PROSECUTOR GENERAL
versus
JOSEPH MATINYARARE
and
REGISTRAR OF DEEDS N.O
and
REGISTRAR OF MOTOR VEHICLES N.O
and
ENERST MUKUMBA

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 19 July & 12 September 2023

Opposed Application

A Jakarasi, for the applicant
G Madzoka, for 1st respondent
No Appearance for the 2nd and 3rd respondents
I Chikaka, for the 4th respondent

CHIKOWERO J:

1. This is an application for an order for civil forfeiture of property made in terms of ss 79 and 80 of the Money Laundering and Proceeds of Crime Act [*Chapter 9:24*] (" the Money Laundering Act").
2. The property in question consists of two immovables and three motor vehicles.

THE APPLICATION

3. At the material time the first respondent was a Parts Manager in Croco Holdings (Pvt) Ltd's Graniteside Branch, Harare. ("Croco Motors")
4. The applicant asks me to find that while so employed the first respondent engaged in some conduct constituting or associated with some kind of serious criminal offence or offences and, using the money obtained from such conduct, bought the property sought

to be forfeited. In other, words I am urged to find, on a balance of probabilities, that the first respondent was engaged in conduct constituting or associated with the serious offences of theft [of trust property], fraud and money laundering in that, having stolen spare car parts from his employer, went on to sell the same and, using money realized from such sales, bought the property targeted for forfeiture. The reason why the applicant seeks forfeiture of the two immovables and the three motor vehicles is that it takes the view that such property is itself proceeds of serious offences by dint of having been acquired using money realized from the sale of the stolen car parts.

5. It is common cause that the first respondent is appearing before the magistrates court on a charge of fraud as defined in s 136 of the Criminal Law (Codification and Reform)Act[*Chapter 9:23*] ("the Criminal Law Code"). The allegations, which I mention in passing, are essentially that he collected spare car parts from Croco Motors' Group Procurement Department using a manual goods out note between September 2019 and September 2020 and instead of entering the parts into the Croco Motors Graniteside, stock, converted the same to his own use. The allegations are that the stock is valued at ZWL$ 306 851-80.

6. It also is common cause that the first respondent is again appearing before the same court on a charge of theft. The allegations are that he stole motor vehicle spare parts belonging to his employer, between 1 January 2016 and September 2020. The value of the spare parts is given as ZWL$103 656 448 03 of which ZWL$8 850 605 05 worth of spare car parts is said to have been recovered.

7. Despite his protestations, I am satisfied, on a balance of probabilities, that while employed as Croco Motors' Parts Manager Graniteside, the first respondent, during the period in question, was involved in some kind of conduct constituting or associated with the theft of US$103 761 568 89 worth of motor vehicle spare parts belonging to his employer of which ZWL$ 8 850 605 05 worth was recovered from him.

8. I have seen the Forensic Audit Report prepared by Caleb Mutsumba, the external auditor. He lays out the basis for his factual findings. He explains why he concluded that it was the first respondent who manipulated Croco Motors' system to facilitate the theft of the motor vehicle spare parts (stock) in question. The manipulation took the form of irregular "adjustments" of the stock in the system followed by the physical removal of such, hence the theft. The four factual findings made by the auditor were these:

   (a) There were deliberate "adjustments" of stock by the first respondent as the identified "user" in the dealership system used by Croco Motors at the material time. There were no business, professional, or occupational reasons for those adjustments.

   The adjustments of the stock were unauthorized and had the effect of writing off stock from the system. No reasons were given on the more than one thousand occasions that the stock was written off. The correspondence between physical stock and stock records indicated that what was removed from the system was correspondingly removed from the physical stock.

   (b) The calculations by the auditor established that the first respondent's actions caused Croco Motors a financial prejudice of ZWLL$103 761 568-89 as at 30 October 2020. This amount represents the value of the stolen stock.

   (c) The value of the recovered motor vehicle parts was ZWL$ 8 850 605 05.

