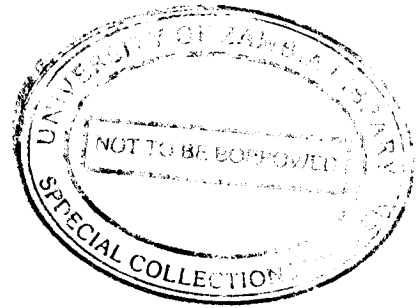


Done

**THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW**

**THE PROTECTION OF THE RIGHTS TO PRIVACY
AND PROPERTY IN THE FIGHT AGAINST
CORRUPTION IN ZAMBIA**

BY



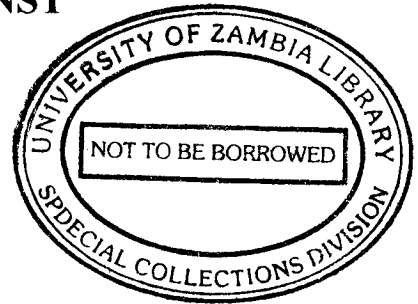
SALLY SIYOMUNJI

UNZA

FEBRUARY 2008

**Directed Research
on**

**THE PROTECTION OF THE RIGHTS TO PRIVACY
AND PROPERTY IN THE FIGHT AGAINST
CORRUPTION IN ZAMBIA**




**Being a research paper submitted to the University of
Zambia in partial fulfillment of the requirements of the
Bachelor of Laws (LLB) Degree Programme.**

**The University of Zambia
School of Law,
P.O. Box 32379,
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February, 2008.

DECLARATION

I SALLY SIYOMUNJI COMPUTER NUMBER 22100423 DO HEREBY declare that the contents of this Directed Research Paper are based on my findings. I have however referred to other peoples work with acknowledgment.

Date.....06.02.08.....
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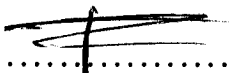
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.....
Dr. Patrick Matibini

Date... 6th FEB. 2008

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TABLE OF LEGISLATION

African Convention on Preventing and Combating Corruption

Anti- Corruption Commission Act No. 42 of 1996.

Anti- Corruption Commission (Disposal of Recovered Property) regulations S.I. No. 58 of 2004.

Banjul Charter

Constitution of Zambia, 1973

Constitution of Zambia, 1996

Corrupt Practices Act No. 14 of 1980

Corrupt Practices Disposal of Recovered Property, Statutory Instrument No. 187 of 2004.

Human Rights Commission Act No. 39 of 1996.

Narcotic Drugs and Psychotropic Substances Act No. 37 of 1993

Parliamentary and Ministerial Code of Conduct, Chapter 16 of the Laws of Zambia

Penal Code CAP 87 of the Laws of Zambia

Penal Code CAP 146 of the Laws of Zambia

SADC Protocol against Corruption

Universal Declaration of Human Rights

United Nations Convention against Corruption

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The People v Richard Sakala (unreported) 2002

The People v Samuel Musonda, SS/99/2004

The People v Stella Chibanda, Faustin Kabwe and Xavier Chungu (unreported) 2002

ABBREVIATIONS

ACC	Anti- Corruption Commission
AMLIU	Anti Money Laundering Investigations Unit
AU	African Union
DPP	Director of Public Prosecutions
DEC	Drug Enforcement Commission
MMD	Movement for Multi Party Democracy
PHI	Presidential Housing Initiative
PPMLA	Prohibition and Prevention of Money Laundering Act
SADC	Southern African Development Community
UNCAC	United Nations Convention against Corruption
UNDHR	Universal Declaration of Human Rights
UNIP	United Nations Independence Party
ZAMTROP	Zambia Trans- Operative
ZSIS	Zambia Service Intelligence Service

ABSTRACT

Many people have written on the subject of corruption, both locally and internationally. Some countries have developed measures to try and eradicate corruption in their countries, but have not been successful because it is difficult to completely eradicate corruption, but can only be reduced. Corruption has been singled out to be one of the factors that causes poverty, lack of development in a nation and retards economic growth. Many countries in the world have set up anti-corruption agencies in their countries and a number of various instruments are being used. These tools that are used in these countries have to comply with international instruments and should not lead to violation of peoples' rights. It is encouraged that countries should sign and ratify the United Nations Convention against Corruption (UNCAC) and other international instruments relevant to the fight against corruption. The nations need to implement measures that are compatible with these instruments.

This research paper looks at the fight against corruption and the protection of the rights to privacy and property. Measures that are used to fight corruption should be in line with human rights principles and should not lead to violation of the rights mentioned. The paper will analyze the various instruments that are used to fight corruption in Zambia and also those that are used globally. The paper will also assess the extent to which they have assisted in fighting corruption. The paper will also address how proceeds of corruption have been handled and if there has been any violation of peoples' rights to privacy and property. It is hoped that this research paper will bring about a greater understanding of the effects of corruption and identify measures necessary to minimize it whilst at the same time safeguarding the rights to privacy and property.

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CHAPTER ONE

1. INTRODUCTION

There have been a number of works written on the subject of corruption and how it is detrimental both socially and economically to the state of the country's development, whenever and wherever it occurs. However, none has addressed the issue of the rights to privacy and property in fighting corruption. There is no single universally accepted definition of corruption. According to Transparency International (TI) Source Book;

“Corruption’ involves behaviour on the part of officials in the public sector, whether politicians or civil servants, in which they improperly and unlawfully enrich themselves, or those close to them, by the misuse of the public power entrusted to them”.¹

The World Bank refers to corruption as the single greatest obstacle to economic and social development and bribery alone is responsible for the global economic losses. Other studies have indicated that corruption is the main reason for the common man not being able to receive the benefits of development. For instance, in a study from India, if the Government allocates millions of money for the development of a village, the actual and real expenditure on the development of the village is only one tenth of the amount allocated. The rest of the amount changes hands in various forms for things that man needs or desires like plots of land, small land holdings and property. It is also stated that the property acquired by these corrupt people is the right that would encourage corrupt people to earn through dishonest and illegal methods and also to enjoy life and even pass on the wealth to their children. Most people feel that proceeds of corruption should be seized and forfeited to the State because such property was acquired corruptly. What then

¹ Jeremy Pope, ed, National Integrity Systems, the TI Source Book, Transparency International, Berlin, Germany (1997) p. 1

are the rights of privacy and property of the individuals whose lives have been affected by the search, seizure and confiscation of property belonging to another?

