MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

ZOMBA DISTRICT REGISTRY

CRIMINAL CAUSE NO 02 OF 2014

THE REPUBLIC

-VERSUS-

OSWALD FLYWELL GIDEON LUTEPO

CORAM: HON. JUSTICE R.E. KAPINDU

For the State: Mrs. Kachale – Director of Public Prosecutions;
Dr. Priminta; Ms. Chikankheni.

For the Defence: Mr. Mandala; Mr. Maele

Official Interpreter: Mr. Nkhwazi

ORDER FOR DIRECTIONS

(CONFISCATION OF PROPERTY AND IMPOSITION OF PECUNIARY PENALTY)

Kapindu, J

1. The convict herein, Mr. Oswald Lutepo, was convicted on 4th September, 2015 on charges of conspiracy to defraud, contrary to section 323 of the Penal Code (Cap 7:01 of the Laws of Malawi), and Money Laundering contrary to section 35(1)(c) of the now repealed Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act (cap 8:07 of the Laws of Malawi) (MLA). He was sentenced to 3 years imprisonment on the conspiracy to defraud count, and 8 years imprisonment on the money laundering count.

2. It was established during the trial that the convict caused Government to be defrauded, and that he laundered money so defrauded from the Government, in the sum of MK4.2 billion. During the sentencing process, it was stated by the State that most of the funds that Mr. Lutepo accessed as part of the money laundering scheme was passed on to others. According to the State, they are of the opinion that his own benefit was in the region of MK 900 million; out of which they have thus far, through

processes in this Court, managed to recover about MK 370 million, and they are still minded to recover the remaining balance.

3. To this end, the State is pursuing proceedings against the convict; and also against the tainted property in respect of which the proven crimes herein relate; for purposes of confiscation and also the imposition of a pecuniary penalty.

4. This is the Court's Order following an application made by the Director of Public Prosecutions for this Court, in its inherent jurisdiction, to provide directions on the conduct of the confiscation of property and/or imposition of a pecuniary penalty proceedings herein.

5. The Court, for purposes of making the present Order for directions, heard submissions from Counsel for the State and Counsel for the Convict herein, Mr. Oswald Lutepo, on preliminary issues for the Court's consideration and directions. The following were the specific questions that were presented to this Court by the Director of Public Prosecutions for purposes of the directions sought:

   (a) What is the legal character of confiscation proceedings?
   (b) How should such proceedings be titled?
   (c) What is the standard of proof in such proceedings?
   (d) How is the burden of proof characterized in such proceedings? and
   (e) What is the mode of introducing evidence in the proceedings?

6. According to the learned DPP, the State sought the directions of the Court on these matters so that these might guide the parties, but also assist the court itself on how to determine the applications in accordance with legal principle and in view of the fact that there appeared to be no domestic express law, whether statutory or by way of precedent, on the same.

7. The state, during the presentation of the submissions, was represented by Counsel Dr. Priminta, although today Counsel Ms. Chikankheni is representing the State for purposes of delivery of the ruling.

8. Counsel Dr. Priminta first addressed the issue of the legal character of the proceedings. It was her submission that confiscation proceedings under the now repealed MLA were generally designed to be criminal in nature although at the same time assuming a hybrid character. She contended that the procedure for the determination of such proceedings is not the procedure of a criminal trial, and that as such, the prosecution is not required to prove its assertions beyond reasonable doubt.

9. On the second issue, namely on the standard of proof, Counsel argued that the appropriate standard of proof is proof on a balance of probabilities. She did not dwell much on offering reasoned justification for suggesting this standard. As will become clear below, this issue is in fact a pertinent issue in relation to the conduct of these proceedings and the Court will dwell significantly on the issue.

10. On the issue of the burden of proof, Dr. Priminta contended that the burden of proof shifts among the parties. She explained that from the beginning, the State has the burden of providing evidence that the property is tainted, and that this must be done on a balance of probabilities. She argued that at this stage, the burden then shifts to the defendant to prove, on a balance of probabilities, that, for instance, the property is not tainted property.

11. Dr, Priminta submitted that the shifting burden of proof emanates from the provisions of section 63(2)(b) of the MLA.

12. Although Counsel found it appropriate to confine her argument to section 63(2)(b) of the MLA, the Court finds it appropriate to set out the entirety of section 63 of the MLA which provided that:

> (1) Where—
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> (a) a person has been convicted of a serious crime and the competent authority tenders to the court a statement as to any matters relevant to—
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> (i) determining whether the person has benefitted from the offence or from any other serious crime of which he or she is convicted in the same proceedings or which is taken into account in determining his or her sentence; or
>
> (ii) an assessment of the value of the benefit of the person from the offence or any other serious crime of which he or she is convicted in the same proceedings or which is taken into account; and
>
> (b) the person accepts to any extent an allegation in the statement referred to in paragraph (a), the court may, for the purposes of so determining or making that assessment, treat his or her acceptance as conclusive of the matters to which it relates.
>
> (2) Where—
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> (a) a statement is tendered under subsection (1) (a); and
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> (b) the court is satisfied that a copy of that statement has been served on the person,
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> the court may require the person to indicate to what extent he or she accepts each allegation in the statement and so far as he or she does not accept any

allegation, to indicate any matters he or she proposes to rely on.