9. The first respondent denies effecting any irregular adjustments of stock in Croco Motors' system. This to me is a bare denial because it was not backed up by expert testimony to controvert that tendered by the applicant, through the external auditor. The first respondent claims that the adjustment option was inactive, and could only be made with the participation of the Croco Motors Information Technology department. Considering the period that stock was adjusted, that this was done on more than one thousand occasions and the absence of any evidence that the first respondent reported to Croco Motors Information Technology department that the adjustment option was inactive, and that it therefore needed to be attended to, I do not accept that the adjustment option in the system was inactive, at all. That the system could only be activated with the

participation of Croco Motors' Information Technology department suggests that it was staff from that department, working with the user of the system, who made the stock adjustments in question. This suggests also that the first respondent, even though he was both Croco Motors' Graniteside Parts Manager and user of the system, was all the while ignorant of the stock adjustments. This is improbable. The question that would arise is what then was he managing, if he, a user of the system, had no control over the movement of the stock both in the system and the physical stock itself.

10. The first respondent does not dispute that the police, in the company of Croco Motors Graniteside employees, recovered motor vehicles spare parts worth ZWL$8 850 605 05 from the house situate at stand number 6940 Southlea Park, Harare. What he says is that those spare parts, recovered from him, belong to him. It is more probable that not that those parts belong to Croco Motors, having been identified through the special dealer code belonging to Croco Motors by its employees, hence the recovery of the same and the corresponding arrest of the first respondent by the police. I think it illogical that the police would countenance a situation where Croco Motors' employees would identify the more than four hundred recovered car parts through the Croco Motors dealer code if such code did not appear on those parts. I think it even more improbable that the police would effect a recovery in those circumstances. I am fortified in this regard by the fact that despite claiming that he purchased what was takenaway from him from other suppliers because he was also involved in the business of buying and selling car parts the first respondent neither named those suppliers nor presented documentary evidence of him having purchased those items. The recovery of the spare parts from his house corroborates the findings of the external auditor that the user of Croco Motors system, the first respondent, irregularly adjusted stock in the system and stole such stock.

UNDIVIDED 2,3250% SHARE BEING SHARE NUMBER 6 INA CERTAIN PIECE OF LAND SITUATE IN THE DISTRICT OF SALISBURY CALLED STAND 2494 ARLINGTON TOWNSHIP MEASURING 3,0772 HECTARES HELD UNDER CERTIFICATE OF CONSOLIDATED TITLE NUMBER 3111/2017 DATED 10 AUGUST 2017 ("THE ARLINGTON PROPERTY")

11. This property was purchased by the first respondent from Danbro Holdings (Pvt) Ltd.
12. As at 17 February 2021 the first respondent had fully paid the purchase price, in the sum of ZWL$677 430, inclusive of value added tax in the sum of ZWL$88 360-44. A letter, dated 17 February 2021, addressed to the Officer in Charge of the Asset Forfeiture and Recovery Unit by Danbro Holdings (Pvt) Ltd bears this out.

13. The first respondent concedes that his salary as Croco Motors Parts Manager was insufficient to fund the purchase of this property.

14. He avers that sometime in 2019 he obtained an interest-free loan of US$20 000 from Kefas Aleck Manda. He employed the loan to pay the purchase price of the property under discussion. I am told that Manda is brother to the first respondent's spouse.

15. The first respondent's spouse and Manda's affidavits have been placed before me. Therein, the two confirm not only the availing of the loan as already indicated but that the loan was repaid in December 2020 when the first respondent sold stand number 6940 Southlea Park Harare to the fourth respondent

16. The fourth respondent, who was joined to these proceedings on 8 March 2023 (the application for forfeiture itself having been filed on 2 September 2022) avers that he purchased Stand Number 6940 Southlea Park, Harare from the first respondent on 7 December 2020. Placed before me are six acknowledgments of receipt wherein the fourth respondent acknowledges receipt of the full purchase price in the sum of US$72 000.

17. The first respondent avers that he employed the balance of US$52 000 (after repaying the US$20 000 loan) to develop the Arlington property.

18. There is overwhelming evidence that the Arlington property is proceeds of crime. I do not accept that Manda lent US$20 000 to the first respondent. It follows that I reject the respondent's averments that he used the US$20 000 loan to pay the purchase price for the Arlington Property.