1.1 STATEMENT OF THE PROBLEM

Investigating cases of corruption may interfere with the property rights and privacy rights of people. The government headed by President Mwanawasa has publicly declared war on corruption in Zambia. The Anti- Corruption Commission is centrally placed in the fight against corruption in Zambia. The Anti Corruption Commission Act allows the Director General of the ACC to direct any person not to dispose of property suspected to be connected to corruption.² In addition any money property or thing of any description which was the subject of corruption and is recovered by the ACC vests in the state if it is not claimed within three months after giving public notice of possible forfeiture. Zambia is a party to the United Nations Convention against Corruption. The parties to this convention are concerned about the seriousness of the problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and rule of law.³ Zambia is also a party to the SADC Protocol against Corruption and African Union (AU) Convention on Preventing and Combating Corruption. All the three multilateral instruments mentioned aim at promoting and strengthening the development of mechanisms and policies that would prevent, detect and punish corruption and contain many provisions that are similar or have similar objectives. The State Parties to the multilateral instruments undertake to abide by the principles of human rights and respecting the rights to privacy and property. How then is it possible to fight corruption

² Anti- Corruption Commission Act No. 42 of 1996, Section 24

³ Preamble, UN Convention against Corruption

without interfering with the right to property and privacy? When law enforcement officers carry out their duty of investigating, they might need to confiscate, seize or even conduct a search on property of the person under investigation. When the case goes for prosecution, the cases take long in court and during such periods, the affected individuals have no access to their property and have no privacy since the officers constantly keep an eye on their affairs. In carrying out their duties, the officers may interfere with the right to privacy and property of the person. Is it possible to effectively fight corruption without interfering with these rights? The right to property is a guaranteed right in the African Charter on Human and Peoples' Rights (Banjul Charter), which was adopted in 1981 and came into force in 1986. The Banjul Charter is reaffirmed by the Constitutive Act of the African Union which promises to protect and promote human and peoples rights. The Banjul Charter also incorporates the Universal Declaration on Human Rights and the Charter of the United Nations. The right to privacy and property is also violated during search and collection of documents. The rights to privacy and property vests in everyone and is affected when a person is charged with a crime and there is a search and seizure of property. Does this therefore mean that people involved in corrupt practices should be consulted before their premises are searched or bank account is searched. Or would this disclosure jeopardize the entire investigations.

1.2 RATIONALE FOR THE RESEARCH

The study will discuss the rights to privacy and property as both rights are recognized in the Zambian Constitution, International Covenant on Civil and Political Rights, The African Charter on Human and Peoples' Rights and the United Nations Charter.

The research will also discuss the provisions of the law which provide for the search, confiscation and disposal of property which has been acquired corruptly.

1.3 OBJECTIVES OF THE STUDY

To establish whether there is interference in the rights to privacy and property when investigating cases of corruption, particularly the search and seizure of property and also to determine the legal safeguards that have been put in place by the Anti-Corruption Commission Act or any other laws to safeguard the rights to privacy and property when investigating cases of corruption.

1.4 METHODOLOGY

The research was carried out by studying the Constitution of Zambia and the provisions on the rights to privacy and property. The study analyzed the local statutes which deal with corruption and seizure of property. The International instruments relevant to the fight against corruption were also considered and how these have been domesticated in local legislation.

In my field research, I visited several institutions such as Anti-Corruption Commission, Transparency International and the Task Force on Corruption where I received materials to guide me in my research.

1.5 ORGANISATION OF THE PROPOSED RESEARCH

CHAPTER ONE – INTRODUCTION AND BACKGROUND.

In this chapter, I discuss the background to the fight against corruption and its effect to the rights to privacy and property.

CHAPTER TWO- THE INTERNATIONAL INSTRUMENTS RELEVANT TO THE FIGHT AGAINST CORRUPTION.

In this chapter I look at the following instruments:

- United Nations Convention Against Corruption
- SADC Protocol Against Corruption
- African Convention on Preventing and Combating Corruption

CHAPTER THREE- THE LEGAL FRAMEWORK RELATING TO THE FIGHT AGAINST CORRUPTION.

CHAPTER FOUR- THE PROSECUTION OF CORRUPT PRACTICES AND THE PROTECTION OF THE RIGHTS TO PRIVACY AND PROPERTY.

CHAPTER FIVE- RECOMMENDATIONS AND CONCLUSIONS

1.6 BACKGROUND TO THE FIGHT AGAINST CORRUPTION

During the period of the first Republic in Zambia, the economy was strong as copper prices were still good. At this same period, corruption was unheard of and if it occurred, it was treated like any other petty offence under the Penal Code and the penalties for corruption were quite light. Before 1980, the law against corruption was provided for under the Penal Code.⁴ The law against corruption did not extend to the private sector, it only provided for official corruption in the public sector. The Penal Code did not cover corruption in tender procedures, auction sales and voting at meetings. The Zambia Police was charged with the duty of enforcement of corruption offences. During Kaunda's political leadership of the One Party State, United Nations Independent Party (UNIP), abhorred corruption and drug trafficking and there was strong commitment to fighting the two crimes. Kaunda introduced the Leadership Code in 1973, which was made part of the

⁴ CAP 146 of the Laws of Zambia

Republican Constitution.⁵ The Leadership Code covered every person working in the Government or statutory corporation or any Commission established by law.⁶ As a result, most of the Cabinet Ministers, Members of Central Committee (MCC) and other high-ranking officials demonstrated exemplary behavior during their tenure of office.⁷ The Leadership Code forbade leaders from running businesses or earning extra money whilst in office. It also forbade leaders from owning real property outside Zambia or owning more than one piece of land in Zambia. This was a measure of preventing public officers to acquire a lot of properties corruptly. In 1980, due to the increasing reported cases of corruption in Zambia, the police could not handle the cases effectively as they lacked adequate knowledge on the offence. The Zambian government passed a Bill in Parliament that would seek to give the Anti- Corruption Commission (ACC) operational autonomy from the Executive. This led to the establishment of a separate body to investigate and prosecute offences of corruption and the definition of corruption was broadened. Apart from investigating cases of corruption, the ACC undertook to prevent the occurrence of corruption in both public and private bodies. The Corrupt Practices Act⁸ provided for the formation of the Anti- Corruption Commission in 1982, and it repealed the provisions of the Penal Code on corruption offences. The Corrupt Practices Act⁹ gave powers to the Commissioner to authorize any officer of the Commission to investigate, to carry out bank searches, and obtain documents or articles as may be required by the officers of the Commission. And if any person failed to disclose such

⁵The Constitution of 1973, Part iv

⁶ Leadership Code first schedule of the Constitution of 1973

⁷ C.R. Matenga, "Corruption, Is It Endemic In Zambia," Paper presented at the Citizens Forum Discussion in Lusaka, Zambia, 28th February 1998, the author is a lecturer at the University of Zambia Development Studies Department

⁸ Corrupt Practices Act No. 14 of 1980

⁹ Ibid Section 11

information, or produce documents, there was a provision for a penalty of conviction if found liable¹⁰. However, the Corrupt Practices Act,¹¹ gave no autonomy to the ACC, in that the executive had a lot of influence on the cases being investigated and the Director General who was appointed by the President had to report to him. The Corrupt Practices Act of 1980¹² stipulated that the ACC shall be a Government Department under the control and supervision of the President. The Corrupt Practices Act¹³ also provided that the President may on such terms and conditions as he thinks, appoint a Commissioner who would be responsible for the administration of the Commission, subject to any specific or general directions of the President.

In 1991, when the Movement for Multi Party Democracy (MMD) took power, the leadership code was scrapped, and leaders were free to own or run businesses whilst in office and also earn an extra income in whatever manner they could. All restrictions on property ownership were removed and this brought about accumulation of wealth. As soon as this new government took over, corruption and drug trafficking allegations against the new leaders in the Chiluba government increased tremendously. There was no political will to fight corruption during the Chiluba presidency. A number of ministers had been investigated for corruption offences and even if there was overwhelming evidence, their cases did not go to court due to interference from the executive. For example, Mr. Michael Chilufya Sata who was Local Government Minister in the Chiluba government was investigated by the ACC for the offence of abuse of office involving a banking deal. Mr. Sata was also found to have abused his power in the award of a

¹⁰ Ibid section 1(2)

¹¹ Ibid section 14

¹² Supra 6, section 4(2)

¹³ Ibid Section 5(2)

contract to construct some Council houses. It was recommended by the ACC that Mr. Sata be prosecuted for the offence, but the then Attorney General of Zambia, Ali Hamir directed the Director of Public Prosecutions(DPP) not to prosecute Sata on the grounds that it would not be in the public interest.¹⁴ Between the period 1980 and 1996, the Corrupt Practices Act was in force in Zambia until a Bill was passed in Parliament and was subsequently signed by the Republican President Mr. F.J.T. Chiluba on 20TH November 1996. The Anti Corruption Commission Act No. 42 of 1996 established the Commission as a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name.¹⁵ The ACC became an autonomous body, which is not subject to the direction or control of any person or authority.¹⁶ Also in 1996, as a result of pressure from the society and the donor community, the government under the leadership of Chiluba adopted the Electoral Code of Conduct Regulations¹⁷, which was aimed at reducing corruption during the Electoral Process. This Code of Conduct forbids the use of public resources for election campaigns. However, the Code of Conduct is ignored, particularly by the ruling party, which helps itself to public funds and government resources in its election campaigns¹⁸.