(3) Where the person fails in any respect to comply with a requirement under subsection (2), he or she may be treated for the purposes of this section as having accepted every allegation in the statement other than—

(a) an allegation in respect of which he or she complied with the requirement; and

(b) an allegation that he or she has benefited from the serious crime or that any property or advantage was obtained by him or her as a result of or in connection with the commission of the offence.

(4) Where—

(a) the person tenders to the court a statement as to any matters relevant to determining the amount that might be realized at the time the pecuniary penalty order is made; and

(b) the competent authority accepts to any extent any allegation in the statement,

the court may, for the purposes of that determination, treat the acceptance of the competent authority as conclusive of the matters to which it relates.

(5) An allegation may be accepted or a matter indicated for the purposes of this section either—

(a) orally before the court; or

(b) in writing in accordance with rules of court.

(6) An acceptance by a person under this section that he or she received any benefit from the commission of a serious crime is admissible in any proceedings for any offence.

13. Dr. Priminta proceeded to address the issue of the mode of receiving evidence. It was her submission, on behalf of the State, that this is to be done by way of a statement made under section 63(1) of the MLA and/or the testimony of a witness under the direction of the prosecutor.

14. On his part, Counsel Mr. Mandala, representing the convict, Mr. Lutepo, stated that he did not have much to say that was different from the representations made by the State as regards the character of the proceedings and the burden of proof. However, Counsel stated that although he did not have authorities, his view was that the proceedings should be civil in nature as much as they are commenced subsequent to criminal proceedings. He stated that this was so in view of the purpose of the proceedings. He did not provide much clarity on what he meant by the purpose of the proceedings and the relationship of the same to his argument that the proceedings should be civil in character.

15. However, Counsel Mandala agreed with Counsel for the State that the standard of proof should be on a balance of probabilities and he also agreed with the state on the mode of receiving evidence.

16. The Court wishes to begin its analysis by acknowledging, with regret, that its decision herein has significantly delayed owing to, among other things, the Judge herein having been away from office for some significant time from mid last year to early this year attending to other judicial matters.

17. The Court wishes to state that having heard the representations of Counsel for both parties herein, and indeed having gone through the written arguments, it forms the distinct view that the critical issue for the court to provide directions on in this matter is whether confiscation

proceedings as envisaged in the present matter are criminal, civil or hybrid in character.

18. I must point out that I am mindful that the MLA was repealed and replaced in 2017 by the Financial Crimes Act (Cap. 7:07 of the Laws of Malawi). During argument, and indeed in the written arguments, none of the parties addressed this Court on whether the passage of the Financial Crimes Act (Cap 7:07 of the Laws of Malawi) in 2017, which had already come into effect at the time of argument, had and has implications on the directions that this Court has been asked to provide.

19. Upfront, this Court holds that the coming into operation of the Financial Crimes Act (FCA) does implicate the manner in which the confiscation and pecuniary penalty proceedings herein ought to proceed. This is so in view of the provisions of section 141 of the FCA. That section provides that:

> (1) Subject to subsection (2), the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act is hereby repealed.
> (2) Anything done in accordance with the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act repealed under subsection (1), prior to the commencement of this Act and which may be done in accordance with the provisions of this Act, shall be deemed to have been done in accordance with this Act.

20. Subsequent to the conviction of the convict herein on the 15th of June, 2015, the State made an application for the Court to postpone hearing of the State's application for confiscation of property and imposition of a pecuniary penalty which were filed under Sections 48(1) as

read with 51(2) of the Money Laundering, Proceeds of Serious Crime and Terrorist Financing Act (Cap 8:07 of the Laws of Malawi). As is evident from this Court's decision in *Republic v Lutepo*, Criminal Case No. 2 of 2014 (Ruling on postponement of application for confiscation of property) of 3rd August 2015 (*Republic v Lutepo, (Ruling on postponement of application for confiscation of property))*, that application was granted.

21. The issues that the Court is called upon to address in this matter have therefore been raised in view of the State's prior application for confiscation of tainted property and imposition of a pecuniary penalty on the convict herein.

22. The important point to note from the foregoing is that the filing of the application for confiscation of property and the imposition of pecuniary penalty was a step which was made under the MLA but which, in terms of the section 141(2) of the FCA, is to be treated as if it had been made pursuant to the provisions of the FCA.

23. The Court is aware that the approach it has adopted, namely holding that the provisions of the FCA are applicable to the present proceedings in respect of the applications in issue, might immediately raise some concerns. It is possible that some might take the view that the Court, in so doing, is perhaps impermissibly invoking the retrospective operation of the FCA on the conduct of the convict herein.