    The first respondent's, his spouse's and Manda's affidavits all speak to the loan, but that is as far as those affidavits go. There is no evidence of movement of funds from Manda to the first respondent. All that the first respondent urges me to accept are bare, unsubstantiated averments. Manda's schedule of his tobacco production history for the years 2008 to 2022 does not demonstrate that he used part of the funds he earned from the tobacco crop that he delivered to The Tobacco Industry and Marketing Board to avail any loan, whether in the sum of US$20 000 or any other amount for that matter, to the first respondent. There is no discernible nexus between what Manda earned from tobacco growing from 2008 to 2019 and the source of the funds used to pay the purchase price by the first respondent for the Arlington Property.

19. The property was purchased and paid for during the period that the first respondent was engaged in conduct constituting or associated with theft of motor vehicle parts, valued at ZWL$103 656 488, from his employer. Out of such stock, only ZWL 8 850 605-05 worth of stock was recovered from the first respondent. This means that the first respondent had already disposed of stock worth ZWL$94 805 883 and employed portion of this to pay the purchase price of the Arlington property.

20. The written agreement of sale and acknowledgments of receipt relating to Stand 6940 Southlea Park cannot, even on the first respondent's version, and that of his spouse, be evidence that the first respondent sold that property to the fourth respondent. I say this for the following reasons. Despite what those documents reflect, there is no evidence of actual movement of the huge sum of US $72 000 from the fourth respondent to Idah Charity Kondo and finally to the first respondent. The fourth respondent says:

> "I purchased the house pursuant to my return from the diaspora after working abroad for over two decades. It is the embodiment of my life savings, pension and a home for my family."

This is contained in the fourth respondent's opposing affidavit deposed to on 17 April 2023. He is speaking to the "agreement of sale" signed on his behalf by Idah Kondo on 7 December 2020. The acknowledgments of receipts reflect that the purchase price was received by the first respondent from Idah Charity Kondo, who is reflected as having been representing the fourth respondent. As already pointed out, all that is before me are documents in the form of the one cast as an agreement of sale and the others as acknowledgements of receipt of the purchase price. While it was easy for Kondo, the first and fourth respondents to connive to create a fictitious agreement of sale and acknowledgments of receipt of the purchase price, for that is what they did, they failed to create documentary evidence of the movement of US$72 000 from the fourth respondent's "life savings and pension" to Kondo and eventually to the first respondent. No bank statements were placed before me. No evidence of withdrawals of cash from any bank account was furnished. I cannot accept that the papers presented as an agreement of sale and acknowledgements of receipt are evidence of an actual agreement of sale and genuine records of payment of the purchase price.

21. Officials from the Ministry of Local Government and Public Works Valuation and Estates Management Department inspected stand number 6940 Southlea Park, Harare on 24 March 2021. They conducted a valuation of the property and rendered their report on 13 April 2021. The valuation report is detailed. It reflects that the property was occupied by the owner, being the first respondent. It reflects that there is an agreement of sale between Ebenezer Multipurpose Society Limited and the first respondent, dated 5 September 2011. It is common cause that the first respondent purchased stand number 6940 Southlea Park Harare on 5 September 2011. I agree with Mr Jakarasi that if the first respondent had sold this property to the fourth respondent as way back as 7 December 2020, for the astronomical sum of US$72 000 and had already received

US$42 000 towards reduction of the purchase price, and that on 7 December 2020, then the appearance of the valuators on 21 March 2021 should have triggered the production of not only the "agreement of sale" of 7 December 2020 but also the even-dated acknowledgement of receipt coupled with an explanation that the first respondent had already sold the property to fourth respondent. That there is no mention of these documents in the valuation report means, in my judgment, that the documents in question, being fictitious, had not yet been brought into existence. I must add that the existence of the second acknowledgement of receipt dated 7 February 2021, speaking to payment of the sum of US$9 500, was also not brought to the attention of the valuators because it had not yet been manufactured.