The law enforcement agency such as the ACC in Zambia, gives powers to investigations officers to investigate and prosecute any public officer who has abused or misused his office, position or authority to obtain property wealth, advantage or profit directly or indirectly for himself or any other person¹⁹. Further, law enforcement officers have

¹⁴ The Post, Friday 2, 1994, "Government shields Corrupt Leaders", says ACC

¹⁵ Anti- Corruption Commission Act No. 42 of 1996, section 4(1)

¹⁶ Ibid Section 5

¹⁷ Statutory Instrument No. 179 of 1996

¹⁸ FODEP, Zambia's 2001 Tripartite Elections Report, Lusaka: FODEP, (2002) pp 22-28

¹⁹ Supra note 11, Section 37

powers to seize property based on reasonable grounds to have been derived or acquired from the proceeds of a crime.²⁰ After the property has been seized, the authorized officer who effected the seizure may at any time before it is forfeited under the Act order the release of the property to the person whom the property was seized, if the officer is satisfied that the property is not liable for forfeiture under the Act and is not required for the purpose of any investigations or proceeding under the Act²¹. The law does not provide for wrongful search and seizure of property. The law in this regard, gives powers to officers to seize property on mere suspicion that the property might be related to the crime, and then later on release the property back to the owner? If the investigations are carried out contrary to the Constitution, it might infringe on the rights to privacy and property of the individuals. The law enforcement agencies should bear in mind that every person who has been charged with a criminal offence is presumed to be innocent until he is proved or has pleaded guilty.²² The 1996 Act has provisions of forfeiture of property to the State if after a notice has been placed in the Gazette paper and a period of three months has elapsed before anyone making a claim.²³ Such property shall vest in the State. The law has no provision for some one making a claim after three months. The period of three months is a disadvantage on some one who could not have seen the notice and makes a claim after three months. Whose property is it then. Is it for the state or the person making a claim. Furthermore, after some one has been investigated, arrested, property seized from them and taken to court for prosecution, and when the court acquits

²⁰ Section 15 of the Prohibition and Prevention of Money Laundering Act No. 14 of 2001

²¹ Ibid Section 16

²² Article 18 of the Constitution of Zambia

²³ Corrupt Practices Disposal of Recovered Property Statutory Instrument No. 187 of 2004

the person, the law does not provide for any compensation for the properties seized which would have lost value at the time of the acquittal.

In 2002, the new government headed by President Patrick Mwanawasa publicly declared war on corruption in Zambia. In July 2002, President Mwanawasa set up a Task Force on Economic Plunder to investigate cases of corruption in the Chiluba regime. This institution consists of officers from the Zambia Police Service, Drug Enforcement Commission and the ACC. The Director General of ACC, Inspector General of Police and the Commissioner of Drug Enforcement Commission (DEC), are all members of the Task Force. The Task Force on corruption was formed to investigate cases of corruption during the term of the Second Republic. The Task Force's terms of reference are to investigate abuse of office, mismanagement of government funds, theft of government resources, money laundering and corruption in the former Chiluba regime. It is only since the coming to power of President Mwanawasa that prosecutions for corruption offences commenced against former ministers in the Chiluba regime. In order to pave way for investigations, Dr Chiluba's immunity was removed on 16th July 2002. One of the first people to have been arrested by the Task Force was Xavier Chungu who was former Director General of Zambia Intelligence Services. Mr. Chungu was charged with 19 counts of theft by public servant and abuse of authority of office involving public funds and the acquisition of boats and motor bikes.²⁴ The ACC arrested former Zambian Ambassador to the United States of America Atan Shansonga who was arrested in connection with the illegal Zambia Trans- Operative (ZAMTROP) Account transactions. Faustin Kabwe, a businessman who was Access Finance Services Executive Director and

²⁴ Chanda A.W., "Zambia's Legal Framework and the Fight Against Corruption: The Shortcomings of the Electoral Act I", The Corruption Eye 1 (Issue No. 2), February 2002

he was believed to be the master mind in the former President Chiluba's externalization of public funds to overseas accounts. Dr Chiluba was alleged to have corruptly obtained and laundered funds of the Zambian government estimated to be worth US\$ 400 million. A number of properties have been seized from Chiluba and have been forfeited to the State. Dr Kashinka Bulaya who was former permanent secretary in the Ministry of Health was charged with one count of abuse of authority of office and two counts of corruption involving billions of United States Dollars which was earmarked for the purchase of Anti- Retroviral HIV/ AIDS medicine for HIV Patients. Anbul Investment, a Company located at Plot number 10935 Chinika which was registered in the name of another individual, but set up and registered by Bulaya has been seized by the State, including some motor vehicles. The Task Force has also raided homes of former Movement for Multi Party Democracy (MMD) National Secretary Vernon Mwaanga and Zambia Republican Party President Ben Mwila.²⁵ In August 2002, the Task Force had arrested the former Permanent Secretary, Ministry of Finance and Economic Planning, Ms Stella Chibanda for the offence of being in possession of property disproportionate to her present or past official emoluments. Several properties were seized from her such as cars, houses and a farm. After the state entered a *nolle* and was discharged, she was not compensated for her properties.

Though there have been all these acts on the confiscation, search and seizure of property connected to the crime of corruption, no one has addressed the issue of the rights to privacy and property of the individuals whose lives are being interfered with as a result of the investigations, search and seizure of property. As much as the law enforcement officers are mandated by law to seize property, it should be done within the confines of

²⁵ Times of Zambia, 31 August 2002, "B.Y Mwaanga Searched", pp3

the law. Also, the laws against corruption should comply with international human rights standards and should afford a fair trial to those accused. Also, the criminal laws against corruption must respect human rights as they are guaranteed in the Constitutional Bill of Rights²⁶. The right to privacy and property are rights that are protected in the Zambian Constitution. The Constitution states that no property of a person shall be searched upon, unless the person has consented to it.²⁷ The Constitution further provides for the protection of the right to property. To what extent does the law safeguard the rights to privacy and property when investigating cases of corruption and how does the law balance the need to fight corruption and the need to uphold the two rights under discussion, bearing in mind that the paths to success for the two subjects are perceived to be diametrically opposed. The Task Force on Corruption has carried out a number of searches of the property on the victims and none with their consent. During the same process, personal documents have been retrieved and used in connection with the crime. What are the rights to privacy and property of the individuals' whose property has been confiscated, forfeited or seized by the State.