24. However, the circumstances of the present matter would not fall within the proscribed forms of retrospective or retroactive operation of laws. Courts in Malawi have properly addressed the issue of retrospective operation of laws. In the case of *Lenson Mwalwanda v Stanbic Bank Ltd* [2007] MLR 198 (HC) Mzikamanda J (as he then was) stated at page 208 that:

> the law is indeed settled that a statute shall not be construed to have retrospective operation unless such construction appears very clearly in the terms of the statute or it arises by necessary and distinct implication. The rule against retrospectivity of statutes or laws is a fundamental rule of law but one that is not rigid or inflexible. This means therefore that there will be situations where a law or a statute may be construed to have retrospective operation. That a statute or a law may have retrospective effect is not a rule but an exception to the general rule.

25. In the case of *Stanbic Bank Limited v Mwalwanda* [2008] MLR 361, the Supreme Court of Appeal affirmed Mzikamanda J's decision. Tambala JA stated at page 363 that:

> We agree with the learned Judge in the Court below and we are satisfied that he correctly stated the law on the retrospectivity of a statute or law.

26. The question was therefore settled by the Supreme Court of Appeal.

27. The same position obtains in comparable jurisdictions such as Kenya. The High Court of Kenya sitting at Nairobi, in the case of *Overseas Private Investment Corporation & 2 Others v Attorney General* [2013] Eklr, Petition No. 319 of 2012 addressed this very issue. Majanja J stated, at paragraph 24, that:

> The Latin maxim *lex prospicit non respicit* encapsulates the cardinal principle that law looks forward not

backwards but this principle is neither absolute nor cast in stone. In the case of *Municipality of Mombasa v Nyali Limited* [1963] E.A. 371 Newbold, JA., stated that "Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is a good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention." This is the principle reiterated in *Orengo v Moi & 12 Others (No. 3)* (2008) 1 KLR EP 715.

28. The learned Judge proceeded to state at paragraph 26 that:

I take the view that the rule against the retrospective application of law is not entirely guarded and in certain cases where the intention of the legislature is clear, the provisions may be construed to have retrospective effect. My reading of the authorities is therefore that retrospective operation is not *per se* illegal or unconstitutional. Whether retrospective statutory provisions are unconstitutional was a matter

considered by the Supreme Court in the case of *Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others*, SCK Application No. 2 of 2011 [2012] *e*KLR where the Court observed that, "[61] As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury's Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it:(i) is in the nature of a bill of attainder;(ii) impairs the obligation under contracts;(iii) divests vested rights; or (iv) is constitutionally forbidden"

29. The learned Judge concluded on this point by stating, at paragraph 27, that:

> It is also worth noting that it is not the role of this court to dictate as to whether a law should or should not apply retrospectively. That is the province of the legislature. The role of the court is limited to product of the legislative process and determining whether its purpose or effect is such that it infringes on fundamental rights and freedoms of the individual. The duty of courts is to give effect to the will of Parliament so that if the legislation provides for retrospective operation, courts will not impugn it solely on the basis

that the same appears unfair or depicts a 'lack of wisdom,' or applies retrospectively.

30. These authorities demonstrate that, save where the Constitution expressly prohibits the non-retrospective application of laws, the general principle in law is that although in general laws should not be made to apply retrospectively, Parliament might, in its wisdom, decide to make them apply retrospectively.

31. Under the Constitution of the Republic of Malawi, section 42(2)(f)(vi) makes provision for the prohibition of particular species of the retrospective operation of laws in the realm of criminal proceedings. The section provides that:

> Every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right as an accused person, to a fair trial, which shall include the right not to be convicted of an offence in respect of any act or omission which was not an offence at the time when the act was committed or omitted to be done, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed.

32. Thus, where the effect of a law is to retrospectively criminalize conduct which did not previously constitute a criminal offence, such law would, to the extent that this is inconsistent with section 42(2)(f)(vi) of the Constitution, be invalid in terms of section 5 of the Constitution. This is because this specific type of retrospective operation of laws has been expressly prohibited under that section and, under section 45(2)(f) of the

Constitution, such prohibition is heightened to the status of a non-derogable right. Again, where the effect of a new law is to retrospectively impose a stiffer penalty than was previously applicable for a particular offence, the same section 42(2)(f)(vi) of the Constitution imposes the same nature of prohibition as that applicable for retrospective criminalization of previously non-criminal conduct. Apart from these two specific instances, there is no other proscription of the retrospective operation of laws whether under the Constitution or under statute; and the authorities that we have explored above provide guidance in terms of how to approach the issue.

33. In the present case, section 141 of the FCA makes it clear that generally, it was the intention of Parliament to legislate that although the MLA was repealed (see section 141(1) of the FCA), any acts taken under the MLA, which might be done under the FCA, should be deemed to be done under the FCA (see section 141(2) of the FCA).

