

IN THE SUBORDINATE COURT
OF THE FIRST CLASS
FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA
(Criminal Jurisdiction)

CRMP/005/2022

BEFORE: HON. D. CHIBWILI ESQ



THE PEOPLE

VS

FRANCIS MUCHEMWA	(ACCUSED 1)
FRILTECH NETWORKS (Z) LTD	(ACCUSED 2)
ALTITUDE PROPERTIES LTD	(ACCUSED 3)

FOR THE PEOPLE: MS. M. C. NALWENGA
MR. D. NGWIRA
MRS. A. K. BENTO all from the Anti-Corruption
Commission

FOR THE ACCUSED: Mr. H. C. TALANTI OF Messrs Legal Aid Board

JUDGMENT

AUTHORITIES REFERRED TO:

CASES REFERRED TO:

1. The People V. Austin Chisangu Liato 2015 SCZ No.

- 2. Shauban Bin Hassien and Others V Chong Fook Kan and Another
(1903) 3 ALLER 1629**
- 3. Mwewa Muroho V The People (2004) ZR 207 (SC)**

LEGISLATION REFERRED TO:

1. The Forfeiture of Proceeds of Crime Act No. 19 of 2010 – Section 71
(1) (2) and (3) and Section 78.
2. The Penal Code, Chapter 87 of the Laws of Zambia, Section 309 A (1).
3. Statutory Instrument No. 10 of 2024 Rules 7, 10 and 17.

INTRODUCTION

Francis Muchemwa, herein referred to as Accused 1 was jointly charged with (2) two companies namely Friltech Networks Zambia Limited, herein called Accused 2 and Altitude Properties Limited, herein called Accused 3, with several counts of offences as listed below;

In Counts 1 to Count 6, the 3 Accused were severally and jointly charged with Possession of Property Reasonably Suspected of being Proceeds of Crime contrary to Section 71(1) of the Forfeiture of Proceeds of Crime Act No. 19 of 2010.

In counts 1 and 2 Accused 1 was charged alone with the above offence and the allegations were that Francis Muchemwa on unknown dates but between 1st January 2015 and 31st August 2022 at Chongwe, in the Chongwe District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with others unknown did possess properties with numbers;

Count 1 – Property No. L/26392/M.

Count 2 – Property No. L/26395/M both located at Silverest of the Great East Road, reasonably suspected of being proceeds of crime.

In Counts 3 and 4, Accused 1 was jointly charged with Friltech Networks Zambia Limited.

The allegations were that on unknown dates but between 1st January 2015 and 31st August 2022 at Chongwe in the Chongwe District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with others unknown, did possess properties with numbers;

Count 3 – L/28477/M/H

Count 4 – L/28477/M/J both located at Silverest off Great East Road reasonably suspected of being proceeds of crime.

In counts 5 and 6, Accused 1 is jointly charged with Accused 3 Altitude Properties Limited for Possession of Properties Reasonably Suspected of being Proceeds of Crime contrary to Section 71(1) of the Forfeiture of Proceeds of Crime Act No 19 of 2010.

The allegations were that Accused 1 and Accused 3 on unknown dates but between 1st January 2015 and 31st August 2022 at Lusaka in the Lusaka District of the Lusaka Province of the Republic of Zambia, jointly and whilst acting together with others unknown, did possess two (2) FAW trucks with Registration Numbers:

Count 5 – BAR 9058ZM

Count 6 – BAR 9059ZM property reasonably suspected of being proceeds of crime.

In Counts 7 and 10, Accused 1 and Accused 3 were severally charged with Failure to Comply with the Provisions of the Income Tax Act Contrary to Section 99 (f) as read with Section 98 of the Income Tax Act Chapter 323 of the Laws of Zambia.

The two were acquitted of the said offence at No Case to Answer stage and set at liberty.

Similarly, in Count 8 were Accused was charged with Tax Evasion Contrary to Section 102(1)(e) of the Income Tax Act Chapter 323 of the Laws of Zambia, Accused 1 was found with No Case to Answer and acquitted accordingly.

In Count 9, Accused 1 was charged with Obtaining a Pecuniary Advantage by False Pretences Contrary to Section 309A(1) of the Penal Code, Chapter 87 of the Laws of Zambia.

The Particulars were that Francis Muchemwa on unknown dates but between 1st January 2020 and 31st August 2021, at Lusaka in the Lusaka District of the

Lusaka Province of the Republic of Zambia, did dishonestly Obtain a Pecuniary Advantage in the sum of K141, 400.00 in form of Subsistence Allowance from the Zambia Electricity Supply Company (ZESCO) on the pretext that he undertook official trips when in fact not.

THE BURDEN AND STANDARD OF PROOF

The 3 Accused Persons and Companies denied all the 7 charges against them, therefore, the burden was upon the prosecution to prove the allegations against all the Accused on all counts beyond all reasonable doubt.