²⁶ Supra, note 1, p. 64

²⁷ Article 17 of the Constitution of Zambia

CHAPTER TWO

2. INTERNATIONAL INSTRUMENTS RELEVANT TO THE FIGHT AGAINST CORRUPTION

Corruption as already discussed is a global problem which poses serious threat to the development of a country and its people. Corruption may be viewed as something that robs a nation of its resources through theft by people who are in a hurry to become rich. Corruption may have a number of consequences which cannot all be listed down. Amongst them is reduced investment in a country because most investors would not like to invest in a destination which is corrupt as resources given will not be used for the intended purpose. Others are poor infrastructure as the materials used would be of poor quality resulting in frequent repairs and replacements which in the long run would be costly for a nation. Because of this, most countries have embarked on a national strategy to deal with corruption and also criminalize corruption in their countries. They are various legislations which have been put in place and agencies to help fight corruption as it is regarded as a criminal offence. Apart from having local agencies which aim at eradicating corruption, they are also some international instruments which have been set up. Three important multilateral instruments that are of relevance to the fight against corruption and which were all finalized between 2001 and 2003 are the Southern African Development Community (SADC) Protocol against Corruption, the African Union (AU) Convention on Preventing and Combating Corruption and the United Nations (UN) Convention against Corruption (UNCAC). All three instruments criminalize corruption and aim at finding solutions that would minimize it.

2.1. UNITED NATIONS CONVENTION AGAINST CORRUPTION

UNCAC was adopted in 2003 and it came into force on 14th December 2005, after being ratified by 30 countries. This is the most relevant global anti- corruption instrument. Others are regional such as the African Union Convention on Preventing and Combating Corruption and the SADC Protocol against Corruption. UNCAC is the first globally binding instrument to fight corruption and it provides a legal framework for international cooperation and domestication at all levels to prevent, fight and control corruption. The UNCAC obliges member countries to undertake certain obligations and common standards which need to be implemented or incorporated into their respective domestic legal systems. The Convention criminalizes corruption both in the private and public sectors and it attempts to regulate corruption. It establishes for the first time legal mechanisms for the return of assets that have been transferred to other countries²⁸. The Convention defines “property” to mean assets of every kind, whether corporal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets²⁹. The Convention also requires countries to establish corruption as a criminal offence, if it is not contained in their national legislation. According to the Convention, countries signing it must establish criminal offences to cover acts of corruption in their countries. They must also co-operate internally to prevent, investigate and prosecute corruption, aid in asset recovery and take first step towards tackling corruption and prevention.

UNCAC also urges the State Parties to consider the adoption of legislation and other measures that would establish “illicit enrichment” as an offence. Illicit enrichment is

²⁸ UN Convention against Corruption Article 51

²⁹ Ibid, Article 2

defined as a significant increase in the assets of a public official that he or she cannot reasonably explain as a criminal offence. The member states have also agreed on asset recovery³⁰. The convention has a number of provisions which have been provided for to make this possible. In the case of embezzlement of public funds, the confiscated property would be returned to the State requesting it. As for the proceeds of any other offence covered by the Convention, the property would be returned providing the proof of ownership or recognition of the damage caused to as requesting State³¹. The Convention also provides for direct recovery of property. Each State Party is required to take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence³². One major disadvantage of civil action is that it is costly and complex. Cases normally take long even years, and parties to the action are supposed to fund litigation. In some cases, it is legally impossible for a State to bring a civil action in another country because it would enjoy sovereign immunity from any judgment issued against it.

2.2. AFRICAN CONVENTION ON PREVENTING AND COMBATING CORRUPTION

The African Convention on Preventing and Combating Corruption was adopted by African Heads of State in July 2003, at the African Union Summit in Maputo, Mozambique. It entered into force on 5th August 2006, when the requirement of 15 ratifying countries was finally met. This convention covers a number of areas including money laundering, bribery and diversion of property by public officials. The African

³⁰ Ibid, Section 51

³¹ Ibid, Section 51

³² Ibid, Section 53

Convention defines corruption as the offering or giving, promising, solicitation or acceptance directly of any undue advantage to or by any person who directs or works for, in any capacity a private sector entity, for himself or herself or anyone else, for him or her to act or refrain from acting, in breach of his or her duties³³. The main objectives of this convention are to promote and strengthen the development of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in Africa and to ensure the effectiveness of measures to be taken.

They are four main approaches to combating corruption, and these are prevention, punishment, co-operation and education. The convention outlines measures to be undertaken to enable the detection and investigation of corruption offences. The Convention outlines measures to be under taken to enable the detection and investigation of corruption offences. The Convention also establishes the laundering of the proceeds of corruption as an offence³⁴. Proceeds of corruption should not be enjoyed as these were not rightly acquired. It also indicates mechanisms for the confiscation and forfeiture of the proceeds of corruption and related offences. The Convention also indicates a requirement to adopt legislative and other measures to prevent and combat acts of corruption and related offences committed in and by agents of the private sector³⁵. In its measures for detecting and investigating corruption and related offences, each State Party is supposed to adopt measures which are necessary to empower its courts or other competent authorities to order the confiscation or seizure of banking, financial or commercial documents³⁶.

³³ African Convention on Preventing and Combating Corruption, Article 4

³⁴ Ibid, Article 6

³⁵ African Convention on Preventing and Combating Corruption , Article 11

³⁶ Ibid, Article 17

According to the AU Convention, corruption is no longer an offence in which only the public officials can be the principal offender. The Convention also calls for the establishment of mechanisms to encourage participation by the private sector in the fight against unfair competition, in respect of tender procedures and property rights. The Convention defines “illicit enrichment”, as the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income³⁷, and State Parties must make this a crime.³⁸ In domesticating the laws, the African countries must respect the African Charter on Human and Peoples’ Rights, a treaty that is in force by ratification with or without implementing legislation. The African Commission takes the view that when a State ratifies the African Charter, it obliges to uphold the fundamental human rights. The African Union Convention States that “subject to domestic law, any person alleged to have committed acts of corruption and related offences shall receive a fair trial in criminal proceedings in accordance with the minimum guarantees contained in the African Charter on Human and Peoples, Rights, and any other relevant international human rights instruments recognized by the concerned States Parties”³⁹. The Banjul Charter is also known as the African Charter on Human and Peoples’ Rights was formally adopted in 1981. The rationale behind the treaty was to challenge Africa’s own neglect of human rights abuses in the post- colonial period, and to urge members of the African Union to adopt a regional human rights instrument. The Banjul Charter also provides that;

“every individual shall have the right to be presumed innocent until proved guilty by a competent court or tribunal⁴⁰.”

³⁷ Ibid , Article 1

³⁸ Ibid, Article 8

³⁹ Ibid Article 14

⁴⁰ Banjul Charter Article 7 (1)

There is also the presumption of innocence in the International Covenant on Civil and Political Rights (ICCPR) which states that ‘every one charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to the law’⁴¹.

The African Union Convention just like the UNCAC, also addresses the issue of confiscation and forfeiture of corrupt proceeds, bank secrecy, co-operation and mutual legal assistance. It calls on signatories to introduce legislation on money laundering and commits them to require designated public officials to declare their assets at the time of assumption of office, as well as during and after their term⁴².

2.3. SADC PROTOCOL AGAINST CORRUPTION

Within the Southern African Region, corruption has also been considered a major concern especially to the development of a country. The Southern African Development Community (SADC) Protocol against corruption focuses on strengthening mechanisms to prevent, detect, punish and eradicate corruption in the Southern Region of Africa. The primary objective of the protocol is to improve and harmonize anti- corruption policies and laws in and across the region, and to facilitate regional co-operation. SADC Member states need to bring their domestic legislation in line with the protocol and harmonise mutual legal assistance mechanisms⁴³. Each member state should develop a detailed framework for combating corruption in both the public and private sectors⁴⁴. The four prominent objectives of the protocol are:

- a) to prevent, detect and prosecute corruption in the public and private sector;

⁴¹ Universal Declaration of Human Rights Article 14(20)

⁴² Articles 6 and 7

⁴³ SADC Protocol, Article 7

⁴⁴ Ibid, Article 4

- b) to promote and facilitate co-operation among state parties in support of prevention, detection and prosecution of corruption in all sectors;
- c) to provide a framework for harmonizing policies and legislation against corruption and,
- d) to set standards by which to periodically measure, through peer review, the performance of member states in combating corruption.