34. Parliament, if it had so wished, could simply have repealed the MLA and said nothing more. In such a case, the provisions of section 14(1)(a) and (b) of the General Interpretation Act (Cap 1:01 of the Laws of Malawi) would have applied. These provisions state that:

> (1) Where a written law repeals and re-enacts with or without modification, any provisions of any other written law, then unless a contrary intention appears—
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> (a) all proceedings commenced under any provision so repealed shall be continued under and in conformity with the provision so repealed;
>
> (b) in the recovery or enforcement of penalties and forfeitures incurred and in the enforcement of rights existing under any provision so repealed or in any other proceedings in relation to matters which have

happened before the repeal, the provision so repealed shall continue to apply;

35. In the present matter, it is the finding of this Court that a contrary intention appears for purposes of section 14(1) of the General Interpretation Act. This contrary intention of Parliament clearly appears in the text of section 141(2) of the FCA. The effect of section 141(2) of the FCA is that any type of legal process commenced under the MLA which could be commenced under the FCA must be deemed to have been commenced under the FCA. Of particular significance to note under section 141(2) of the FCA are the words "anything done". Section 141(2) states that "anything done" under the MLA which can be done under the FCA should be deemed to have been done under the FCA, and the word "anything", in the view of this Court, means "anything." This is of course subject to constitutional limitations. Thus where, for instance, "anything" means commencing prosecution of an offence in respect of conduct which did not constitute an offence under the MLA, or proceeding to impose a penalty under the FCA for conduct preceding the coming into effect of the FCA and where such penalty would be more severe than under the old law (the MLA), then the FCA would not apply.

36. However, when it comes to confiscation of property, the process neither entails prosecution for an offence nor does it constitute imposition of a penalty, let alone a stiffer penalty than under the MLA. Secondly, when one examines the provisions on a pecuniary penalty under sections 51 and 52 of the FCA, it is evident that they do not impose stiffer penalties compared to the corresponding provisions under the MLA.

37. This Court therefore concludes that the provisions of the FCA are to apply in the present matter both in relation to the application for

confiscation of property as well as the imposition of a pecuniary penalty, if applicable.

38. Pausing here, it is significant to point out that under section 48(1) of the FCA, the FCA makes a significant shift in terms of the time limitation within which an application for confiscation of tainted property or for a pecuniary penalty might be made. In place of the highly restrictive provisions of section 48(1) of the MLA which provided that an application for confiscation of tainted property or for a pecuniary penalty had to be made within 12 months from the date of conviction, section 48(1) of the FCA provides that "Section 149 of the Criminal Procedure and Evidence Code shall apply to proceedings under this Part with such modifications as are necessary." Section 149(1) of the CP & EC provides, among other things, that such an application can be made "[a]t any time in the course of, or after the conclusion of, an inquiry or trial." This provision therefore imposes a more flexible timeframe within which such proceedings can be brought by the competent authority.

39. Importantly, it must again be made clear that this new procedure on the temporal aspects of bringing such applications does not in any way come into conflict with the absolute prohibition of the non-retrospectivity of criminal laws under section 42(2)(f)(vi) of the Constitution. It does not introduce a new offence nor does it bring up a stiffer penalty.

40. Secondly, section 48(2) of the FCA brings out yet another fundamental shift in the law. It provides that:

> without limiting the generality of subsection (1), a court, upon conviction of an accused person, shall order forfeiture or confiscation of tainted property of the

convicted person as one of the penalties to be imposed in sentencing the convicted person.

41. According to this provision, the Court is now under an obligation to either forfeit or confiscate tainted property once it convicts a person of a financial crime under the Act. The section makes it clear that such forfeiture or confiscation constitutes one of the penalties that the Court is to impose when sentencing the convicted person.

42. Section 49(1) of the FCA makes it further clear that confiscation of tainted property under the FCA is an obligatory process on the part of the Court. It provides that "where, property is tainted property in respect of an offence of which a person has been convicted, the court shall order that specified property be confiscated." The section uses the mandatory term "shall". This is much unlike the permissive provisions that obtained under the erstwhile MLA, where section 48(1)(a) stated that in cases where a person is convicted of a serious crime, "the competent authority may…apply to court for…a confiscation order against property that is tainted property in respect of the offence; and a pecuniary penalty order against the person in respect of benefits derived by the person from the commission of the offence." The permissive words "may" were used. The scheme under the MLA was evidently weaker in this regard as it suggested that the prosecution had the option to decide whether or not to pursue the confiscation of tainted assets in any given case subsequent to a conviction. The MLA scheme did not bind the prosecution to pursue such a process.

43. Considering that the process of confiscation or imposition of a pecuniary penalty is now a mandatory process, and that it is expressly stated to be part of the penalties under sentence, one would be inclined to think that the process is, therefore, part of the criminal procedure process and not a civil process. However, I must hasten to say that the FCA, just

like the MLA before it, is not one of the easiest pieces of legislation to unpack. It requires more careful and purposive interpretation and construction.