This was the position stressed in the case of *The People V Austin Chisangu Liato* both in the High Court and in the Supreme Court of Zambia.

There was no such onus on the accused to prove their innocence.

If at the conclusion of all the evidence, I will be left with any doubt in my mind as to the Accused's guilt, that doubt shall be resolved in the Accused's favour and they shall be acquitted.

In order to prove the Accused's guilt, the prosecution must prove each and every ingredient of the offence charged beyond all reasonable doubt.

In Counts 1-6, where the Accused were charged for Possession of Property suspected of being Proceeds of Crime Contrary to Section 71(1) of the Forfeiture of Proceeds of Crime Act No. 19 of 2010 the section states:

(1) A person who, after the commencement of this Act, receives, possesses, conceals, disposes of or brings into Zambia any money, or other property, that may reasonably be suspected of being proceeds of Crime commits an offence and is liable upon conviction to:

(a) If the offender is a natural person, imprisonment for a period not exceeding 5 years; or

- (b) If the offender is a body Corporation, a fine not exceeding 700, 000 Penalty Units (K280, 000.00).

It follows then that in Counts 1-6 the Prosecution must prove the following elements, beyond all reasonable doubt:

- (i) That the Accused were in Possession of the identified properties in the indictment at the material time.
- (ii) And that the said property could reasonable be suspected of being proceeds of crime.

In count 9, where Accused 1 was charged for Obtaining a Pecuniary Advantage by False Pretences Contrary to Section 309 A (1) of the Penal Code, Chapter 87 of the Laws of Zambia the section states:

- (i) Any person who, by any False Pretence, dishonestly obtains for himself or another any pecuniary advantage is guilty of misdemeanor and is liable to imprisonment for 5 years.

The Prosecution must prove the following elements of the offence each beyond all reasonable doubt.

- (ii) That the Accused Person by a False Pretence,
- (iii) Dishonestly obtained for himself or another.
- (iv) A Pecuniary Advantage.

THE PROSECUTION'S CASE

The Prosecution called a total of 15 witnesses in support of their cases against the Accused.

The summary of the Prosecution's Case, especially on possession of properties in question, which has not been disputed, was that the Accused 1 did possess the following Properties situated at Silverest in Chongwe.

- a) Property Number L/26392/M
- b) Property Number L/26395/M

Further, that during the period in question, the Accused 1 and Accused 2, a Company in which he had an interest, did possess:

- (c) Property number L/28477/M/H and
- (d) Property number L/28477/M/J both situated at Silverest in Chongwe.

Further, that during the same period, Accused 1 and Accused 3, another company in which Accused 1 had an interest, had in their possession:

- (e) FAW Truck Registration No. BAR 9058ZM
- (f) FAW Truck Registration No. BAR 9059ZM

All the above properties were valued by the prosecution as follows:

- (i) L/26392/M valued at K2. 5 Million.
- (ii) L/26/395/M valued at K5. 7 Million
- (iii) L/28477/M/H and L/28477/M/J valued at K2.6 Million.
- (iv) The two FAW trucks, subject of Counts 5 and 6 were valued at USD62, 000.00 each.

According to the prosecution evidence through the Investigations Officer PW14, one truck was fully paid for at USD62, 000.00 whilst on the second one USD17, 800.00 was paid towards its purchase making a total payment to the supplier of trucks at USD79, 800.00.

The valuer of the fixed properties Chileshe Ndazye, a Quality Surveyor who was called as PW9, produced a report which was admitted without objection and was marked as P16.

It put the estimated value of the Accused's Properties at K10, 800, 000.00 covering both completed and uncompleted structures.

Further PW15, Rosemary Sifueo Ndeleki Kombe, a Registered Valuation Surveyor produced a valuation report she wrote after examining and valuing the Accused's movable properties at the request of Anti-Corruption Commission.

She valued the Properties in question at K561, 664. 00

That report was produced in evidence and was admitted without objection. It was marked P47.

This brought the Accused's total assets being valued at K11, 261, 664.00. According to the testimony of PW14, the Investigations Officer, she measured this value against the Accused 1's and the companies' total earnings and she came up with the following amounts:

- i) The Accused 1's total earnings by way of salaries and allowances from ZESCO where he worked as a Security Inspector from 2015 to 2021 – K643, 000.00.
- ii) Friltech Networks Zambia Ltd from their dealings with various institutions K1. 88 Million.
- iii) Altitude Properties Ltd from their dealings with various entities K1.58 Million.

The total known incomes for the 3 accused person and companies came to K4, 103, 000.00

This figure as compared to the Accuseds assets or properties of K11, 261, 664.00 shows a disproportionate value of assets to the known earnings of K4, 103, 000.00.

It was also the prosecutions case with regard to the allegation in Count 9 (Obtaining a pecuniary advantage by false pretences) that the Accused 1 was employed by ZESCO from 2015 to 2021 as a Security Inspector.