The SADC Protocol states that corruption;

“indicates bribery or any other behaviour in relation to persons entrusted with responsibilities in the public and private sectors which violates their duties as public officials, private employees, independent agents or other relationships of that kind which are aimed at obtaining undue advantage of any kind for themselves or others”

Most SADC countries have put in place their own anti- corruption legal framework. The protocol also states that each State Party should adopt measures as may be necessary to enable the confiscation and seizure of proceeds of an offence under its laws⁴⁵.

They are various investigative tools which are used within the SADC Region. Some of the ways in which investigations are done are through interviews with suspects, and complainants. At times it is through search of premises and offices. This right to search premises and to investigate people is given to officers who are specially trained and authorized by law to carry out the work. The State parties which have provided these powers have also recognized that corruption is exceedingly difficult to investigate and prove and offences of such a nature take place in great secrecy and at times without witnesses.

Some of the powers which the officers of the special investigations agencies have are powers which include restraint of assets found, conduct searches without warrant, compel

⁴⁵ Ibid, Article 8

suspects to produce documents and without recourse to the courts, compel banks and other financial institutions to breach client confidentiality by disclosing details of suspects' financial activities. The extent to which these powers are available in the region differs from country to country. From the discussion above, it is necessary that the protocols and conventions need to be incorporated into national laws of a country. Most of the countries which have ratified the conventions and the protocols have put in place domestic laws to help fight corruption. Zambia has ratified the UN Convention against Corruption on 16th December 2007. And the convention would enter into force for Zambia on 6th January 2008. According to a press statement released by Transparency International Zambia president Reuben Lifuka, ratification of the UN convention if not implemented locally would just remain on paper. He stated that ratification is alright because it provides measures for asset recovery and new dimensions of fighting the vice⁴⁶.

⁴⁶ The Post News Paper, Monday December 17th 2007

CHAPTER THREE

3. THE LEGAL FRAMEWORK RELATING TO THE FIGHT AGAINST CORRUPTION

The political will to fight corruption in Zambia has been strengthened with the coming into power of President Levy Patrick Mwanawasa. Several institutions that had existed before and were designated to fight corruption are now receiving a lot of support from the new Government. Corruption in Zambia has been in existence for a long time, and now the need to fight it has become more necessary because it has increased over the years from the One Party State to the present Multi Party System. The legal provisions against corruption in Zambia were first contained in the Penal Code.⁴⁷ This legislation was exclusively concerned with Corruption in the public service only. The provisions of this law did not take offence with corruption transactions by or with private bodies or agents. In 1980, the Zambian government set up a separate body to investigate and prosecute corruption offences and most of the provisions which were contained in the Penal Code were repealed. The provision which is in the penal code relating to corruption states that;

“any person who being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights or interest of the government or any other person is guilty of a misdemeanor⁴⁸”.

Several mechanisms have been put in place to fight corruption in Zambia. These measures which are aimed at fighting corruption must be compatible with human rights principles and should not lead to violation of the rights of privacy and property of the individuals concerned. The rights to privacy and property are guaranteed rights in the

⁴⁷ Cap 146

⁴⁸ Penal Code CAP 87, Section 99

Zambian Constitution and must be respected⁴⁹. These rights are not absolute, but are subject to certain limitations imposed in the interests of defending public order in society and protecting the rights and freedoms of other people. The Constitution has a provision which permits any person who alleges that any of his rights has been, is being or is likely to be contravened in relation to him, to apply to the courts for redress⁵⁰. And if such a case goes to the High Court, the High Court will make orders, issues writs and give directions, as it may consider appropriate for the purpose of enforcing or securing the enforcement of the rights in question. The Human Rights Commission⁵¹ is also empowered to investigate human rights violations as well as maladministration of justice in Zambia.⁵² In order to prevent abuse of power and reward, the Constitution of Zambia has a provision that requires a Presidential candidate to make a statutory declaration of his liabilities open to the public for inspection⁵³. This is another mechanism which has been put in place to minimize unjustified enrichment through abuse of power once a candidate becomes President.

3.1 PARLIAMENTARY AND MINISTERIAL CODE OF CONDUCT CHAPTER 16 OF THE LAWS OF ZAMBIA

Ministers and Deputy Ministers are required to conduct themselves in accordance with the Parliamentary and Ministerial Code of Conduct Act⁵⁴. The Code of Conduct requires Ministers and Deputy Ministers to disclose their pecuniary interest on any matter before the National Assembly or any of its Committees⁵⁵. They are also required to declare their

⁴⁹ Article 17 and 16 of the Constitution of Zambia

⁵⁰ Ibid, Article 28(1)

⁵¹ Act No. 39 of 1996

⁵² Human Rights Commission Act, Section 9 (a) and (b)

⁵³ Ibid Article 34(5)

⁵⁴ Chapter 16 of the Laws of Zambia

⁵⁵ Ministerial Code of Conduct, Section 5

Government Contracts to the Chief Justice⁵⁶. A Minister will lose his position if he breaches provisions under the Code of Conduct. If a Minister fails to disclose pecuniary interest in any matter before the Assembly, will make him lose his position⁵⁷. The public has a right to know where or how the people they voted into power are acquiring their wealth. It is important for the people of Zambia to know that the wealth that they have has been acquired legitimately.

3.2. THE ANTI- CORRUPTION COMMISSION ACT NO. 42 OF 1996

The Anti Corruption Commission Act⁵⁸ establishes the Commission as an autonomous body. This institution is set up to fight corruption in Zambia. However, there are other public institutions that are charged with the role of law enforcement in other related vices. These are Drug Enforcement Commission (DEC), Anti- Money Laundering Authority (AMLU) and the Zambia Police Service (ZPS). Under the ACC corruption is defined as;

“the soliciting, accepting, obtaining, giving or offering of a gratification by way of a bribe or other personal temptation or inducement, or the misuse or abuse of a public office for private advantage or benefit.”

This Act broadened corruption from just receiving a bribe to include even soliciting or offering of a gratification. Efforts to fight corruption should come from every one. The Commission encourages members of the public to report cases of corruption. The complainants can disclose their identity or remain anonymous until the matter goes to court, but once the matter is in court, the identity of the witnesses is disclosed and the lack protection. The ACC Act does not protect whistle blowers and this should be taken into consideration. In its fight against corruption, the ACC has adopted a three pronged

⁵⁶ Ibid Section 6

⁵⁷ Ibid Section 3

⁵⁸ Anti Corruption Commission Act No. 42 of 1996

approach. The institution undertakes activities in corruption prevention, community education as well as investigations and prosecution. These activities are mostly funded by the donor community. The ACC Act gives powers to the Director General or any officer of the Commission to investigate any public officer where there are reasonable grounds to believe that such public officer has abused or misused his office, position or authority to obtain property, wealth, advantage or profit directly or indirectly for himself or any other person has abused or misused his office, position or authority to obtain property, wealth, advantage or profit directly or indirectly for himself or any other person;

- a) maintains a standard of living above that which is commensurate with his present or past official emoluments;
- b) is in control or possession of pecuniary resources or property disproportionate to his present or past official emoluments; or
- c) in respect of the benefit of any services which he may reasonably be suspected of having received corruptly or in circumstances which amount to an offence under the Act.