44. This Court made it clear, in the case of *Republic v Lutepo*, *(Ruling on postponement of application for confiscation of property),* that an order of confiscation under the MLA was made "against the tainted property" and "not against the person". At paragraph 44, the Court stated that:

> According to Section 48(1)(a) of the MLA, a confiscation order is made "**against property** that is tainted property in respect of the offence." Similarly, Section 54(1) of the MLA provides that "(1) Subject to subsection (2), where a court makes **a confiscation order against any property** under section 53, the property vests absolutely with the Government by virtue of the order." Of significance under these provisions is the fact that the confiscation Order is made **"against the tainted property"**. It is not made "against the person of the convict." A confiscation order is therefore an order *in rem*, that attaches to the property as long as it is tainted and may, beyond the convict, be enforced against any person to whom the tainted property may be traced (i.e a person having an interest in the tainted property). The procedure under Section 49 of the MLA for instance, lays this bare. The point that the confiscation procedure is a procedure *in rem* as contrasted with an *in personam* procedure also comes out clearly under Section 52 of the MLA which is headed "Procedure for *in rem* confiscation order where person dies or absconds."

45. This Court proceeded to emphasise, at paragraph 47 of that Ruling, that "the law in cases of confiscation aims to remove, among others, the assets derived from crime which are tainted property."

46. This Court also reviewed comparable foreign case law, including the decision of the Supreme Court of Seychelles in **Hackl v Financial Intelligence Unit** (2012) SLR 225, where, among other things, the Court stated that:

> In **United States v Ursery** (95-345) 518 US 267 (1996) the Supreme Court of the United States of America after reviewing a long list of similar precedents, found that in contrast to the *in personam* nature of criminal actions, *in rem* forfeitures are neither "punishment" nor criminal for purposes of the double jeopardy clause of the American Constitution. In the case of **Bennis v Michigan** (94-8729) 517 U.S. 1163 (1996) the forfeiture was found constitutionally permissible even in the case of a joint owner of property as the court found that – "historically, consideration was not given to the innocence of an owner because the property subject to forfeiture was the evil sought to be remedied."

47. This Court, in *Republic v Lutepo*, *(Ruling on postponement of application for confiscation of property),* therefore concluded that, upon careful examination of the authorities, the clear inference to be drawn was that "the process of confiscation is a process *in rem*, which focuses on the tainted property itself rather than the individual convict." The Court observed that "the tainted property itself is the evil that ought to be

cleansed by disgorging it from those who are not bonafide purchasers for value without notice of the tainting, by way of confiscation"; and that this "is demonstrated by the fact that even if a person dies and is not thereby convicted of a serious crime, under Section 52 of the MLA, a confiscation order *in rem* may still be made by the Court."

48. The Court notes that this *in rem* philosophy in crafting legislative provisions on the subject of confiscation of property was not lost on the minds of the framers of the FCA. They adopted basically the same regime that applied under the MLA. Just like under the MLA, under section 50(1) of the FCA, "a court makes a confiscation order against…property" and that "the property, by virtue of the order, vests absolutely with the government." Similarly, under section 53(1) of the FCA, it is clear that the application that is envisaged under the FCA in respect of confiscation, is "for a confiscation order against any tainted property." Further, the *in rem* procedure envisaged under section 52 of the MLA has been replicated under section 53(1) of the FCA.

49. The Court is highlighting the *in rem* character of the confiscation proceedings – i.e. that these are proceedings against the property rather than proceedings against the person who is holding, is in possession or has control or management of the property; in order to demonstrate that confiscation proceedings are not essentially criminal in character. Perhaps, the non-criminal character of the confiscation proceedings under the FCA comes out even more clearly under section 127(1) (a) & (b) of the Act which provides that:

> (1) where—
> (*a*) a court or tribunal of another country issues a preservation order or confiscation order, (whether based

upon criminal or *in rem* or other non-conviction based proceedings), in respect of an offence against the corresponding law of that country; and

(*b*) that country requests assistance from Malawi in enforcing those orders against property believed to be located in Malawi, the attorney general may apply to the court for the registration of the order.

50. What comes out from this provision is that a distinction is drawn between "criminal" proceedings on the one hand and "*in rem* or other non-conviction based" proceedings on the other. This seems to suggest, therefore, that confiscation proceedings are not essentially criminal in character. This perhaps also explains why, under both the erstwhile MLA and the FCA, whenever issues are raised by interested parties with respect to confiscation proceedings, it is the Attorney General rather than the Director of Public Prosecutions or any other prosecutorial agency who is expressly mandated to contest and where appropriate appeal against an adverse order. This procedure is provided for under sections 83(5) & (6) of the FCA. Under the MLA, this had been provided for under sections 56 (5) & (6). The involvement of the Attorney General seems to point away from the criminal character of the proceedings and towards the civil character of the same.

51. But the conclusion that these proceedings are not essentially criminal in character already strikes one to be at odds with the earlier indication that these proceedings might be viewed as being criminal in character in view of the language under section 48(2) of the FCA, namely that confiscation of tainted property constitutes one of the penalties to be imposed in sentencing the convicted person.