It was the prosecution's evidence through PW1, the Human Resource Officer at ZESCO, PW2, the Accountant at ZESCO, PW6, the Assistant Superintendent Zambia Police attached to ZESCO and PW10, the Chief Accountant at ZESCO that during the course of Accused 1's employment, he not only received a regular salary but was also paid subsistence allowances whenever, he purported to work outside his station.

In that regard a total of K141, 400.00 was paid to the Accused 1 as Subsistence Allowance between January, 2020 and 31st August, 2021. There was, however, no evidence that Accused 1 did undertake the said trips out of town on ZESCO business, because he never presented any activity reports and according to evidence of the Airtel and MTN Service providers through PW11 and PW13, the Accused 1's phones locations on the relevant dates when he was supposed to be out of town, showed that he was within Lusaka.

PW14, Claudia Chimfwembe Chibiliti, the Investigations and Arresting Officer after analyzing this evidence and the one with regard to the properties that the 3 Accused acquired in the period between January 2015 and August, 2022 as against the known incomes from Accused 1's employment with ZESCO and Accused 2 and 3's business dealings with other institutions and entities made her to make up her mind to charge and arrest the 3 with the subject offences. She did so with regard to Accused 2 and 3 when she established that they filed 'NIL returns' with Zambia Revenue Authority meaning they never made any profits from whatever business they engaged in.

When she interviewed the Company Directors of Friltech Networks (Z) Ltd and Altitude Properties Ltd namely Mwila Muchemwa and Totiwe Tembo respectively, with regard to their companies' tax affairs, they both elected to remain silent. She again asked them with respect to where the resources had come from for the two companies to acquire the properties and vehicles attributed to them but they again opted to remain silent.

That is when she made up her mind to arrest and charge them with the various offences they face today.

There was also testimony from the Investigating Officer and other witnesses from Lusaka City Council such as PW7 the former Town Clerk and PW8, the Senior Accounts Clerk concerning the Accused 1's activities as a party cadre operating from the Intercity Bus Terminus with other Patriotic Front cadres.

That testimony, however, lacks a direct link to the charges before this court that he is facing today hence those testimonies have not influenced this court one way or the other in arriving at its conclusion.

In any case Section 71(3) of the Forfeiture of Proceeds of Crime Act states;

'The offence under subsection (1) is not predicated on proof of the commission of a serious offence or foreign serious offence'

That being the case the court is not going to speculate on Accused 1's activities at the Intercity Bus Terminus.

THE DEFENCE'S CASE

When the Accused were all put on their defence, through their Counsel of record, they all elected to give evidence on oath and did indicate that they will call witnesses.

I must mention here that the Accused Person's and Companies' defence was fraught with many challenges in the conduct of their case generally.

They changed lawyers on several occasions making it difficult sometimes to follow events properly.

They first started with Mr. N. Botha of Makebi Zulu Advocates who was later joined by Mr. T. S. Ngulube of Tutwa S. Ngulube and Company. After hearing about 3 witnesses, these two law firms dropped out of the picture and Mr. J.

Chirwa of Ferd Jere and Company came on board as representing the Accused.

He was assisted by Mr. M. Mwangi and Mr. S. F. Chipompelo of the same firm and trial continued up to the time the accused were put on their defence.

It should also be noted that the accused were put on their defence in October, 2023.

The defence could however, not commence immediately because there were a number of applications that followed.

The state applied for the case to be stated because they were displeased that the accused were acquitted on some counts, an application which was dismissed.

This was followed by an application by the defence for the Accused to be given access to one of the properties to be used as a home because they contended that Accused 1 had no where to live and was virtually a destitute.

Again, that application was dismissed.

When the defence eventually opened on 29/02/2024, the defence lawyers for the Accused had changed law firms and one of them Mr. M. Mwangi was with MAK partners.

He however, remained as Counsel of record representing the Accused with Mr. F. S. Chipompela of Messrs. Joseph Chirwa and Company.

Defence opened with Accused 1 on the stand but in the course of his testimony there was an application by the defence to have certain documents believed to be in the possession of the state to be availed to them.

The matter was then adjourned to enable the defence file a formal application to that effect.

The next thing the court saw on 5th March 2024 were notices of withdrawal as advocates from MAK Partners and Messrs Joseph Chirwa and Company.

When the matter came up on the 6th March 2024, which was a scheduled date, Mr. H. C. Talanti of Messrs Legal Aid Board put himself on record as representing the Accused and immediately asked for more time to acquaint himself with the case and put his house in order.

It should be noted that by that date Statutory Instrument No. 10/2024 had come into effect and by Rule 17 of the Rules, this case was caught up in the Economic and Financial Crimes Rules and was deemed to have continued under those Rules.

Since the defence had barely commenced, the defence were directed to comply with Rule 7 and file documents they intended to rely on within 14 days.