When exercising these powers, the officers do not take time to carry out a back ground check on the individuals concerned in order to find out if the allegations are true, but are usually in a hurry to search and arrest victims. This is one of the reasons of the many acquittals which are given by the courts because proper investigations had not been done by the officers. It is necessary to carry out a back ground search before victimizing people through the searches and interviews and then establish that there is no case against them. The officers can also investigate any person who maintains a standard of living above that which is commensurate with his present or past official emoluments or is in

control or possession of pecuniary resources or property inappropriate to his present or past official emoluments. The officers of the ACC conduct investigations and if it has been established that there is a prima facie case may unless the accused gives a reasonable explanation be charged with having or having had under his control or in his possession pecuniary resources or property which is suspected of having been acquired or having misused or abused his office, position or authority. It is up to the accused to give a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how pecuniary resources or property came under his control or in his possession. Under the ACC, the ACC can only prosecute with the consent of the Director of Public Prosecutions (DPP)⁵⁹. The DPP may delegate his powers to such public officer as he may specify⁶⁰. If the DPP has not given consent, the case cannot be prosecuted. In all the investigations which are done, the officers of the Commission need to observe the rights of the accused person. Any person who is charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an impartial and independent court⁶¹. And further more, any person charged with an offence is presumed innocent until proves guilty. The ACC Act also provides that;

“the Director General may by written notice to a person who is a subject of an investigation in respect of an offence alleged or suspected to have been committed under the Act, or against whom a prosecution for such offence has been instituted, direct that such person shall not dispose of or otherwise deal with any property specified in such notice without the Consent of the Director General⁶²”.

⁵⁹ Ibid Section 46(1)

⁶⁰ Ibid Section 47

⁶¹ Article 16 of the Constitution of Zambia

⁶² Anti Corruption Commission Act No. 42 of 1996, Section 24(1)

In addition, any money, property or thing of any description, which was derived from the proceeds of crime, becomes liable to forfeiture by the court⁶³. Such recovered property may be forfeited to the State as provided,⁶⁴ that any recovered property which comes into the possession of the Anti- Corruption Commission shall, subject to the other provisions of these regulations, vest in the State if such recovered property cannot be returned because;

- a) the rightful owner is the subject of an investigation in respect of an offence alleged or suspected to have been committed under the Act, has left Zambia for the purpose, or apparent purpose, of evading the consequences of such investigations or of the trial of a prosecution brought against that person;
- b) the rightful owner or the person in possession thereof absconds;
- c) the person in possession thereof admits involvement in the alleged corrupt act and agrees to the surrender of such recovered property to the Commission because of an involvement.

The Director General has to give notice to that effect that such recovered property is liable to vest in the State if it is not claimed within three months and after giving notice the property remains unclaimed. The notice shall be deemed to have been duly given if it is published in the Gazette and a copy is-

- a) served on the person concerned, or left at, or posted to, the usual or last known place of abode or business of the person concerned;
- b) left at, or posted to, the usual or last known place of abode or business of the person concerned;

⁶³ Ibid Section 17

⁶⁴ Statutory Instrument No. 58 of 2004, Regulations 3, Section 3 (1)

- c) published in a national newspaper if the person concerned is unknown or if the address or whereabouts of that person are unknown; or
- d) In case of a limited Company, personally served on a Director or Secretary of the company or left at the registered office of the company.

If the Director General is of the opinion that any recovered property is subject to speedy or natural decay, or that its immediate sale would be for the benefit of the owner, the Director General may at any time direct that such property be sold. No sale or disposal of any such property shall be ordered without an order of the Court first being obtained. It has been noticed that the ACC takes too long to investigate their cases. From the time the property is seized, to the time the case comes to an end normally takes about three years or even longer. Because of the long period that the cases take to be disposed off, the property seized may get damaged or if it is a motor vehicle loss certain parts.

The ACC Act prohibits Public officers from accepting gifts unless they are “casual gifts.”

A “casual gift” is defined as;

“any conventional hospitality on a modest scale or unsolicited gift of modest value offered to a person in recognition or appreciation of that persons services, or as gesture of goodwill towards that person and it includes any inexpensive seasonal gift offered to staff or associates by public and private bodies or private individuals on festive or other occasions which is not in any way connected with the performance of a person’s official duty so as to constitute an offence.”⁶⁵

The question of what a casual gift is does not seem to have been clearly defined in the Act. The Act defines it as a conventional unsolicited gift of modest value. Who determines what is of modest value. The Act has not fully explained this term of casual gift.

⁶⁵ Ibid part iv

Under the General Orders which apply to the Civil Service, Officers are forbidden from giving or receiving valuable presents, goods or passages except with the specific approval of the responsible officer of a Ministry or Province concerned in respect of an officer. An officer who infringes this order misconducts himself or herself. Even if this law has been put in place, it is not usually enforced and most civil servants receive valuable presents, which they do not disclose to their superiors. Gifts given to Ministers and public officials need to be recorded in a register. However, this does not take place.

3.3. THE NARCOTIC DRUG AND PSYCHOTROPIC SUBSTANCES ACT CHAPTER 96 OF THE LAWS OF ZAMBIA

The law that relates to drugs in Zambia is covered by the Narcotic Drugs and Psychotropic Substances⁶⁶. This Act provides for the seizure of property used or derived from a drug trafficking offence.⁶⁷ The Narcotic Drug and Psychotropic Substances Act created the Drug Enforcement Commission (DEC). Money laundering in Zambia was associated with drug trafficking and since there was no legislation against money laundering at that time, it was convenient to insert a provision to fight money laundering in the Narcotic Drug and Psychotropic Substances Act. The Act provides that whenever the Commissioner has reason to believe that there is reasonable cause to suspect that in or on any premises there is concealed or deposited any property liable to forfeiture under this Act or as to which an offence under the Act is reasonably suspected to have been committed, or any book or document directly or indirectly relating to or connected with any dealing or intended dealings whether within or outside Zambia, in respect of any property liable to seizure or forfeiture under this Act or which would, if called out, be an

⁶⁶ Narcotic Drugs and Psychotropic Substances Act No. 37 of 1993

⁶⁷ Ibid Sections 31-49

offence under the Act or which would, if called out, be an offence under the Act, he may, by order in writing, authorize a Drug Enforcement Officer or Police Officer to⁶⁸:

- a) Enter the premises and search for, seize and obtain any such property, book or document
- b) Search any person who is in or on the premises and detain that person and remove him to any place in order to facilitate the search.
- c) Arrest any person who is in or on the premises in whose possession any property liable to seizure or forfeiture under the Act if found, for whom the Officer reasonably believes to have concealed or deposited the property.

The Act also provides that⁶⁹:

“any property which a Drug Enforcement Officer or Police reasonably suspects to be the subject matter of an offence under the Act, or which has been used for the Commission of that offence or is illegal property shall be liable to seizure”.

The Act also makes provision for the release of seized goods before they are forfeited to the state if the officer who seized the goods is satisfied that the said property is not liable to forfeiture and is not required for the purpose of any investigation proceedings or prosecution under any written law. The Law further provides for the forfeiture of property where there no proceedings or claim. It states that where any property has been seized under the Act and;

- a) No prosecution for any offence under any person that is instituted with regard to the property.
- b) No claim in writing is made by any person that he is lawfully entitled to the property or that it is not liable under the Act.

