in case no HACC20/20 the 1<sup>st</sup> applicant explained that he has no links with Rewstand Enterprises (Pvt) Ltd. There is no reason to insinuate that he has anything to do with the company and his perceived sins visited upon it. Nicole Tawonga Chihuri was a minor when the UWO was granted on 18<sup>th</sup> June 2020. He

attached her birth certificate. The UWO was therefore erroneously sought because the 1<sup>st</sup> applicant did not disclose the Nicole's minority status to the court. It should also be set aside.

[7.10] The 1<sup>st</sup> applicant explained his source of funds generally. He retired after serving the ZRP for 37 years. Over the period he made savings on salaries, bonuses, savings from foreign trips and conditions of service benefits. He was a delegate and vice president for Interpol in Africa and remunerated in USD. In any event the applicants acquired all the assets prior to the period during which, the 1<sup>st</sup> respondent says, the 1<sup>st</sup> applicant became involved in serious crime. The allegation is that he was involved in crime in the year 2017. All the properties acquired by him and his wife or through income from legitimate business. Some of the properties were registered as the property of their children for estate planning purposes. The 1<sup>st</sup> respondent is not justified in insinuating that they are proceeds of crime because they were all acquired prior to the year 2014. Various documents have been submitted with the application to prove the acquisition; in some cases, disposal; and ownership of the various properties. The applicants therefore contend that the UWOs are unreasonable and unjustified and that had he been afforded the opportunity to explain it is unlikely that this court, acting reasonably and carefully would have granted the UWOs. Their uncontested explanation ought therefore to be regarded as just cause for setting aside the UWOs

[8] With respect to the alleged infringement of fundamental rights and freedoms the 1<sup>st</sup> applicant stated the following. The procedure adopted by 1<sup>st</sup> respondent to obtain the UWOs overallly infringed upon several of his fundamental rights and freedoms. He named the right to protection of the law; fair and equitable administrative justice; fair and equitable administrative procedure; right to a fair trial or hearing; the right to be heard prior to the making of an adverse order against them; the right to legal representation in legal proceedings, the presumption of innocence and protection against discrimination. The 1<sup>st</sup> respondent's decision to proceed *ex parte* denied the applicants the opportunity to respond to the allegations which in itself was irregular and a breach of the rules of natural justice. Had they been accorded the opportunity to respond it is unlikely that this court would have granted the UWOs in its present form or at all. As if obtaining UWOs against the applicants without serving the chamber applications was

not enough, the 1<sup>st</sup> respondent did not serve the UWOs in terms of the rules of this court and has, despite written demand, steadfastly refused to serve both UWOs and the chamber applications. The applicants submitted, as proof of same, correspondence between their legal practitioners of record and 1<sup>st</sup> respondent's counsel of record.

The applicants only became aware of the UWOs through a notice published in the Herald Newspaper in mid-June 2020. The 1<sup>st</sup> respondent's conduct in not furnishing the chamber applications was in all probabilities, calculated to deprive them of the specific averments made against them thereby embarrassing them in their defence and explanations.

*1st respondent's opposition and counter application.*

[9] The respondents have opposed the applications. The 1<sup>st</sup> respondent's grounds of opposition are as follows. He is an enforcement authority as defined in terms of s 37A(1)(b) of the Money Laundering and Proceeds of Crime Act and empowered in terms of s337 B (1) thereof to make *ex parte* applications for UWOs.

[9.1] The UWOs granted by this court do no more than simply call for individual explanations by the various persons mentioned in it as to how they acquired the assets they own and the wealth they have. The applicants have failed to comply with the UWOs which requires the applicants to, all and each, explain their wealth to the 1<sup>st</sup> respondent within the period of 15 days mentioned in the order. The explanations will be assessed and based on their veracity or lack of it the 1<sup>st</sup> respondent will decide on the next course of action.

[9.2] Each of the applicants ought therefore to have rendered the required explanation separately to the extent that the UWOs require them to do so. Reliance on the 1<sup>st</sup> applicant's explanation.