Rule 7 states;

- (1) Where an accused person found with a case to answer intends to lead evidence in the accused persons defence, that accused person or the accused person's legal representative shall within 14 days from the date of the accused person being found with a case to answer, by way of disclosure file a document that the accused person intends to rely on.
- (2) An accused person shall, within 2 days of-
 - (a) Filing the document referred to in sub-rule (1) by way of disclosure, serve the document on the prosecution; and
 - (b) Service of the document on the prosecution in accordance with paragraph (a), file an affidavit of service.
- (3) A document that has not been disclosed in accordance with sub-rule (2) Shall not be relied on at trial by the defence.
- (4) Despite sub-rule (3), an accused person found with a case to answer may, with leave of the court, rely on a document not disclosed in accordance with sub-rule (2), if the court is satisfied that-

(a) The document was not available at the time of the disclosure referred to under sub-rule (1); or....

They were also directed to serve the said documents on the state and file an affidavit of service to that effect.

When the matter came up on 22nd March 2024 the defence asked for a further adjournment because they had not complied with the earlier order to file documents they wished to rely on.

With reluctance but in the interest of justice the adjournment was granted to enable the new defence lawyers get to grips with the matter they had joined.

When the matter came up on 12th April 2024 the defence were still not ready and they asked for a further adjournment to enable them comply with the earlier directive.

Since at that time the Rules had become operational and the reasons given for seeking an adjournment were neither compelling nor exceptional, I declined to grant the adjournment and defence continued with Accused 1's testimony on the stand.

ACCUSED 1'S DEFENCE

The Accused 1 begun his defence by recounting his political life in the Patriotic Front Party.

He told court how he joined the Patriotic Front Party in 2006 as a member and became an executive member of the Intercity Branch as Vice Secretary.

He rose through the ranks and eventually became the Vice Chairperson of the branch between 2016 to 2021.

He denied running parallel structures for revenue collection at Intercity Bus Terminus and that he worked for R. K. Motor Ways from 2009 to 2012 and later for Intercape from 2012 to 2014 as a Manager.

He said that during that period all revenue from the terminus was collected by the Council and not any Parallel Structure.

He told court that he has been in business for 13 years and that he started off as a Cross border trader in 2009 and that in 2012 he opened up a restaurant at the bus terminus.

From his cross-border business, he said he made between K200, 000.00 and K300, 00.00 between 2009 – 2012 which made him open a restaurant.

In the same year of 2012 he opened a bar business which he named the Fril Bar and Grill at North Mead.

He said he operated that business for almost 10 years.

He acknowledged PW5's testimony to the extent that he rented the shop he operated in from PW5's mother's building.

He said he opened another Fril Pub and Grill in Kanyama Compound but later moved it to Chilenje Compound due to thefts and break ins.

Due to poor business in Chilenje, he again moved his business to Garden Compound and later to Ibex Hill in April 2021.

It was Accused 1's testimony that for the 10-year period he ran his bar, he made about K6 Million from it.

When he was referred to the testimony of PW14 the Investigating Officer he said she left out a number of years when he operated the bar business in which he made about K3.5 Million.

He also referred to P37 – P41 which were books of account for his bar business.

He went on to explain how in December, 2021, he received a phone from the Investigations Officer at ACC PW14, who summoned him for interviews.

The responded and went to the ACC offices with his lawyer then Mr. N. Botha of Makebi Zulu Advocates.

It was Accused 1's testimony that the investigation extended to his property and he had to surrender a number of documents to PW14 which included invoices, receipts, purchase orders and contracts he had with the Ministry of Health, The National Council for Construction, PACRA, Disaster Management and Mitigation Unit etc.

In the course of Accused 1's testimony another application for an adjournment was made apparently to enable the defence get some documents which they believed were in the possession of the state and which documents were pertinent to their case.

Though the application was opposed by the state, it was granted the matter was adjourned to a later date.

When defence resumed on 22nd March 2024, Accused 1 continued with his testimony concerning his business activities.

He told the court that apart from his bar business he also ventured into chicken rearing in 2021 which gave him about K500, 000.00 that year.

He said he also engaged in various transactions with Public and Private Institutions between 2020 and 2021 from which Friltech Networks Zambia Ltd raised about K1.5 Million and his other company Altitude Properties Ltd made about K10.1 Million.

He narrated how he had contracts to deliver rice to various districts in the country, how he supplied face masks and was paid about K1. 0 Million through his ABSA Account.

Further amounts of K4.2 Million and K4, 410, 000.00 were paid into the Altitude Properties ABSA Account from the supply of face masks to Mwencha Zambia Ltd and Atkinson Construction Zambia Ltd.

It was Accused 1's testimony that from such business transactions, his companies were able to diversify into property management and trucking business.

That is how the company Friltech Networks Zambia Ltd bought Plot L/26392/M and L/26395/M.

It was his testimony that the developments at Plot L/26392/M cost between K700, 000.00 and K800, 000.00 and that on Plot L/26395/M it cost about K3.0 Million.

In 2021, Altitude Properties Ltd invested in the transport business and bought 2 trucks from Mass breeders at USD124, 000.00 on credit.