22. Enock Hutepasi is a member of the Criminal Investigation Department Asset Forfeiture Unit. In his affidavit he highlights the following. He was in the presence of the valuators when they conducted a valuation of the property on 24 March 2021. Also present were *Mr Mapiye of Kwenda and Chagwiza Legal Practitioners* (legal practitioner for the first respondent) and the first respondent himself. The first respondent and his legal practitioner took Hutepasi and the valuators to stand 6940 Southlea Park Harare. The duo led the police and the valuators around the property as the valuation process was being conducted. In doing this the two never mentioned that the first respondent had sold the property to the first respondent as way back as 7 December 2020. Neither did the fourth respondent nor Kondo appear at the scene to register the fourth respondent's interest in the property. In my estimation this can only mean that the fourth respondent's eleventh hour surfacing in this matter is designed to assist the first respondent to foil the application for forfeiture of both the Arlington and Southlea Park properties.

23. The first respondent deposed to an affidavit in opposition to the application for civil forfeiture. His deposition was made on 19 September 2022. That was almost two years after he is supposed to have sold stand number 6940 Southlea Park to the fourth respondent. I observe that he avers therein that he sold that property to the fourth

respondent in December 2020 and used US$20 000, being portion of the price he received for the property, to repay Manda's loan which he, in turn, had utilized to pay the purchase price of the Arlington property. However, the issue is not as simple as that. The first respondent's opposing affidavit is self-destructive. Even as late as 19 September 2022 he repeatedly referred to stand number 6940 Southlea Park Harare as his house. He said this not once but four times in the said affidavit. I reproduce the pertinent portions of that affidavit in this regard:

> "17. It is true that some parts were recovered from my house. The parts did not however belong to Croco Motors. They belonged to me……"
> "55. I admit that some parts were recovered from my house. I, however, deny that the parts were in any way associated with Croco Motors. It is accordingly not correct that parts recovered were missing stock"
> "56. It is correct that the deponent and the detectives found certain car parts at my house. Those, however, were not parts stolen from the company. They were my own parts procured from other sources and third-party suppliers"
> "60. Parts were indeed taken from my house upon my arrest. The parts however belonged to me, and not to Croco Motors……."

24. In an affidavit deposed to on the same date, the first respondent's spouse stated:

> "8.2 It is not correct that the parts recovered from our house belonged to Croco Motors. They did not. My husband was running an outside work venture which involved the purchase and sale of motor vehicle parts to third parties. Those parts were acquired from sources other than Croco Motors"

25. The net effect of their depositions was that the first respondent and his spouse on 19 September 2022, said (five times between them) that stand number 6940 Southlea Park, Harare still belonged to them. They said so under oath. They want me to believe them. I believe them on that point not only because they corroborate testimony adduced for the applicant but also by virtue of their testimony being consistent with their occupation of the property post the purported sale and supposed receipt of the full purchase price and their (including their legal practitioner's) conduct during the inspection of the same property, for purposes of valuation, more than a year earlier.

26. Inadvertently, the first respondent buttressed his position that stand number 6940 Southlea Park, Harare belongs to him. In a defence outline dated 14 April 2021, placed before me as an annexure to his opposing affidavit, the following appears:

> "8. First accused will tell the court that the motor spares taken from his house by the police had no Croco logos or codes but belonged to his company. The goods were taken without his consent.
> 9. Accused I will tell the court that the property taken from his house was not ferried to police but complainant's premises"

27. The foregoing simply means that the first respondent, his spouse and the fourth respondent are all not being truthful in saying, in another breath, that the first respondent sold the Southlea Park Property to the fourth respondent on 7 December 2020. Any other conclusion would defy common sense and logic.

28. It was common cause that the police recovered some motor vehicle parts on 23 September 2020 at stand Number 6940 Southlea Park Harare. It was common cause that such recovery was effected from the first respondent, who occupied the premises together with his spouse. Both were careful to insist not only that the car parts belonged to the first respondent but also that even the house belonged to the first respondent. At the end of the day, the first respondent has placed papers before me wherein his spouse and himself have on no less than seven times categorically made it clear that stand number 6940 Southlea Park, Harare belongs to them. I have already indicated that I agree with them on this aspect.