52. This Court therefore opines, consistent with the conclusion that Dr. Priminta reached in her oral submissions – albeit the Court's conclusion emerging from a very different reasoning path, that confiscation and pecuniary penalty proceedings, both in the scheme of the repealed MLA and under the current FCA scheme, assume a hybrid character. This means that they should be viewed as processes that are both quasi-criminal and quasi-civil. In other words, they lie somewhere in the middle of criminal and civil processes.

53. However, considering the clear language expressed under section 48(2) of the FCA, the processes of forfeiture, confiscation or imposition of pecuniary penalty cannot be separated from the main criminal proceedings for the principal reason that they form part of the penalties to be imposed on the convict in sentencing him or her.

54. As stated earlier, this Court is of the view that the legislation could have made matters easier by simply making provision for a civil confiscation regime. It is evident that this is missing under both the repealed MLA and the existing FCA. The only civil regime provided for is under Chapter VI of the FCA on "Civil Forfeiture, Seizure, Detention, Freezing and Preservation of Assets." The Chapter does not deal with confiscation of tainted property or imposition of pecuniary penalties as the State seeks in the present proceedings. These matters are provided for under Part VII of the FCA which generally mirrors the old processes for confiscation or imposition of pecuniary penalty under the MLA.

55. The preference for having restitutive assets recovery processes resulting from financial crimes to be grounded in civil claims rather than criminal procedure processes has been expressed in other jurisdictions. An example is the Republic of Kenya where, in the case of *International Air Transport Association & another v Akarim Agencies Company Limited & 2*

others [2014] eKLR, Gikonyo J, the High Court of Kenya made some interesting observations regarding the asset recovery processes in property or financial crimes. In that case, the learned Judge took the view that the State must seriously consider pursuing a civil avenue to the assets recovery process.

56. Gikonyo J challenged courts to move out of their comfort zones of conservativeness and become more creative and robust in developing the common law remedies as they relate to assets recovery in cases of property tainted with the proceeds of crime or indeed simply tainted with crime. Gikonyo J stated, at paragraphs 26 -28 of the Ruling, that:

> Following and Tracing of assets is expressed better within the enterprise of Trust which encompasses very wide instances of fiduciary relationships including constructive trusts. And nations have realized the remedy is "the big idea" which could deliver the promise of asset recovery in causes of action based on criminal activity- recovery of proceeds of crime under constructive trust…Following and Tracing of assets are different and are utilized at different stages such that the former comes before the latter. Nonetheless, both are kind of "investigative tools" and are always engaged in the same venture; locating assets. They may, also draw from the same factors. Following of assets refers to the initial steps where the movement of the assets from one person to the other or from one location to another is literally monitored or followed. "Tracing" graduates "Following" of assets and refers to the process of identifying the actual assets or other asset into which the original assets may have been converted.

The conversion arises when the trust property is used to purchase or in exchange with another form of or substitute property; that is what is known in law as "Related Property", and is in principle recoverable once traced. The traced property may also be in a pool of other property owned by the respondent alone or jointly with other persons or held by the respondent in trust for others. The conglomerate property in that status is referred to as co-mingled or mixed property. In co-mingled property there could be property which is innocently or legitimately owned by the respondent or other parties but which in some way, legally or physically, is connected to recoverable property say deposit of money in a joint or trust account. In that case, the property which is not the trust property or related property is called in law "Associated Property", and it may not be recoverable especially if it belongs to innocent third parties. But if it belongs to the respondent, it will be subject to recovery for as long as the trust property remains unsatisfied. In tracing of assets identification and or disentangling of the recoverable property are necessary and the onus of doing that lies on the applicant. But where the defendant intentionally mixes trust property with other properties, the law has created a burden on the defendant to identify the recoverable property lest the entire traced assets are deemed to be and shall become recoverable. Courts have taken this position as a way of damning any efforts by unscrupulous trustees to engage complicated designs to conceal misappropriated or stolen trust property. A further safeguard; where it is

> practically impossible to separate or identify the recoverable property from other property, courts have taken the view that the entire property 'represents' recoverable property.

57. Clearly, the High Court of Kenya expressed preference, in considering the procedure for recovery of tainted assets, for a civil process rather than a criminal process.

58. Be that as it may, we rest in the present matter with the conclusion that in so far as applications for confiscation of tainted property or the imposition of pecuniary penalties under Part VII of the FCA are concerned, the legal character of the proceedings is hybrid (or intermediate) between criminal processes and civil processes. This is so in view of the fact that the legislative scheme under the FCA clearly links these processes directly to the criminal proceedings, as constituting part thereof, but also classifies *in rem* proceedings, of which confiscation proceedings are a type, as non-criminal in nature.

59. The next question is on the standard of proof. Having concluded that the character of the proceedings is hybrid in character, the Court is quickly inclined to hold that the standard of proof on the part of the competent authority should likewise be an intermediate standard. This is so however only in respect of the imposition of a pecuniary penalty on the convict, or where the confiscation of the tainted property relates to property or a property interest that has been passed on to a third party. The Court will explain the justification for this bifurcated approach later in this Order.