Accused 1 acknowledged that he had paid USD62, 000.00 on one truck in full and about USD 26 000.00 on the other leaving a balance of about USD35, 000.00.

He said the said trucks and other properties have since been seized by the ACC.

He went on to explain that in 2015 after he stopped working for Intercape, he joined ZESCO Ltd as a Security Sergeant.

He said whilst working for ZESCO he obtained a loan of K382, 000.00 from ABSA Bank part of which he used to buy the Property on L/26392/M at K120,000.00.

He said he further earned allowances from his job which enabled him to put up a slab and wall fence on the said property.

He was later promoted to Security Inspector where he headed a special division under Security where he earned about K141, 400.00 in subsistence allowances for travelling.

He said he used to do special assignments such as investigating ZESCO workers, vandalism etc.

He was also involved whenever the state President was travelling within the country to ensure that there was power back up at whatever lodge he was staying.

He said his trips were sanctioned by the Managing Director and Senior Manager for Security in conjunction with the Office of the President. It was his testimony that he never received any query regarding the allowances he was receiving. He said due to the sensitive nature of the jobs he was involved in he would leave his phones behind and would use a different phone to communicate either with the Senior Manager or the Managing Director of ZESCO.

He said because his work involved investigating Senior Officers at ZESCO, only the Senior Manager Security and the Managing Director knew about his assignments.

He summarized his earnings as:

- | | |
|-----------------------|---------------|
| - Altitude Properties | K10.1 Million |
| - Friltech Networks | K1.5 Million |
| - Chicken Rearing | K500, 000.00 |
| - Loan from ABSA | K382, 000.00 |
| - Earnings from ZESCO | K500, 000.00 |
| - Fril Pub and Grill | K6.0 Million |

He said these earnings were sufficient for him to buy the two trucks from Mass breeders as well as develop his properties on L/26392/M and L/26395/M.

In cross examination, Accused 1 told the court that he had no documentary evidence by way of Pay slips or Bank Statements to show how much he earned when he worked for Intercape or carried on the business of a cross border trader.

He admitted having registered his business for tax purposes with Zambia Revenue Authority but that he did not declare any profits with them.

He also admitted not to have declared the K6.2 Million profit he made under the Fril Pub and Grill to ZRA and that what he declared were Nil Returns.

In similar fashion he told the court that Altitude Properties was registered in 2020 and that by 2022 he had made a Profit of K10.1 Million.

Whilst he stated that Altitude Properties had declared its profits with ZRA, he was referred to P43 a Tax Compliance status Report for December, 2021 which showed that Altitude Properties was not Tax Compliant.

He further admitted not paying taxes on Friltech Networks' profits and that he did file Nil Returns with ZRA.

On his none retirement of Subsistence Allowances from ZESCO he told the court that he was not aware that he needed to retire the money he got upon his return from his trips. He further told the court that he used to give verbal reports of his trips to a selected few Senior Officers at ZESCO who included the Managing Director, the Senior Manager – Security and the Investigations Supervisor.

He denied being known as Commander 2 but admitted to being the Second in Command at the Intercity Bus Station Patriotic Front Office as Vice Chairperson.

He admitted that after the 2021 General Elections, revenue collection at the Intercity Bus Station increased but denied that it was because PF cadres ran away from the station.

In re-examination by his Counsel, Accused 1 told the court that at the time he worked for ZESCO there was no requirement for retirement of Subsistence Allowance whenever he returned from his trips.

DW2(Accused 3) was Toliwe Tembo, a Director and Shareholder in Altitude Properties Ltd (Accused 3) and a wife to Accused 1.

She adopted her witness statement in her defence in which she confirmed being a co-director in the company and that she was not actively involved in the running of the company but Accused 1, her husband was.

She recalled her husband expressing his intention to buy two trucks to aid the business and that later he entered into an agreement with Mass breeders and acquired 2 FAW trucks whose registration numbers she could not recall.

She retaliated her none involvement in the active running of the business but that she would help out when the need arose with administrative duties.

She was aware that the trucks which were purchased on hire purchase had not been fully paid for and they belonged to Mass Breeders until they were fully paid for.

She said she had Bank Statements to prove the payments though she did not produce any.

At this point I wish to explain what transpired with regard to the witness statements and the bundle of documents the defence wanted to rely on in line with Rule 7 of the Stationery Instrument No. 10/2024 which states:

RULE 7

(1) Where an accused person found with a case to answer intends to lead evidence in the accused person's defence, that accused person or the Accused person's legal representative shall within 14 days from the date of the Accused person being found with a case to answer, by way of disclosure, file a document that the Accused person intends to rely on.

(2) An accused person shall, within 2 days of;

a) Filing the document referred to in sub rule (1) by way of disclosure, serve the document on the prosecution and

b) Service of the document on the prosecution in accordance with Paragraph (a), file an affidavit of service.