29. The foregoing necessarily means that the first respondent did not receive the averred loan, did not use the non-existent loan to pay the purchase price for the Arlington property, and did not refund that loan, as there was no loan to talk about in the first place. The first respondent has thus failed to disclose and explain the source of funds used by him to acquire and develop the Arlington property. I attribute his failure to knowledge on his part that the funding was illicit. The Arlington property, being proceeds of crime, will be forfeited to the state. The open market value of the property was put at US$115 000

or ZWL $9 706 000 at the Reserve Bank of Zimbabwe auction mid-rate of US$1 to ZWL 84-4 as at 13 April 2021.

TOYOTA RAV 4 X T4 REGISTRATION NUMBER AA JOSTE AND FORD RANGER REGISTRATION NUMBER AFC 8278

30. These vehicles were registered in the first respondent's name on 3 July 2019 and 4 March 2019 respectively. He had acquired them, outside this country, during the same year. The Ministry of Local Government and Public Works' Valuation Report of 15 June 2021 put their values at US$10 000 (ZWL 850 700) and US$12 000 (ZWL 1020840) respectively. In the absence of countervailing evidence from the first respondent, I accept these values.

31. The first respondent averred that he used his savings as well as those of his spouse to fund the purchase of these vehicles. He tendered no evidence of the existence and quantum of such savings. He did not even disclose how much his spouse earned during the period in question.

32. He acquired these assets in the same year that he acquired the Arlington property. This is important. He did not disclose the cost of shipping the assets into the country. All he did was to avail documentation reflecting the value declared by him for purposes of assessment of revenue eventually paid to the Zimbabwe Revenue Authority. What was withheld was evidence of the origin of the funds. In addition to not disclosing his alleged savings the first respondent did not take the court into his confidence on his expenses during the period that he acquired these assets.

33. The first respondent did not dispute that, as Croco Motors Parts Manager, his salaries totalled ZWL 144 465-11 for the period January 2016 to September 2020.

34. The two motor vehicles (not forgetting the Arlington property acquired in the same year) were assets disproportionate to the first respondent's known legitimate sources of

income, which was his salary. I share the view of the court in *Amuti* v *Kenya Anti-Corruption Commission* [2009] EKLR that a person with lawful income has no trouble proving the legal origin of his or her assets. In my estimation a bare statement that the first respondent used his spouse's and his own savings to fund the cost of purchasing the two cars, without more, cannot be a satisfactory explanation for legitimate acquisition of the two cars. Anyone can say that. The first respondent needed to back up his averment with figures of the supposed savings and a demonstration of the existence of such savings. In light of the clear evidence of conduct constituting or associated with theft of the car parts and the extent of the financial prejudice occasioned thereby, I find that, on a balance of probabilities, the first respondent used the proceeds earned therefrom to fund the acquisition of the two vehicles. They will be forfeited to the state.

IVECO AEX9419

35. Save for recording that this vehicle was registered in the first respondent's name on 4 December 2018, having been acquired from the United Kingdom by him in the same year, what I have already said in respect of the two other motor vehicles applies to this asset with equal force.

36. It was not a coincidence that during the period when the first respondent is associated with the theft of over one hundred million dollars' worth of motor vehicle spare parts belonging to his then employer, the bulk of which stock was never recovered, he suddenly embarks on a spree, within a very short period, of acquiring (and developing) an immovable property and three motor vehicles, the latter from outside the country. The acquisition of the property is stage five in the money laundering circle, being the stage when circumstantial evidence emerged that the first respondent was involved in money laundering.

STAND 6940 SOUTHLEA PARK, HARARE

37. This property was acquired by the first respondent, on 3 September 2011, from Ebenezer Multipurpose Society Ltd. The purchase price paid by the first respondent was US$9000.

In terms of s 79(2) of the Money Laundering Act, property acquired or used before the Act came into force may not be liable to civil forfeiture. The Act came into force on 28 June 2013.