60. I must mention that the intermediate standard which is to apply to some species of confiscation proceedings as pecuniary penalty proceedings as stated above, is not a novelty in the law. This is a standard which

already applies in some types of civil proceedings. An example is in divorce cases. In the case of *Modesta Matupa v Odala Matupa* [2007] MLR 252 (HC), Kamanga J stated, at page 253, that for matrimonial matters, the standard of proof is higher than any other civil case and, citing *Mnthali v Mnthali and Kalilani* [1975-77] MLR 8 Mal at 101, explained that the justification for such high standard is the sanctity of marriage and the value attached to it by society.

61. Courts, in applying an intermediate standard, do not require proof with the same level of strictness as they do in criminal cases, namely, proof beyond reasonable doubt. All that the intermediate standard means is that the Court must be convinced beyond a mere balance of probabilities. Put differently, whilst in an ordinary civil case, the slightest tilting of the scales of the balance in favour of a claimant wins the case for them, this will not suffice under the intermediate standard. Under the intermediate standard, the Court will require to be convinced that the balance clearly tilts in favour of the conclusion that it reaches.

62. The intermediate standard has been variously described in a number of decisions in common law jurisdictions. In *Piers v Piers* [1849] 2 HL Cas 331, 389, the Court held that this standard of proof entailed that the evidence must be 'strong, distinct and satisfactory.' In *R (N) v Dr M* [2003] 1 WLR 562 (CA), the Court stated that the standard entailed that the fact sought to be proven must be 'convincingly shown.' In *Moorhouse v Lord* [1863] 10 HL Cas 272, the Court held that the issue before the court must be 'clearly and unequivocally proved.'

63. In the American case of *Mason v Texaco Inc* 741 F Supp, 1510, the Court had occasion to describe the intermediate standard. The Court stated that

> The next highest burden of proof occurs in civil jury cases where fraud is alleged against a defendant. In cases involving fraud, the law requires a plaintiff to prove his or her case by clear and convincing evidence. The clear and convincing evidence standard means that the evidence should be "clear" in the sense that it is certain, plain to the understanding, unambiguous, and "convincing" in the sense that it is so reasonable and persuasive as to cause the jury to believe it.

64. In *Santosky v. Kramer* 455 U.S.745 (1982) the US Supreme Court had an opportunity to expound more on the intermediate standard. The Court confirmed that the standard entails that "clear and convincing evidence" must be led before the court. The Court, at page 754, set out the fundamental considerations that inform a Court on the degree at which the standard of proof is to be pegged in any particular class of cases. The Court stated that these fundamental considerations are:

> the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure.

65. The Court proceeded to observe at pages 754 - 755 that:

> In *Addington* v. *Texas,* 441 U. S. 418 (1979), the Court, by a unanimous vote of the participating Justices, declared: "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact-finding, is to 'instruct the factfinder concerning the degree of confidence our society thinks

> he should have in the correctness of factual conclusions for a particular type of adjudication."' *Id.,* at 423, quoting *In re Winship,* 397 U. S. 358, 370 (1970) (Harlan, J., concurring). *Addington* teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.

66. The Court went on to clarify on the conceptual justifications for society adopting different standards of proof in civil cases and criminal cases. The Court said:

> Thus, while private parties may be interested intensely in a civil dispute over money damages, application of a "fair preponderance of the evidence" standard indicates both society's "minimal concern with the outcome," and a conclusion that the litigants should "share the risk of error in roughly equal fashion." 441 U. *S.,* at 423. When the State brings a criminal action to deny a defendant liberty or life, however, "then interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Ibid.* The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected, *id.,* at 427, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that

> "society impos[e] almost the entire risk of error upon itself." *Id.,* at 424. See also *In re Winship,* 397 U. S., at 372 (Harlan, J., concurring).

67. The Court proceeded to explain the intermediate standard in the following terms:

> This Court has mandated an intermediate standard of proof – "clear and convincing evidence" – when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money." *Addington v. Texas,* 441 U. S., at 424. Notwithstanding "the state's 'civil labels and good intentions,'" *id.,* at 427, quoting *In re Winship,* 397 U. S., at 365-366, the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with "a significant deprivation of liberty" or "stigma." 441 U. S., at 425, 426. See, *e. g., Addington* v. *Texas, supra* (civil commitment); *Woodby v. INS,* 385 U. S., at 285 (deportation); *Chaunt* v. *United States,* 364 U. S. 350, 353 (1960) (denaturalization); *Schneiderman* v. *United States,* 320 U. S. 118, 125, 159 (1943) (denaturalization).