(3) A document that has not been disclosed in accordance with (2) shall not be relied upon at trial by defence.

The accused were put on their defence in October, 2023 before the Rules in Statutory Instrument No. 10 of 2024 came into effect.

However, due to numerous applications for adjournments mostly occasional by the defence, Accused 1 did not take a stand in defence until 29th February 2024. Even then he did not conclude with his testimony as there was another application by defence to adjourn in order for them to get certain documents they wished to rely on supposedly in the custody of the state.

That application was reluctantly given and the matter was adjourned to 6th March 2024.

In the meantime, on 1st March 2024 the Rules in SI No. 10 of 2024 became effective.

When the matter came up for Continued Defence on 6th March 2024, the defence team changed with the previous Counsel having filed a Notice to Withdraw the previous day.

The new Counsel of record Mr. H. C. Talanti from Messrs Legal Aid Board asked for more time to familiarize himself with the case.

Since his coming on board coincided with the coming into force of the rules the defence were directed to comply with Rule 7 and file the list of witnesses and statements and bundle of documents they wished to rely on and were given 14

days within which to do so. The matter was then adjourned to 22nd March 2024. When the matter came up on that day the defence had not complied with the directive and asked for more time.

They were given up to 12th April 2024 to comply.

On 12th April 2024 when the matter came up the defence had still not complied with Rule 7 and asked for a further adjournment which was denied because there were no compelling or exceptional reasons offered.

Accused 1 then continued with his defence and concluded on that day.

The matter was thereafter adjourned for Accused 1's cross examination to 2nd May 2024.

When defence resumed on 2nd May 2024 the court only sat for half a day for cross-examination of Accused 1 and when it was concluded and DW2, Accused 3 was to take a stand, there was yet again an application for an adjournment by the defence who claimed Accused 3 had fallen ill.

The matter was adjourned to 8th May 2024.

When the defence resumed on 8th May 2024, it was brought to the court's attention that the defence had filed their list of witnesses and witnesses statements the previous day together with their bundle of documents.

Although the documents were stamped 30th April 2024, that was not true because when court sat on 2nd May 2024 there was no mention of documents having been filed on 30th April 2024. The said filing was done without leave of court and against the rules of court.

Further, the defence did not serve the said documents on the state nor did they file an affidavit of service with the court.

Because of the many violations of the rules connected to that filing and in particular Rule 7(2)(3) of the SI No 10 of 2024, which are couched in mandatory terms, in my ruling of 9th May 2024, I ruled that the documents filed by the

defence shall not be relied on in their defence nor become part of these proceedings.

That is how the defence proceeded. Though both Accused 2 and 3 were allowed brief references to their witness statements for a complete capture of their testimonies in defence.

No documents filed on 7th May 2024 or thereabout were thus produced nor relied upon by the defence.

Thus, defence continued with the cross-examination of DW2.

She told court in cross-examination that she was not aware that she was also a Shareholder and Director in Altitude Properties.

When she was shown a PACRA printout, P7, she admitted that the details therein were hers.

She did not know the financial matters to do with Altitude Properties Ltd and referred everything to Mwila Muchemwa Accused 2.

When queried about Accused 1, her husband's phone number she gave them as 0973 088822 and 0966 816678 on which she used to communicate with him even when he was out of town on duty.

It was her testimony that Accused 1 used to go with his phones when he travelled out of town.

She also was not familiar nor aware of her husband's activities at the Inter City Bus Terminus nor that he was known as Commander 2.

DW3 was Mwila Muchemwa a Director at Friltech Networks Zambia Ltd.

He told the court that Friltech Networks was incorporated in 2015 with a nominal Capital of K15, 000.00.

That it was involved in the supply of goods and services to institutions such as PACRA, Ministry of Health, Lusaka Provincial Office, National Council for Construction and Disaster Management and Mitigation Unit among others.

He said as a company, they bought a piece of land at Chongwe at K350, 000.00 and started construction works in 2020.

The defendant then referred to his witness statement where he indicated that there were 3 unfinished buildings at the site.

One was at slab level, two at window level, a guard room and a wall fence.

He said the construction of those structures cost between K800, 000.00 – K900, 000.00.

He denied that the company was involved in any criminal activity to raise its money.

He said through their various businesses they were able to raise about K1.5 Million part of which was used to buy land and commence construction works.

He told court that the company was tax compliant and that the goods they were involved in supplying were tax free because at the time in question there was Covid 19 and they supplied hand sanitisers, masks and Covid Protective Clothing.

In Cross-examination he maintained that Friltech Networks was tax compliant and they paid all their taxes but then he was shown the tax compliant report which read Nil returns and that Friltech was not tax compliant.

He gave his position in Friltech as Director and Operations and Administrative Manager responsible for Financial Management, record keeping and training and recruitment of staff.

DW4 was Keke Chama who gave his occupation as a Business man and IT Specialist.

He told Court that he was employed by Friltech Networks in 2018 and he started by improving on the bar business. He said they could make about K30, 000.00 from the Fril Night Club in Garden Compound.