38. Cognisant of the foregoing, the applicant sought civil forfeiture of the property on the basis that it was an instrumentality of the serious offences of either theft or fraud of the spare parts, alternatively laundering of the same. In other words the applicant argued that the property was functional in either or both the theft of the car parts or the laundering thereof in that the first respondent kept, concealed and sold the parts from stand number 6940 Southlea Park, Harare.

39. Section 2 of the Money Laundering Act defines "instrumentality" and "instrumentalities" thus:

> "means any property used or intended to be used, in any manner, wholly or in part to commit a criminal offence or criminal offences and is deemed to include property of or available for use by a terrorist organization."

40. The Oxford Study Dictionary, at p334, contains the following:

> "instrument (noun) 1. a tool or implement used for delicate or scientific work……
> 4. a person used and controlled by another to perform an action, was made the instrument of another's crime.
> Instrument (adjective) 1. serving as an instrument or means of doing something, was instrumental in finding her a job."

41. What is suggested in the ordinary or dictionary meaning of the word "instrument" or "instrumentality" is, for my purpose, the idea of a tool or thing used in the commission of a criminal offence. However, the Money Laundering Act does not confine the concept of "instrumentalities" to the actual use of property or part of it to the commission of an offence. The intention to use such property or part of it to commit a criminal offence is sufficient to render the property in question an instrument or instrumentality in the commission of the criminal offence.

42. Interpreting a statutory provision that defined "instrumentality of an offence" to encompass any property that is "concerned in the commission or suspected commission of an offence" the Supreme Court of Appeal of *South Africa in National Director of Public Prosecutions* v *R O Cook Properties* 2004(2) SACR 208(SCA) said at part a 31 that the connection must be such:

> "that the link between the crime committed and the property is reasonably direct, and that the employment of the property must play a reasonably direct role in the commission of the offence. In a real or substantial sense the property must facilitate or make possible the commission of the offence. As the term "instrumentality" itself suggests (albeit that it is defined to extend beyond its ordinary meaning), the property must be instrumental in, and not merely incidential to, the commission of the offence" (emphasis added)

43. After referring to the above pronouncements, the Supreme Court of Appeal of South Africa in *National Director of Public Prosecutions* v *Van Staden* [2006] SCA 135 p 11 para 12 said:

> "[12] Clearly the presence of a motor vehicle is indispensable to commission of the offences with which we are concerned and in that sense 'makes the commission of the offence possible'. Yet there are many offences in which property plays a role indispensable to the commission of the offence-in some cases it is the subject of the offence, in other cases it is the necessary venue at which otherwise innocent activity becomes criminal-but I do not think that, by itself, makes it an 'instrumentality' of an offence. In my view, the 'functionality' that is required by Cook Properties brings the term closer to its ordinary meaning, which envisages that the property is the means, or the tool or instrument, that is used to commit, the offence" (emphasis added)

44. In Cook Properties the Court said in regard to immovable property that the mere fact that an offence was committed at a particular place did not by itself make the premises concerned an instrumentality of the offence and that some closer connection than mere presence on the property would ordinarily be required. It was also explained in that matter that either in its nature or through the manner of its utilization, the property must have been employed in some way to make possible or to facilitate the commission of the offence. In this vein, the court in *Prophet* v *National Director of Public Prosecutions* [2016] 1 All SA 212 (SCA) said at para 26:

> "Where premises are used to manufacture, package or distribute drugs, or where any part of the premises has been adapted or equipped to facilitate drug-dealing …..they will in all probability constitute an instrumentalities of an offences committed on them."

45. The court then referred to *United States* v *Chandler* 36F 3d 358 (1994) where certain factors were suggested as useful in measuring the strength and extent of the nexus between the property sought to be forfeited and the offence. It took the view that some of those factors are helpful in determining whether property was an instrumentality of an offence. Those factors, not necessarily exhaustive in my view, are:

    (1) whether the use of the property in the offence was deliberate and planned or merely incidental and fortuitous;

    (2) whether the property was important to the success of the illegal activity;

    (3) the time duration which the property was illegally used and the spatial extent of its use;

    (4) whether its illegal use was an isolated event or had been repeated; and

    (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offence.