[10] The 1<sup>st</sup> respondent proceeded against the applicants on an *ex parte* basis because of perverse behavior on the part of the 1<sup>st</sup> respondent. He destroyed records and went on a spree of disposing the property soon after the ascendance of the sitting president to executive power. Stand no 231 was sold to Grace Matsika and Benedict Mawodza for US\$230 00. 00 and

transferred through the agency of Aitken Khan who is the 2<sup>nd</sup> applicant's brother. The 2<sup>nd</sup> applicant sold stand 1421 Gletwyn to Brian Chijaka for USD\$130 000.00 and stand 1411 through her brother Aitken Khan. Samantha Hamadziripi Chihuri sold Lot 28 Chisipuiti also known as no 8 St Aubin's Chisipite to Erina Muchingamih for USD 365 000.00. Nicole Tawonga Chihuri sold stand 784 Strathaven through Aitken Khan for USD 125 000.00. Samantha Chihuri, Ethan Augustine Chihuri, Nicole Tawonga Chihuri and Anashe Melanie Chihuri sold Lot 3 of Plot 4 of Juliasdale held by them under Deed of Transfer 2208/12 for \$3 860 000.00. The 1<sup>st</sup> applicant sold and transferred stand 15038 Bulawayo Township to Tendai Madamombe. Stand 828 Mt Pleasant is registered as the property of Nicole Tawonga Chihuri and must have been acquired by the 1<sup>st</sup> and 2<sup>nd</sup> applicants. They must explain their source of the money to buy the property. The 1<sup>st</sup> applicant and his family have shown dishonesty in dissipating their properties and relocating to South Africa.

[11] The 1<sup>st</sup> respondent avers that the applicants have not shown good cause for the setting aside of the UWOs. The freezing orders infused in the UWOs should remain for the purpose of preserving the goods believed to be proceeds of crime and prevent their dissipation. The 1<sup>st</sup> respondent has therefore moved the court to dismiss the court applications for the setting aside of the UWOs.0

[12] 1<sup>st</sup> respondent avers that *ex parte* applications are constitutionally and legally permissible in this jurisdiction particularly since, according to him, they are interlocutory. The manner in which the assets were acquired is peculiarly known by the applicants and they all have the obligation to explain the source of their wealth. Public policy demands the explanations, especially the 1<sup>st</sup> applicant who had control or custody of public funds. The alleged acrimony between the 1<sup>st</sup> applicant and the President of the Republic of Zimbabwe, while not admitted, has no relevance to the matter at hand. The 1<sup>st</sup> applicant abused his position of authority to acquire the wealth and that amounts to the crime of theft. He orchestrated the theft of about USD32 million. The State has evidence to prove the commission of the crimes beyond a reasonable doubt. The 1<sup>st</sup> applicant is suspected of having committed crimes through falsified deliveries of goods to the ZRP for which payment was received by the companies subjected to the UWOs. There are about 25 entries that were identified namely one entry in the year 2015,

one in 2016 and the rest in 2017. Only four of these are genuine. The 1<sup>st</sup> applicant destroyed the records hence the need for him to explain the companies' activities. The 1<sup>st</sup> respondent submitted various statements by some police officers giving evidence on proper procurement procedures. The submission was made that the correct procurement methods were not followed.

[13] The 1<sup>st</sup> respondent submitted evidence on the directorship of the companies in which the applicants had interest and the amounts received from the ZRP by the said companies. The directors of Mastaw Investments Limited are Augustine Chihuri, Isobel Chihuri and Aitken Khan. The ZRP paid the company a total sum of \$3 823 285.00 through the company's CBZ Kwame Nkurumah bank account. The directors of Master Media (Pvt) (Ltd) are Isobel Chihuri, Virginia Bosha and Aitken Khan. The company received a total of \$2 417 148.79 through a CBZ bank account. The directors of Rewstand Enterprises (Pvt) (Ltd) are Makono Abigail and Beulah Billie. The company received \$10 401 500.00 through a CBZ bank account. The directors of Nodpack Investments are Clever Nziramasanga and Isobel Chihuri. The company received \$5 766 252.31 through an Ecobank bank account. The directors of Croxile Investments are Vanessa Madalitso and Isobel Chihuri. The company received &1 892 040.00 from the ZRP. The directors of Adamah Enterprises are Isobel Chihuri and Nelia Mafunga. The company received \$10 575 732.00. All in all, the companies netted \$34 875 948.10 and such wealth must be explained. The companies were contracted in circumstances which smack of corruption.