⁶⁸ Section 24

⁶⁹ Section 31

- c) No proceedings are commenced by the Commission, within six months from seizure, for the forfeiture of the property, the property shall become forfeited immediately upon expiration of the period of six months.

The law makes provisions for the forfeiture of property on conviction⁷⁰. It also provides that the Director of Public Prosecutions may apply to the High Court for an Order of forfeiture of any property he believes to be illegal property⁷¹. An application made under this subsection shall contain all relevant information, including but not limited to-

- a) the name of the convicted person and his address, if known;
- b) identification of the property, its estimated value and location.

The Director of Public Prosecutions may make a fresh application-

- a) relating to any property which was not the subject matter of an earlier application against the accused;
- b) against any person whom an earlier application under this section had not been made.

The Act also provides for forfeiture of property where the owner is untraceable or has absconded or is outside Zambia and cannot be compelled to attend court after forfeiture notice has been issued⁷². The Act provides for forfeiture of untraceable property by the High Court where the property forfeited⁷³;

- a) cannot be located or traced
- b) has been sold to a purchaser in good faith for value consideration
- c) is outside Zambia

⁷⁰ Section 34(1)

⁷¹ Section 35(1)

⁷² Section 37(1)

⁷³ Section 38

- d) has been mingled with other property which cannot be separated or divided without difficulty or
- e) has been diminished in value.

It is important to note that if a person whose property has been forfeited dies, the Order to that effect shall have effect against the deceased's estate. The High Court shall order that any property of a similar value be forfeited. This provision is similar to Section 43 of the Anti- Corruption Commission Act. All the property that is forfeited under this Act is forfeited to the State.

3.4. THE PROHIBITION AND PREVENTION OF MONEY LAUNDERING ACT NO. 14 OF 2001

Currently, the legal frame work for combating money laundering is provided for in the Prohibition and Prevention of Money Laundering Act⁷⁴ that was enacted in November 2001. The Act prohibits money laundering, establishes the Anti Money Laundering Investigations Unit and it provides for the disclosure of information on suspicion of money laundering activities by supervisory authorities and regulated institutions. The PPMLA criminalizes money laundering and provides for prosecution of money laundering offences and the punishment of individuals and institutions found guilty⁷⁵. The PPMLA gives powers to authorized officers to seize property suspected of having been derived or acquired from money laundering.⁷⁶ The officers can search any person who is suspected or connected with the offence in or on the premises and take that person into custody for investigation. The officer can also break, open, examine and search any premises, article, container or receptacle suspected or connected with the offence. If the

⁷⁴ Prohibition and Prevention of Money Laundering Act No.14 of 2001

⁷⁵ Ibid Section 12 and 13

⁷⁶ Ibid Section 15

seized property is not claimed or if there is no prosecution that has been instituted, such property is liable to be forfeited to the state. The Commissioner is required to apply to the court upon the expiry of six months for an order of forfeiture of the property.⁷⁷ The court can give an order of forfeiture if the Commissioner has given notice by publication in the Gazette and newspaper to the effect that if the property seized is not claimed within three months, it will vest in the State.⁷⁸ The Act also has provisions to release the seized property before it is forfeited to the State and it is similar to Section 31 of the Narcotic Drug and Psychotropic where property is released, the officer or anyone acting on behalf of the State shall not be sued unless it can be proved that the seizure and release were not in good faith. A record in writing should indicate the reasons and circumstances for the release. The AMLIU, the ACC and DEC can all effect seizure of property and deal with the eventual forfeiture of the proceeds of crime.

3.5. THE PENAL CODE CHAPTER 87 OF THE LAWS OF ZAMBIA

The Penal Code also provides for instances when property can be forfeited which has passed in connection with the commission of an offence. It provides that where a person is convicted of an offence, the Court which convicts the person shall, in addition to any other penalty imposed order the forfeiture of all the property which has been used for or derived from the commission of an offence. If such property cannot be forfeited or cannot be found, the court has power to assess the value of the property and the payment of the assessed value may be enforced in the same manner and subject to the same payment of a fine after conviction⁷⁹.

⁷⁷ Ibid Section 18(2)

⁷⁸ Ibid Section 20

⁷⁹ Section 29 of the Penal Code Chapter 87 of the laws of Zambia

CHAPTER FOUR

4. THE PROSECUTION OF CORRUPT PRACTICES AND THE PROTECTION OF THE RIGHTS TO PRIVACY AND PROPERTY

This chapter will discuss the prosecution of cases on corruption and the protection of the rights to privacy and property. The Anti Corruption Commission is the main body tasked to fight corruption in Zambia. One of the duties of the Commission is to receive and investigate complaints of alleged corruption and to prosecute offenders of the crime. Before any case can be prosecuted before the courts, the commission needs to obtain consent from the Director of Public Prosecutions (DPP). The ACC has received a lot of support to fight corruption with the coming to power of Dr Levy Mwanawasa as President. Owing to the increased political will to fight corruption, the ACC has been operating without political interference since 2002. The ACC can investigate any person where there is a reasonable ground that an offence has been committed. After investigations have been carried out and the person is found with a case to answer, unless he gives a reasonable explanation, he will be charged with having or having had under his control property reasonably suspected of having been corruptly acquired⁸⁰. The person will then have to explain in court how they acquired such property, or else he would be convicted for the same offence. A number of cases have been investigated, prosecuted and a few have been convicted. The ACC has also seized and forfeited a number of properties to the State. The Act provides for forfeiture to the State of any pecuniary resource, property, advantage, profit or gratification received in the commission of an offence. Once the property has been forfeited to the State, it becomes government

⁸⁰ Anti Corruption Commission Act No. 42 of 1996, Section 37

property. The following are some of the high profile cases investigated by the Commission;

4.1. CASE LAW

a) THE PEOPLE V GESHOM MUMBA

The case of Mr. Geshom Mumba, former Chief Executive at Development Bank of Zambia was convicted for abuse of office by the Lusaka Subordinate Court⁸¹. Mr. Mumba was convicted following investigations launched by the Anti Corruption Commission. Mr. Mumba was ordered to pay K1 million within seven days and was sentenced to nine months imprisonment suspended for twelve months.

b) THE PEOPLE V MAXWELL MWAMBA

The mayor of Luanshya, Maxwell Mwamba was arrested for allegedly stealing money from the local authority. He was alleged to have embezzled the Council out of millions of kwacha through falsification of imprest receipts. The invoices showed that Mr. Mwamba incurred a bill of K100, 000 for laundry charges when the motel where he stayed did not have laundry facilities. The mayor was said to have spent K 1million for all three trips, but instead presented a receipt of K14 million and he claimed to have spent from his own pocket.

c) THE PEOPLE V RICHARD SAKALA

Former State House Press Secretary in the Chiluba regime, Richard Sakala, pleaded not guilty before the Lusaka magistrate court to four counts of abuse of office⁸². In the first count, Sakala who was jointly charged with two others was accused of having abused his office when he was chairman of the Presidential Housing Initiative (PHI) by registering

⁸¹ Zambia Daily Mail, dated 13/02/02

⁸² Times of Zambia, dated 25th April 2002, Sata Arrested as ACC Nubes Richard Sakala, p.1

three motor vehicles in his name. In the second count, Sakala was accused of ignoring the tender procedures when he awarded a building contract to a Zimbabwean Construction Company. In the third and fourth counts, Sakala was accused of converting a government Ono Linear Editing Suite and a Betacam SP camera into personal property and abuse of office by diverting PHI money to pay for his associate's meals and lodging at Mulungushi Village Complex. Richard Sakala was convicted for five years.