    The approach of the courts in South Arica is to recognize that the issue does not fall to be determined on one factor. Instead, on a consideration of the totality of the circumstances, in light of such of the factors as are relevant to the particular matter before the court, the question is then answered whether the property was 'a substantial and meaningful instrumentality' in the commission of the offence.

46. I think that the South African jurisprudence on the issue under discussion provides helpful guidelines. The real distinction, in my view, between their statutory provision and ours on forfeiture of property which is an instrumentalities of the commission of an offence is that in our jurisdiction even the intention to use property as an instrumentality or instrumentalities of a serious offence places such property at risk of civil forfeiture. This aside, there does not appear to be any difference in substance in how a court in this jurisdiction and another in South Africa would determine whether property is an instrumentality or instrumentalities of a serious offence. The wording of the statutory provisions may be different, but the intention of the makers of the laws appear to be the same- to deter persons from using or allowing their property from being used in the commission of serious offences and to deprive the owners of such property of the same. At its core, in our jurisdiction, an instrumentality or instrumentalities of the commission

of a serious offence is such property- movable or immovable- used or intended to be used as a tool, weapon or instrument to facilitate or make possible the engagement in conduct constituting or associated with serious offences.

47. It is in this light that I propose to apply the factors highlighted in Cook Properties to determine whether stand 6940 Southlea Park is an instrumentality or instrumentalities of a serious offence. In undertaking this exercise, I bear in mind the definition of "instrumentality" and "instrumentalities" as set out in s 2 of the Money Laundering Act as read with s 80(3)(b) of the same Act. The latter reads:

> "(3) In order to satisfy the court, under subsection (2) –
>
> (a) …….
> (b) That property is an instrumentality of a serious offence or terrorist act, it is not necessary to show that the property was used or intended to be used to commit a specific serious offence or a terrorist act, or that any person has been charged in relation to such an offence or act, only that it was used or intended to be used to engage in conduct constituting or associated with the serious offence or act." (emphasis added)

48. My task is not to decide whether the immovable property in question was used or intended to be used to commit any specific serious offence be it theft, money laundering or any other. Rather, I will answer the question whether the immovable property was used or intended to be used to engage in conduct constituting or associated with the serious offences of either theft of the car parts or laundering the proceeds thereof. In doing this, I apply the factors that I have listed, in no particular order.

49. The first respondent acquired stand Number 6940 Southlea Park, Harare on 5 September 2011. The purpose of acquiring, maintaining and using the property was to accommodate his family. It was his family residence. There is no evidence that such of the stolen car parts as were not recovered were brought to these premises, concealed and sold therefrom. To proceed otherwise would, in my view, be to elevate speculation to the status of evidence. Although theft is a continuing offence, there is no evidence that the first respondent acquired the immovable property in question on 5 September 2011 so that he would use it to engage in conduct constituting or associated with any serious offence, be it theft, money laundering or any other serious offence between January 2016 and September 2020. I have already found that the three motor vehicles and the

Arlington property are proceeds of serious crime. I have also found that he used an undisclosed portion of the Southlea Park property to keep some of the stolen car parts, which were subsequently recovered. All the same, I am unable to find that the purpose of acquiring, maintaining or using the property was to carry out serious offences in respect of both the recovered and unrecovered stolen car parts. If this were the only relevant factor, I would automatically have found that the immovable property was not an instrumentality of a serious offence.

50. There is no evidence to suggest that the stolen car parts were repeatedly brought to the immovable property. What this means is that I cannot agree with Mr *Jakarasi's* contention that the immovable property had been converted into an illegal and cheap warehouse to store stolen car parts. The mere fact that some of the stolen car parts were kept at the premises in question does not, in my view, mean that the premises had been turned into an illegal and cheap warehouse. For all we know, the immovable property continued being used also for the innocent purpose of affording accommodation to the respondent's family ever since 2011.
51. The investigations conducted at the instance of the applicant do not appear to have been directed at establishing the time duration which the property was used to illegally conceal the stolen car parts. This has had the effect of depriving this court of evidence on which to decide whether the property, despite retaining its other use as a family residence, could be said to have acquired the status of an illegal outlet for the sale of motor car parts. Despite the recovery of some of the stolen car parts, the applicant did not place any evidence before the court relating to the spatial extent of the illegal use of the immovable property. The contention in the applicant's heads of argument that some rooms had been dedicated to concealing the recovered car parts is without factual foundation. A party cannot lead evidence through heads of argument.
52. I also am without evidence to find that the use of the property in the offence was deliberate and planned. I do not know how the recovered car parts were brought to the premises. I do not know whether they were brought in broad daylight or under cover of darkness. Once there, I also am without evidence on how they were kept and how the first respondent reached out to potential customers. I was not told that special