[14] The applicants must state the price at which they acquired the stands in Gletwyn through the Police Housing cooperative. They looted the stands. The 2<sup>nd</sup> applicant was not a serving member of the ZRP. The 1<sup>st</sup> respondent submitted that it would move the court to inspect the 1<sup>st</sup> and 2<sup>nd</sup> applicants' family home to see for itself how monstrous it is. [This approach was not pursued at the hearing].

[15] The applicants' constitutional rights have not been infringed in any way. The 1<sup>st</sup> applicant obtained the UWO after following due process set out in the Money Laundering and Proceeds of Crime Act. The procedure when it runs its full course, does give the applicants the opportunity to be heard before forfeiture is ordered. He maintains that the chamber applications



for the UWOs were motivated by the desire to fight crime and the procedure is defensible in any civilised and democratic society. All it does is to call upon certain persons to explain their acquisition of property believed, on reasonable grounds to be proceeds of crime. Setting aside the UWOs would be prejudicial to public interest and contrary to public policy. While conceding that Ethan Takudzwa Augustine Chihuri and Nicole Tawonga Chihuri were minors when the UWOs were sought and granted against them, the 1<sup>st</sup> respondent argues it was not necessary to comply with rule 249 (b)(2) of the High Court rules, 1971 since the minors had been joined with their natural guardians who are their parents. The minor had no capacity to commit crime and the property was in any event donated to him by the 1<sup>st</sup> applicant. It is the 1<sup>st</sup> applicant who must explain the source of the wealth which he donated.

[16] The explanation given by the applicants is inadequate and does not merit the setting aside of the UWOs. According to the 1<sup>st</sup> respondent, the 1<sup>st</sup> applicant was involved in various serious crimes. He is also connected to the various companies listed in the UWOs which were awarded huge contracts dubiously and were paid large sums without following compulsory competitive bidding procedures.

[17] With regards to the stands, the 1<sup>st</sup> respondent averred that the Gletwyn housing project was intended to benefit State employees in various government departments. The 1<sup>st</sup> and 2<sup>nd</sup> respondent looted seven stands from a Police Cooperative which had been allocated land in Geletwyn for residential purposes.

[18] The 1<sup>st</sup> respondent filed a counter application with respect to a property known as Lot 28 Chisipiti which Samatha Hamadziripi Chihuri sold to Erinah Muchingamih for USD\$368 000.00, Stand 784 Starhaven Township registered as the property of Nicole Tawonga Chihuri sold to Fairline Investments Pvt Ltd, Lot 3 of Plot 4 of Juliasdale owned by Samantha Chihuri, Ethan Augustine Chihuri, Nicole Tawonga Chihuri and Anashe Melanie Chihuri, stand 14453 Bulawayo township sold by the 1<sup>st</sup> applicant to Tendai Madamombe.

[19] The counter application is opposed by the respondents who all rely and associate with the opposing affidavit filed by the 1<sup>st</sup> respondent. The 1<sup>st</sup> applicant essentially based his opposition on the same submissions he made in the main application explaining his acquisition of his wealth.

*The 2<sup>nd</sup> to 6<sup>th</sup> respondents' notice of opposition*

[20] The 2<sup>nd</sup> to 6<sup>th</sup> respondents opposed both applications on a technicality and on the merits. They all relied on an opposing affidavit deposed to by the 6<sup>th</sup> respondent. The 6<sup>th</sup> respondent submitted that he does not know the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants. He made no further averments regarding their application. He also contended that the board resolutions authorising the 1<sup>st</sup> applicant to represent the companies were defective and inadmissible because they were not authenticated.

He contended further that the UWOs are valid because they were issued in terms of an existing law.

He however conceded that the applicants are within their rights to bring the present applications for the setting aside of the UWOs in terms of s37 b (7) of the Money Laundering and Proceeds of Crime Act. He accepts that, at law, the UWOs can be set aside on good cause shown.

The impugned provisions of the Money Laundering and Proceeds of Crime Act are constitutional and do not infringe on the applicants' right to be presumed innocent, protection of the law and protection against discrimination. The applicants have not laid a constitutional basis for setting aside of the contested provisions of the Act.

He is not opposed to either the determination of the constitutional issues by this court or referral thereof to the Constitutional court.

He also concedes that if indeed Nicole Tawonga Chihuri and Ethan Takudzwa Chihuri were minors at the time the UWOs were granted, the terms of the UWOs applying to them to them should be excluded.