They also did business with institutions such as the Ministry of Health, National Council for Construction, DMMU, Lusaka Provincial Health Office and PACRA.

After doing business with the above institutions that is when they ventured into real estate and bought land in Silverest.

He repeated what Accused 1 and DW3 had told the court on the two companies business dealings and how they raised their money.

In cross examination, he admitted having lied about the amount the company Friltech Networks made from its bar and night club. He further told court that the company taxes were done by someone who was engaged to work on them by the company.

That person was not called as a witness.

I found DW4 not to be a credible witness.

This witness equally did not produce any documents to refer to in his testimony like all the other defence witness.

At the conclusion of this witness' s testimony the matter was again adjourned to a later date for more witnesses.

When the matter came up on 3rd June 2024 for continued defence, the Counsel for the Accused informed the Court that they had attempted to plea bargain with the state pursuant to the Plea Negotiation and Agreement Act No. 20 of 2010.

The state acknowledged having received overtures from the defence but stated that the offences the Accused were facing were not subject to plea negotiations because they had no minor offences to which the accused could plead guilty to.

As a result, the plea negotiations in this matter were not available.

The negotiations having failed the defence were ordered to continue with their defence but they asked for a further adjournment to the following day which was a preset date.

The following day the 4th June 2024 the defence again asked for an adjournment stating that the witnesses they intended to feature were not before court and they had documents they wished to subpoena.

The application for a further adjournment was opposed by the state.

Having considered the submissions from the two sides I agreed with the state not to adjourn the matter any further because the numerous adjournments occasioned in this case were mostly at the instance of the defence and the reasons offered were neither compelling nor exceptional thus did not fall within the ambit of Rule 10 of SI No. 10/2024.

When the defence failed to bring up any witness on that day I then considered their case closed and invited both sides to file their final submissions.

Both sides did file their final submissions and I am grateful to their industry.

Otherwise this was the evidence received in this case from both the prosecution and the defence.

EXAMINATION AND ANALYSIS OF EVIDENCE

I have examined the evidence from both the prosecution and the defence and I have found that some prosecution witness knew the Accused 1 prior to the allegations against him before this court but that there was no animosity nor any acrimony between them. They all enjoyed a warm and cordial relationship.

I have accordingly ruled out a possibility of a false or malicious prosecution being orchestrated against the Accused by prosecution witnesses.

From the evidence as a whole, I have found the following facts to be established uncontroverted:

1. With regard to Count 1 – 6

- that the Accused 1 and the two companies Friltech Networks Zambia Limited and Altitude Properties Limited during the period between January 2015 and August, 2022 did possess the properties mention in Counts1 – 6 that is:
 - (i) Property No. L/26392/M
 - (ii) Property No. L/26395/M
 - (iii) Property No. L/28477/M/H
 - (iv) Property No. L/28477/M/J
 - (v) FAW Truck BAR 9058ZM
 - (vi) FAW Truck BAR 9059ZM

Since possession of the above properties by the accused persons and companies has not been disputed I will then move to the second element of the offences charged which is reasonable suspicion that the properties were Proceeds of Crime

The state through its witnesses and evidence in court tried to show that there was a disparity between what the accused earned or their known incomes and the values of the properties they owned and that that fact should raise reasonable suspicion that the properties in question were proceeds of crime.

In dealing with the issue of reasonable suspicion, the Supreme Court of Zambia, in the case of **The People V Austin Chisangu Liato (2015) ZR** stated at page...

“We are, for our part, perfectly satisfied that reasonable suspicion as used in Section 71(1) of the Forfeiture of Proceeds of Crime Act, is mere conjecture or surmise, shy of actual proof that a state of affairs exists. Such suspicion must be based on articulable facts.....”

...In this regard we are persuaded by the dicta of Lord Devlin in **Shauban Bin Hussein V Chang Fook Kan and others....**

The Court proceeded to state that

“in the formulation of Section 71 (1) Proof beyond reasonable doubt of reasonable suspicion, was not contemplated or intended.”

It follows then that the reasonable suspicion in Section 71(1) was to be proved at a Standard of Proof lower than beyond all reasonable doubt.

My view has been reinforced by Section 78 of the Forfeiture of Proceeds of Crime Act No. 19 of 2010 which states:

“Save as otherwise provided in this Act, any question of fact to be decided by the Court in proceedings under this Act is to be decided on a balance of probabilities.”

The question I have to address is what then are the articulable facts the prosecution have presented before me to prove or support their allegation that there was reasonable suspicion in the property owned by the Accused persons that they were Proceeds of Crime?

The Prosecution have through their various witnesses and analysis by PW14 the Investigations Officer, established the value of the properties owned by the accused person and his companies at K11, 261, 664 as against their known sources of income of K4, 103, 000.00.

The defence on the other hand though disputing the values attached to their properties as well as their sources of income, have not presented any evidence to the contrary especially that their documents were not made part of the record.