68. The Court is of the opinion that the given the convoluted nature of the proceedings herein, which take a hybrid form, and part of which also directly attach to the sentencing process whilst at the same time assuming an *in rem* character, it is important that where the tainted property to be

confiscated has passed on to a third party, the standard of proof to be attained must be higher, namely the intermediate standard. Similarly, where the proceedings are for the imposition of a pecuniary penalty on the convict, in respect of which failure to pay would attract further prison terms; the standard to be applied must be the intermediate standard. The Court must receive clear and convincing evidence that the property was tainted, in the case of confiscation, or that the convict is liable to the payment of a pecuniary penalty, in the case of such a penalty. The justification for this approach, just like the Court explained in *Santosky v. Kramer* (above), is that this level of certainty for purposes of standard of proof is necessary in order to preserve fundamental fairness in a variety of Government-initiated proceedings that threaten the individual involved with a deprivation of property acquired from a third party, a significant deprivation of liberty for the individual concerned – in the case of a pecuniary penalty; or may result in social stigma for a person who does not have the stain of a criminal conviction in the case of a concerned third party.

69. In respect of the confiscation of the property of the convict himself or herself however, the Court is of the opinion that the normal standard of a balance of probabilities must apply. This is so because at the stage of confiscation of his or her property, it would already have been demonstrated that he or she committed the financial crime in issue and that he or she caused substantial losses either to the State or to non-State actors which lost assets must necessarily be recovered. It should therefore not take much for the Court to be satisfied that property that he or she owns, holds, controls or manages is tainted by the proceeds of the financial crime that he or she committed.

70. As I conclude on this issue, I must mention that the Court saw a plausible justification for the approach taken by the learned DPP to seek

directions on the issue of standard of proof in this matter in advance prior to hearing of the actual confiscation application. I can probably put such justification in no better terms than the Court did in *Santosky v. Kramer* (above) where the Court stated that:

> Since the litigants and the fact-finder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance. Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard.

71. The third issue to be dealt with is on the burden of proof. The Court agrees with both Counsel that whilst the burden of proving that the property in issue is tainted and therefore liable for confiscation; or that the convict is liable to the imposition of a pecuniary penalty primarily rests with the competent authority (the State), the burden shifts. Counsel Dr. Priminta made reference to section 63 of the MLA but, in the context of the FCA as applicable in the present matter, the corresponding provision, which is in *pari materia* with section 63 of the MLA, is section 87 of the FCA. Under sections 87(2)(a) & (b) and 87(3), the FCA states as follows:

> (2) where—
> (*a*) a statement is tendered under subsection (1) (*a*); and
> (*b*) the court is satisfied that a copy of that statement has been served on the person, the court may require the person to indicate to what extent he accepts each allegation in the statement and so far as he does not

accept any allegation, to indicate any matters he proposes to rely on.

(3) where the person fails in any respect to comply with a requirement under subsection (2), he may be treated for the purposes of this section as having accepted every allegation in the statement

72. It is clear that sections 87(2) & (3) impose an evidential burden on the part of the convicted person which, if he or she does not respond to or address, presumes acceptance of allegations made in the statement and these may lead to either confiscation of property or imposition of a pecuniary penalty.

73. Finally, in terms of the question as to how the evidence is to be tendered, the applicable provisions are contained under the same section 87 of the FCA. Counsel correctly pointed out that the first method is that of a statement. Under section 87(1) of the FCA, the competent authority is required to tender to the court a statement as to any relevant matters in connection with the application sought to be made.

74. Secondly, under section 87(5) of the FCA, an allegation may be accepted or a matter indicated for the purposes of the section either orally before the court; or in writing in accordance with rules of court. This entails therefore, that acceptance might be done through an affidavit or sworn statement as well.

75. In conclusion therefore, the Court orders and directs as follows:

75.1 The character of confiscation and pecuniary penalty proceedings brought under Part VII of the FCA is that they are hybrid in

character. They are neither purely criminal nor purely civil in character.

75.2 Notwithstanding paragraph 75.1 above, such proceedings, in view of section 48(2) of the FCA, must still be brought under the title of the criminal proceeding in which the trial on the substantive offence is conducted.

75.3 The burden of proof lies primarily on the State to demonstrate that the property to be confiscated is tainted and thus liable to confiscation; or that the convicted person is liable to having a pecuniary penalty imposed on him or her under the circumstances; but the burden would also shift in view of the provisions of section 87(2) & (3) of the FCA.

75.4 In view of the hybrid (intermediate) character of the proceedings, the standard of proof is an intermediate standard where:

(a) The tainted property to be confiscated has passed from the convict to a third party;
(b) The Court is to impose a pecuniary penalty.

75.5 Where the tainted property to be confiscated is owned, held, controlled or otherwise managed by the convict, the standard of proof is the ordinary balance of probabilities.

75.6 Evidence before the Court is brought pursuant to a statement made under section 87(1) of the FCA. The Court may also receive oral evidence under section 87(5)(a) of the FCA; and written evidence in accordance with the rules of Court under section 87(5)(b) of the FCA. Such written evidence may therefore take, among others forms that

may be provided for in such rules, the form of an affidavit or sworn statement.

76. It is so directed.

Made at Zomba in Chambers this 16th day of July, 2020

RE Kapindu, PhD
JUDGE