*Conclusions on the facts and the law.*

[21] I will not be influenced by the allegations of political harassment and victimization made against the President. The President is not a party to these proceedings. He is therefore unable to respond to the allegations. I did not order his joinder because the alleged personal vendetta has no bearing on the resolution of the dispute before me. It may or may not exist but that is not important for the effective resolution of the issues that arise in this case. The issues are (1)

Whether the applicants have placed before me facts that constitute just cause to the setting aside the UWOs granted by this court in case nos HACC 16/20 and HACC 20/20 (2) Whether the counter application for an UWO in case HACC 21/20 should succeed (3) Whether the applicants have utilised the proper legal framework for the granting of a declaratory order of constitutional invalidity of a law (4) Whether the request for referral of constitutional questions is in compliance with s 175(4) of the Constitution (5) If so, whether or not the request is frivolous and vexatious,

[22] Section 37B (1) authorizes an enforcement authority to make an *ex parte* chamber application to this Court for an Unexplained Wealth Order with respect to any property provided certain requirements are met. On the face of it the procedure act as a limitation to the rights mentioned. However, the Constitution of Zimbabwe contemplates limitation of fundamental rights and freedoms set out in Chapter 4 as long as such rights are derogable and the derogation is within the limits set out in section 86 thereof.

The *ex parte* procedure provided for in s37B (1) Money Laundering and Proceeds of Crime Act is easy to justify. It is in the public interest to identify and freeze proceeds of crime before they are dissipated. That is one of the key objectives of the Act. The law as set in s 37 B of the Money Laundering and Proceeds of Crime Act has general application and has sufficient safeguards. See *Greaterman Store (1979) (Pvt) Ltd ta Thomas Meikles Stores and Anor vs Minister of Public Service and Social Welfare and Anor* CCZ 86/15. The *ex parte* procedure is not new in this jurisdiction. For example, this court has the power to issue Antony Pillar orders which authorize seizure of items for the purpose of preserving real evidence. Such orders are granted without giving notice to the affected party and sometimes in camera to prevent dissipation of property or destruction of evidence material pending another process. The order may be issued to compel disclosures or production of documents. See the discussion in Herbstein & Wan Winsen , *The Civil Practice of the High Courts of South Africa*, fifth Edition , Vol 2 at pages 1495 to 1500. It appears that the Money Laundering and Proceeds of Crime Act simply codified and extended the application of the common law Anton Pillar remedy. The reason for the codification could be that, as explained by the learned authors, some judges have expressed reservations about the propriety of the court inventing *ex parte* procedures. The

Money Laundering and Proceeds of Crime Act has been amended several times to make it more effective in the fight against money laundering and improve the mechanisms for the confiscation of proceeds of crime. I could not find case law on the implications of s 37 B of the Act since it is a very recent addition introduced by the Finance Act 1/19]. The Act seems to have extended this court's common law power in Antony Pillar to deal with proceeds of crime and unexplained wealth. The rules of this court provide for non-service of chamber applications where there is risk of perverse conduct.

The UWO does not deprive the person subjected to it of the right to be heard because such orders are issued solely for the purposes of investigation and can be set aside or varied. (See ss37E and 37 B (7) respectively). The interference with one's right to possess or control a thing is temporary and minimal. It is in the public interest to take measures to prevent the dissipation of proceeds of crime which is the whole purpose of the Money laundering and Proceeds of Crime Act Chapter 9:24. The preamble to the Act sets out its purpose as, among other things:

“AN ACT to.....enable the unlawful proceeds of all serious crime and terrorist acts to be identified, traced, frozen, seized and eventually confiscated; ....”

There are several safeguards in the Act to mitigate against the impact of the *ex parte* procedure which include, and are not limited to; that the court will not grant the order unless certain specific requirements have been met (s 37 B (3) of the Act); the enforcement authority must determine the fate of a freezing within sixty days(s 37E); the explanation given in compliance with an UWO may not be used as evidence in subsequent criminal proceedings (s 37 E); the person subjected to the UWO has the right to apply for the setting aside of the order (s 37 B (7)) and the power of the court to vary or discharge a freezing order(s 37 G). Rule 60 (3) (c) and the common law power of this court to set aside or vary or rescind any order made by it on good cause shown.