When the Accused elected to give evidence in their defence, in my view, they placed themselves under Section 71(2) of the Forfeiture of Proceeds of Crime Act No. 19 of 2010 and were expected to show the Court albeit, on a balance of probabilities, that they had no reasonable ground for suspecting that the

property they owned were derived, released directly or indirectly from any unlawful activity.

The Accused failed to show that and as a result, I have found that the Prosecution have proved, on a balance of probabilities, the second element of the offence which is reasonable suspicion.

This was in no way to say that the burden of proof shifted or was cast on the defence.

The burden of proof was always on the prosecution.

However, when the Accused were put on their defence and they elected to give their defence on oath, they had an evidentiary burden to discharge, on a balance of probabilities, on how they came to possess the property in question and that they had no reason to suspect that it was Proceeds of Crime, which, unfortunately they did not do.

The case in point is that of **Mwewa Murona V The People (2004) ZR 207 (S.C)** holdings 1 and 4 it was stated:

1. In Criminal Cases, the rule is that the Legal burden of proving every element of the offence charged, and consequently the guilty of the Accused lay from beginning to end on the prosecution.
2. The Standard of Proof must be beyond all reasonable doubt.
4. The Accused bears the burden of adducing evidence in support of any defence after he has been found with a case to answer.

Overall, I am satisfied by the evidence on record that the prosecution have proved their cases in Counts 1 – 6 beyond all reasonable doubt.

For the avoidance of doubt, I have found Accused 1, Francis Muchemwa GUILTY in Count 1 and 2 with regard to Properties L/26392/M and L/26395/M of the Offence of Possession of Property reasonably suspected of being Proceeds of

Crime Contrary to Section 71(1) of the Forfeiture of Proceeds of Crime Act No. 19/2010 of the Laws of Zambia and I CONVICT him accordingly.

Similarly, in Counts 3 and 4, I have found Accused 1, Francis Muchemwa and Accused 2 Friltech Networks Zambia Ltd, GUILTY with regard to properties L/28477/M/H and L/28477/J of the offence of Possession of Property reasonably suspected of being Proceeds of Crime Contrary to Section 71(1) of the Forfeiture of Proceeds of Crime Act No. 19 of 2010 of the Laws of Zambia and I CONVICT them accordingly.

I further find Accused 1, Francis Muchemwa and Accused 3 Altitude Properties Guilty in Counts 5 and 6 with regard to the 2 FAW Truck with Registration number BAR 9058ZM and BAR 9059ZM of the offence of Possession of Property Reasonably suspected of being Proceeds of Crime Contrary to Section 71(1) of the Forfeiture of Proceeds of Crime Act No. 19/2020 of the Laws of Zambia and I CONVICT them accordingly.

I now come to count 7 where Accused 1 was charged for Obtaining a Pecuniary Advantage by False Pretences Contrary to Section 309A (1) of the Penal Code Chapter 87 of the Laws of Zambia.

The Prosecutions allegation on this count was that the Accused 1 whilst in the employ of ZESCO between January, 2020 and August, 2021 did dishonestly obtain subsistence allowance amounting to K141, 400.00 on the pretext that he undertook official trips when in fact not.

The Accused 1 on the other hand did not dispute the material facts that he was in employment with ZESCO at the time and that he did obtain the amount mentioned on various Occasions when he had assignments to perform on behalf of the company as a Security Inspector.

Accused told court that his assignments were of a sensitive nature and therefore he only reported to the Managing Director of ZESCO and other Senior Managers. His reports were verbal and were never written.

The state on the other hand showed by call records that the dates on which the Accused claimed to have travelled out of town on duty, his phones were traced to locations within Lusaka.

While that, by itself, may not be conclusive evidence that Accused was within Lusaka on the said dates, the Prosecutions' view has been supported by a lack of activity or written reports of the Accused 1's activities when he was supposed to be out of town.

His failure to call witnesses such as the persons he claimed he was reporting to did not help his case.

ZESCO being a Public Company, using Public Funds has a way of accounting for how those funds are utilised.

The Accused's statement that there were no procedures for accounting for Subsistence Allowance cannot therefore be accepted.

I have accepted the prosecution's evidence that indeed Accused 1 between January, 2020 and August, 2021 did obtain K141, 400.00 as Subsistence Allowance from his employer but there was no evidence that he did anything for the Company. I am accordingly satisfied beyond all reasonable doubt that the Accused 1 dishonestly gained a Pecuniary Advantage by False Pretences in the process.

I find him GUILTY of the offence of Obtaining Pecuniary Advantage by False Pretences Contrary to Section 309 A(1) of the Penal Code Chapter 87 of the Laws of Zambia and I CONVICT him Accordingly.

DELIVERED AT LUSAKA IN OPEN COURT THIS 26th DAY OF July 2024


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HON. D. CHIBWILI
CHIEF RESIDENT MAGISTRATE