arrangements were made to design the immovable property in such a way as to accommodate the car parts before, during or after the theft. In the circumstances, it appears the immovable property was incidental to the serious offences of theft and money laundering in the sense that the recovered car parts were brought to those premises, where the first respondent was residing, with the intention to dispose of them under his watch as if they belonged to him.

53. I do not think that enough evidence has been placed before me to make a finding that the existence of the immovable property was important to the success of the theft and the laundering of the car parts as well as the further laundering of the proceeds of the sale of those parts. In the absence of any indication as to where the unrecovered parts were taken to before they were disposed of, I cannot find that the immovable property was important to the success of the theft, laundering of the parts and further laundering of the proceeds of the sale of the parts.
54. On a consideration of the totality of the circumstances, this court finds that stand number 6940 Southlea Park was not instrumental to, but was merely incidental to the commission of conduct constituting or associated with the serious offences of theft and laundering the proceeds of the theft of such car parts as were recovered from those premises. The immovable property was not an instrumentality of the commission of a serious offence.
55. In light of the foregoing conclusion, the need to examine the fourth respondent's "legitimate owner" defence, raised to resist the granting of an order for civil forfeiture of the immovable property in question, falls away.

COSTS

56. The applicant has attained a substantial measure of success. Ordinarily, this would have entitled it to an award of costs, on the party and party scale, against the first respondent. However, there would be no order as to costs as the applicant did not seek costs.
57. There will also be no order as to costs as between the applicant and the fourth respondent because, despite the outcome, the latter has not succeeded in opposing the application. I dismissed the application in so far as it relates to stand number 6940 Southlea Park, Harare on the basis of a point raised and argued by the first respondent. In any event, the

legitimate owner defence does not arise for consideration in view of my earlier finding that the fourth respondent did not purchase that property.

ORDER

58. IT IS ORDERED THAT:

1. The Toyota RAV 4X T4 Registration Number AA JOSTE, the Ford Ranger Registration number AFC 8278 and the IVECO Lorry 75E15 Flatbed Registration number AEX9419 be and are forfeited to the State.
2. The first respondent shall within the next forty-eight hours do all such things and complete and sign all such papers and documents to transfer registration of ownership of the property mentioned in paragraph 1 of this order to the State failing which the Sheriff of Zimbabwe, his deputy or assistant shall do so.
3. The third respondent shall upon being called upon by the applicant do all things and sign and complete all papers and documents necessary to register ownership of the property mentioned in paragraph 1 of this order in favour of the State.
4. The undivided 2.3250% share being share number 6 in a certain piece of land situate in the district of Salisbury called Stand 2494 Arlington Township measuring 3.0772 hectares held under Certificate of Consolidated Title Number 3111/2017 dated 20 August 2017 be and is forfeited to the State.
5. The first respondent shall within the next forty-eight hours do all such things and sign and complete all papers and documents necessary to transfer title in the property mentioned in paragraph 4 of this order in favour of the State failing which the Sheriff of Zimbabwe, his deputy or assistant shall do so.
6. The second respondent shall upon being called upon by the applicant do all such things and complete and sign all papers and documents necessary to transfer title in the property mentioned in paragraph 4 of this order in favour of the State.
7. The application for an order for the civil forfeiture of Stand Number 6940 Southlea Park, Harare to the State be and is dismissed.
8. Each party shall bear its own costs.

The National Prosecuting Authority, applicant's legal practitioners
Kwenda and Chagwiza, first respondent's legal practitioners
Zvimba Law Chambers, fourth respondent's legal practitioners