[23] In this case the court ordered that in each case the explanation was to be given in writing to the 1<sup>st</sup> respondent within 15 days of the service of the order at the 1st respondent's business address. The property subjected to the order was placed under the management of the Asset Management Unit from the date of the order. Instead of complying with the order the applicants

applied for the setting aside of the order. It appears the Act gives the person subjected to an order the election to either comply unquestioningly or to apply at any time for an order setting aside the UWO on good cause shown. The applicants opted for the latter and there is nothing wrong with that.

[23] It is common cause that 1<sup>st</sup> respondent did not serve the order on the applicants as directed by this court and has steadfastly refused to do so despite demand by the applicants. There is evidence on record that State counsel refused to serve the order and the application. The logic is difficult to fathom because the draft order which was the basis of the UWOs was crafted by 1<sup>st</sup> respondent's counsel and placed before the Judge in chambers for approval. The 1<sup>st</sup> respondent was therefore in wilful defiance of the terms of an order crafted by it. It not possible for the applicants to give an informed response to the specific allegations made to found the chamber applications which persuaded that the requirements of the issuance of the UWOs had been met. The following requirements are set out in s 37 B (3) Money Laundering and Proceeds of Crime Act: -

- a. there is reasonable cause to believe that the respondent holds the property; and
- b. the value of the property is greater than ten thousand United States dollars or its equivalent in any currency; and
- c. 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; and
- d. there are reasonable grounds for suspecting that the respondent is, or has been, involved in serious crime (whether in Zimbabwe or elsewhere), or a person connected with the respondent is, or has been, so involved. [See s 37B (1), 37(B) 2(2) (3) of the Act].

In my view these requirements must be present with respect to each and every person who is subjected to an UWO. It is therefore imperative that the chamber applications should be served, in the case of an *ex parte* application, as soon as the order is granted. Failure to serve the order and the chamber application may negatively reflect on the *bona fides* of the applicant.

[24] As it turns out the stance taken by the 1<sup>st</sup> respondent was counterproductive. The fact that the 1<sup>st</sup> respondent decided not to serve the UWOs means that the *dies inducie* set in the UWOs did not start to run and had not begun to run at the time of filing of these court applications since it would only be reckoned from the date of service.

The applicants, after becoming aware of the order through notices in the newspaper, were entitled to invoke s 37 B (7) of the Act and in order to attack the *bona fides* of the applicant..

[25] At the hearing the 2<sup>nd</sup> to 6<sup>th</sup> respondents did not persist with the technical objections to the 1<sup>st</sup> applicant's authority. Their counsel opted to abide by the decision of the court despite having filed heads of argument. No specific allegation of impropriety was being made against them. However, I take note that the respondents conceded, on the papers, that the *ex parte* procedure adopted by the 1<sup>st</sup> respondent is constitutional. They ,however, took the view that the request for referral is frivolous and vexatious and relied on the case of *National Director of Prosecutions v Basson* 2002 SA 419 SCA 2002 (2) 255.

[26] This court has the power to declare a law constitutionally invalid in deciding a constitutional application. See s175 (6) of the Constitution as read with s 175(1). However, the applicants ought to have accessed this court for such a remedy in terms of s 85 of the Constitution. Section 85 of the Constitution provides the legal framework for the enforcement of fundamental human rights and freedoms.

The applicants commenced both cases HACC 21/20 and 22/20 in terms of s 37(B) (7) of the Money laundering and Proceeds of Crime Act [*Chapter 9:24*]. Section 37(B) (7) is unambiguous which provides for access to this court by a “person subjected to any unexplained wealth order...” who may “...at any time apply to the High Court that issued the order set it aside on good cause shown.” It is not the legal framework for the constitutional remedies or enforcement of fundamental rights and freedoms.

The combination of private litigation which can be adjudicated upon without reference to the constitution and a challenge to the constitutional validity of a law was frowned upon by the Supreme Court in the case of *Central African Building Society v Penelope Douglas Stone &*

*Others* SC15/21. At pages 14 and 15 of its judgment per Gwaunza DCJ, the Supreme Court emphasized the importance of the principle of subsidiarity.

“[33] Malaba CJ in the constitutional case of *Moyo v Seargent Chacha* CCZ7/17 elaborated the principle of subsidiarity as follows: -

One cannot ignore non constitutional remedies preferring to directly to enforce the right as enshrined in the constitution, where the question for determination is whether conduct the legality of which is impugned is consistent with provisions of a statute, the principle of subsidiarity forbids reliance on the constitution, the provisions of which would have been given full effect by statute.”

In the same judgment, at page 13 the Supreme Court also noted that if the matter before the court is resolvable in terms of an available non constitutional remedy then there would be no constitutional matter before the court. In other words, the constitution can be avoided. In this case the applicant seeks an order setting aside the UWO s to which they were subjected. That is achievable in terms of s 37B (7) of the Money Laundering and Proceeds of Crime Act.

I therefore find that the applicants have not adopted the correct procedure for the enforcement of fundamental rights or declaration of rights.

[27] The alternative reliefs for referral of constitutional questions for determination by the Constitutional Court are also improperly sought. The applicants commencing proceedings specifically for a constitutional remedy must apply for direct access to the constitutional court. There is no point for commencing proceedings in the High Court when what the applicant wants to achieve is referral of constitutional questions for determination by the Constitutional Court. Referral of constitutional matters for determination by the Constitutional Court is done in terms of s 175(4) of the Constitution. The constitutional issue to be referred ought to arise in proceedings before the court commenced for some other relief other than the constitutional matter. I reproduce s 175(4) of the constitution below.

**“175 Powers of courts in constitutional matters**

- (1) .....
- (2) .....
- (3) .....

(4) If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and, if so requested by any party to the proceedings, must refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious.

The applicants' counsel argued that the constitutional issues arose during proceedings pending in this court in that the UWOs are interlocutory. They relied on *Mushapaidze vs St Anne' Hospital and Ors* CCZ 18/17 at page 6 of the cyclostyled judgment.

“...an application cannot be made directly to the Constitutional Court in terms of s 85 of the Constitution alleging a violation of a fundamental right in respect of conduct, the lawfulness of which is subject of enquiry in proceedings pending before a subordinate court. If a question of violation of a fundamental right arises in proceedings before a subordinate court, the correct procedure is one set out in s 175 (4) of the constitution.”

I disagree. The contested UWOs issued by this court were final in nature. They were not subject to confirmation on a return day. The proceedings had therefore terminated. While it is correct the UWOs contemplated other processes, such processes would be before different fora and at the discretion of the enforcement authority. The matters before me are fresh applications commenced in terms of s 37 B (7) of the Money laundering and Proceeds of Crime Act. They may be related to earlier litigation but that does mean that the earlier proceedings had not terminated.

Even if I am mistaken in holding that the requests for referral were properly raised, I still consider the requests frivolous and vexatious. The Money laundering and Proceeds of Crime Act has various mechanisms that offer remedies against arbitrariness. I have already found that the limitation on rights occasioned by the *ex parte* procedure provided for in s 37B of the Money Laundering and Proceeds of Crime Act are in terms of a law of general application which is justifiable in terms of s 86 of the constitution. I have also made the finding that the constitutional questions raised by the applicants are not key to the determination of the matters before me. The applications before me seek the setting aside of unexplained wealth orders and all the applicants need to show is good cause for doing so. Persuasive authority on the constitutionality of *ex parte* procedure is found in the case of *Dabelstein v Hildebrandt* 1966(3)42 (C) where the South African Constitutional Court observed that *ex parte* orders, properly granted, are constitutional when necessary and proportionate provided the other



requisites of a justifiable limitation are present. The dictum is in sync with s 86 of the constitution. I find the request for referral frivolous and vexatious and refuse to grant it.

[28] Ethan Takudzwa Augustine and Nicole Tawonga Chihuri were minors were minors at the time the UWO were sought and granted. The procedure set out in set out in rule 249(2) (b) of the High Court Rules, 1971 was not followed. This court was not made aware of their age. It is unlikely that this court would have granted the UWOs against them in the absence of due process. Rule 249 (1) (b) of the High Court Rules, 1971 reads as follows: -

“(1) In the case of any application in connection with—  
(a) .....  
(b) a minor;  
a chamber application, annexing the written consent of the person proposed to be so appointed, shall first be made for the appointment of a curator *ad litem*.  
(2) A copy of a chamber application in terms of sub rule (1) shall be served on the Master, who shall make a written report to the judge.  
(3) After the appointment of a curator *ad litem* following a chamber application in terms of sub rule (1), a copy of the substantive application shall be served on him and, after he has conducted such investigation as may be necessary, he shall prepare a written report which shall be filed with the registrar and a copy served on the applicant and all other interested parties.”

At the hearing 1<sup>st</sup> respondent’s counsel conceded that this courts’ power to set aside an unexplained wealth order necessarily gives this court the competence to set aside portions of it on good cause shown. The other respondents conceded that much in their opposing affidavit. Good cause is should be given the wide meaning that it is accorded in the setting aside of default judgments. In terms of rule 63 of the High Court rules, 2021 this court may set aside a default judgment if satisfied that there is good and sufficient. The factors which a court takes into account when asked to set aside a default judgment were set out in *Stockil v Griffiths* 1992(1) ZLR (S) at 173D per Gubbay CJ. They are (1) reasonableness of the applicant’s explanation for default, (2) the bona fides of the application and (3) the bona fides of the defence on the merits of the case which carries some prospects of success. The situation governed by rule 63 of the High Court rules, 2021 is not on all fours with the procedure created by s 37 B (7) of the Money Laundering Act but there are similarities. The UWOs in terms of s 37A (1) are not granted in default. There is therefore no need to explain default. They are

however similarities in that UWOs are granted in the absence of and thus without the benefit of affected parity's version. Rule 63 speaks of 'good and sufficient 'cause and not just 'good cause.' It appears that the threshold set by 'good and sufficient cause' is higher than just 'good cause' because in the case of a default judgment the presumption is that the party in default was given an opportunity to be heard. It appears to me, however, that both the phrases 'good cause' as used in the Money Laundering and Proceeds of crime Act and 'good and sufficient cause' as used in the High Court rules, 2021, are intentionally wide in order to give this court wide discretionary powers. An applicant who seeks the setting aside of an UWO in terms of s37B (7) of the Money Laundering and Proceeds of crime Act should succeed if he or she satisfies the Court that (1) his or her application is *bona fide* in that the court would not have granted the order had it known of the facts now presents before it by way of the application and (2) the facts which he or she relies on are *bona fide*. This court may properly set aside an UWO if the court is persuaded that it would not have granted the UWO had it become aware of uncontested facts now placed before it in terms of an application made in terms of s 37B (7) of the Act or that such information was withheld or the UWO was illegally obtained or to prevent an illegality from subsisting. I do not intent the situations that I have mentioned to be exhaustive. Much is left to the discretion of the court.

[29] I must explain that it is the owner of a property who is targeted by an UWO when the value of the asset or cumulative value of the person's assets exceeds the value stated in the Act and his or her known sources of lawfully obtained income appear insufficient for the purpose of enabling the person to acquire the assets(s). Critically this court must be satisfied that the person or a person is involved in serious crime. The main respondent therefore is the owner of the property even if the investigation is triggered by suspected criminal conduct of another. That other person may be cited as a respondent for completeness. In the case of the minors therefore they are the principal targets because their proprietary interests are at stake. The appointment of a curator *ad litem* therefore becomes of utmost importance. I therefore reject the submission by the 1<sup>st</sup> respondent that the appointment of curator was not required in this case. Both UWOs will be amended to remove properties held by the minors.

[30] Most of the property subjected to the UWOs was acquired prior to the period during which the 1<sup>st</sup> and 2<sup>nd</sup> applicants are suspected of having committed serious crimes. Such property

cannot properly be considered as proceeds of serious crime in the circumstances of this matter.. The period of acquisition is not contested. The title deeds speak for themselves. The 1<sup>st</sup> respondent does not dispute that the 1<sup>st</sup> applicant was a successful commercial farmer from the year 1996, a period of twenty-one years. He would not have records of all his produce. The law did not impose a duty on him to keep records and if so for how long. The level at which he conducted his commercial farming activities is such that it cannot be said that his income was insufficient to acquire the residential properties listed. All the immovable property was acquired before the year 2015. The 1<sup>st</sup> applicant is alleged to have committed serious crimes from the year 2015. S 37 C (3) makes it clear that the court which grants an unexplained order must be satisfied that there is a relationship between the acquisition of the targeted asset(s) and the suspected commission of a serious crime. It reads as follows: -

**“37C. Requirements for making of unexplained wealth order**

- (1) .....
- (2) .....
- (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.”

[31] The acquisition of immovable properties in Gletwyn Township is not only explained by the applicant but is something facilitated by the State. Such records would therefore be available to the State. The 1<sup>st</sup> respondent’s papers ironically state the sources of the stands in Gletwyn. The source is the State. A minute from the Ministry of Local Government, Public Works and National Housing dated 29<sup>th</sup> May 2018 confirms the allocation of the land to the 1<sup>st</sup> applicant’s family (True Hope Trust) through a ZRP corporative, the consolidation of stands and the allocation of a stand to the 2<sup>nd</sup> applicant.

The information was not before this court when it granted the UWOs *ex parte*. The following sources of income have not been contested; the long service spanning over 35 years, large scale commercial farming, savings from government trips, employment by the Interpol, conditions of service benefits which included high value vehicles which the appellant could and did sell after their tenure. Such information which was not before this court when it granted the UWOs *ex parte*, constitutes good cause if looked at objectively. The requirement is not that a person subjected to an order must give an explanation verifiable by an actuarial scientist but that which

is *bona fide*. The law contemplates a value judgment based on the assessment of the *bona fides* of the application and facts presented with the application.

Section 37 C (2) is worded as follows: -

**“37C. Requirements for making of unexplained wealth order**

(1.....

(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.”

[32] It is common cause that the 1<sup>st</sup> applicant obtained all his vehicles through his conditions of service. The manner in which he acquired the vehicles is known by the State since he was an employee of the State throughout his career. I do not believe that this court would have included the vehicles in the UWO issued in HACC16/20 had it become aware that the 1<sup>st</sup> applicant acquired the vehicles from the State as part of his employment benefits or benefits on retirement. There would be no reason to suspect that such vehicles are proceeds of crime. The UFOs will be amended to exclude the vehicles. The same applies to the farm equipment. The fact that the property was acquired long back and has become obsolete has not been contested. The specific averment that some of it was purchased with funds borrowed from Mr Gono.

[33] I am not satisfied that good cause has been shown to set aside the order with respect to the funds received by the 7<sup>th</sup> to 10<sup>th</sup> applicants.

[34] Aitken Khan, Netsai Khan, Rewstand Enterrprises (Pvt) Ltd, Abigail Makono Billie and Beulah Billie are all not before me. The UWO issued against them remains extant.

[35] One Erinah Muchilingami was joined as a party to the 1<sup>st</sup> respondent's counter application under case no HACC 21/20 as the 11<sup>th</sup> respondent with the consent of all the parties. She is the owner of Lot 68 Chisipite Township of Chisipite which she holds under Deed of Transfer NO 0007417/2019. Her intention was to resist the order sought in the counter application subjecting her property to the UWO sought therein. At the hearing she was excused by agreement of the parties following the agreement that her property should not be subjected to an unexplained wealth order in the event that the 1<sup>st</sup> respondent's counter application succeeds.

The order sought in paragraph 1 of the counter application may therefore not be granted. Paragraph 2 may also not be granted since it will affect the proprietary rights of minors, Ethan Takudzwa Augustine Chihuri and Samantha Chihuri without following the procedure set out in rule 61 of the High Court Rules, 2021. The counter application is granted as amended in that only the relief in paragraph 4 will be granted.

[36] I am not satisfied that good cause has been shown to set aside the order with respect to the funds received by the 7<sup>th</sup> to 10<sup>th</sup> applicants.

[37] The applicants have not prayed for costs.

In the result I order as follows: -

1. The unexplained wealth order granted by this court on 11<sup>th</sup> June 2020 under case no HACC 16/20 be and is hereby varied by the deletion of paragraphs 15, 16, 17 and 18.
2. The unexplained wealth order granted by this court on 18<sup>th</sup> June 2020 under case no HACC 20/20 be and is hereby varied by the deletion of paragraphs 7 and 8.
3. The 1<sup>st</sup> respondent's counter application in case no HACC 21/20 is granted as amended.
4. There shall be no order as to costs.

*Kantor and Immerman*, Applicants' legal Practitioners

*National Prosecuting Authority*, 1st respondent's Legal Practitioners

*Attorney General's Office*, 2<sup>nd</sup> to 6<sup>th</sup> respondent's legal practitioners.