4.2. THE TASK FORCE ON CORRUPTION

In order to ensure speedy but thorough investigations and successful prosecution, President Levy Mwanawasa set up a Task Force comprising officers from Drug Enforcement Commission (DEC), Anti- Corruption Commission (ACC), Zambia Police Service (ZPS) and Zambia Security Intelligence Service were appointed to probe alleged corruption and abuse of authority that was said to have taken place during the time of Chiluba's government. The DEC investigates cases of money laundering through the Money Laundering Act⁸³ and the Narcotic and Psychotropic Substances Cap 96 of the Laws of Zambia while the Office of the President Special Division's role is to provide intelligence back up to the investigating team. The Task Force was appointed with a specific mandate of prosecuting the suspected plunders and recovering the stolen national resources. The Task Force on Corruption has investigated a number of persons and has forfeited more than 150 properties to the State. The following are some of the real properties that have been recovered⁸⁴:

1. Stand No. F/401a/33 Lilayi- in the name of Buchizya Mseteka, valued at K600 million.

⁸³ Act No. 14 of 2001

⁸⁴ Source: Task Force Against Corruption Public Relations Officer

2. Stand No. 17071 Mongu Road, Light Industrial Area, Lusaka, (All Fresh Limited), belonging to former Director General Office of the President, Xavier Chungu valued at K730 million.
3. Stand No. F/401a/35 Lilayi Road, Lusaka, (Lusaka Trust and Corporate Services Limited, belonging to Xavier F. Chungu valued at K240 million.
4. Stand No. 515 Siavonga, (Zamdaell) not valued.
5. Stand No. 6955 Longacres, Lusaka, Barnett Development Corporation (connected to Presidential Housing Initiative cases and its former Chairperson Richard Sakala.
6. Stand No. 3585 Kabwe, Niseo Farms, belonging to Stella Chibanda, Former Permanent Secretary, Ministry of Finance, valued at K160 million.
7. Stand No. 377a/45/A/3/12 Reedbuck Road, Kabulonga, Lusaka, in the name of Vincent Malambo, valued at K460 million.

One of the first people to be under investigations by the Task Force was Mr. Xavier Chungu, who was the former Zambia Service Intelligence Service Director General. He was arrested by the Task Force in connection with the plunder of the national economy. He was charged with 19 counts of theft by public servant and abuse of authority of office involving public funds. The Task Force on corruption has seized money and property from the Zambia Security Services account.⁸⁵ The properties included tractors belonging to former Ben Mweene, former Permanent Secretary Stella Chibanda, former Executive Director of the Office of the President Yotham Zulu and ZSIS Director Xavier Chungu.

⁸⁵ Transparency International Zambia, State of Corruption Report 2002 by report editor F. Mutesa

4.3. CASE LAW

a) THE PEOPLE V SAMUEL MUSONDA

Another senior officer investigated was Samnel Musonda who was the former managing director of the state owned Zambia National Commercial Bank. During the period June 1998 to September 2001, he abused his position by paying out money that amounted to about US\$ 2.2 million from a suspense debtors account in order to obtain property, wealth, advantage or profit directly or indirectly contrary to sections 37(2)(a) and 41 of the Anti- Corruption Commission Act⁸⁶. On 10th October 2006, judgment was delivered and Mr. Musonda's house which had been bought using funds indirectly drawn from the suspense debtor's account was seized by the Task Force during investigations. The forfeiture process of his house which was attached to the case started on 11th April 2003. This property was advertised for forfeiture and it was eventually forfeited to the State when Mr. Musonda was found guilty⁸⁷. However Musonda contested and the house was not taken from him and it is still in his name⁸⁸.

b) THE PEOPLE v STELLA CHIBANDA, FAUSTIN KABWE AND XAVIER CHUUNGU

In August 2002, the Task Force arrested former Permanent Secretary in the Ministry of Finance and Economic Planning, Ms Stella Chibanda. She was charged with being in possession of property disproportionate to her present or past official emoluments. The property in question included cars, houses and farms⁸⁹.

⁸⁶ Act No. 42 of 1996

⁸⁷ The People v Samuel Musonda SS/99/2004

⁸⁸ Source: Task Force Public Relations Officer responsible for properties, Lusaka.

⁸⁹ Times of Zambia dated 27/08/02

Another prominent business man who was arrested by the Task Force on Corruption is Faustin Kabwe. Mr. Kabwe was arrested and detained immediately that he alighted from a plane on 29th June 2002. Mr. Kabwe was jointly charged with Mr. Xavier Chungu for allegedly receiving close to US\$ 6million public funds. They have all been held to have conspired to misappropriate from the Government under the Zamtropol Conspiracy.

The Task Force has seized most of these properties under the ACC Act⁹⁰. The Officers can make restrictions on the property whilst investigations are taking place⁹¹. Once a prima-facie case has been established, they use the provisions of Corrupt Disposal of Recovered Properties Regulations of the ACC⁹². The ACC Act also provides for instances when property can be forfeited if a person is convicted of a Corrupt Offence⁹³. The other Act which the Task Force uses is the Prohibition and Prevention of Money Laundering Act⁹⁴. They use this provision especially for forfeiting equipment and motor vehicles. The provisions under this section are such that the Drug Enforcement Commissioner applies to the court upon the expiration of six months for an order of forfeiture of the property. And if there is no claim within three months after publication in the Gazette, the court can proceed to make an order of forfeiture. If there is a claim to the property, by a person lawfully entitled to the property seized under the Act, the Commissioner may release the property to the claimant if there is no dispute as to ownership of the property and if it is not liable to forfeiture. The Task Force uses the provisions contained in the Narcotic Drugs and Psychotropic Substances Act⁹⁵. The ACC

⁹⁰ Act No. 42 of 1996

⁹¹ Section 24, Anti Corruption Commission Act No. 42 of 1996

⁹² The ACC (Disposal of Recovered Property) regulations statutory Instrument No.58 of 2004

⁹³ Supra Section 41

⁹⁴ Act No. 14 of 2001, Section 18

⁹⁵ CAP 96 of the Laws of Zambia

Act provides that any property which a drug enforcement officer or police officer reasonably suspects to be the subject of an offence shall be liable to seizure⁹⁶. The Act also provides for confiscation of other properties if the forfeited property has diminished in value⁹⁷. The Penal Code also provides for instances where property can be forfeited which has passed in connection with commission of an offence. The Act provides that where a person is convicted of an offence, the court can order the forfeiture of all property which has been used for or derived from the commission of an offence⁹⁸. The police officer may also without a warrant, stop, search and arrest any person found driving, or in possession, charge or control of a motor vehicle, where the officer believes on reasonable grounds that the vehicle is stolen⁹⁹. The preceding laws have been employed by the Task Force on Corruption to forfeit property. According to the mandate of the Task Force, all the property recovered becomes property of the State. Once the property has vested in the State, they write to Cabinet Office informing them that such property is now vested in the State. It is put to Cabinet Office to set the date of auction sale of the forfeited property.

When serving the documents for forfeiture and restriction notice, the Task Force Officer in Charge of Seizure of Property explains to the person being served on what the legal document is and if they are aggrieved, they can appeal to reverse the decision of the Director General of ACC¹⁰⁰. They are basically four instances when property can vest in State¹⁰¹:

⁹⁶ Section 31 and 33(1) Narcotic Drug and Psychotropic Substances Act, 1993

⁹⁷ Ibid, Section 11

⁹⁸ Penal Code CAP 87, Section 281a(3)

⁹⁹ Ibid, section 281B(1)

¹⁰⁰ Supra note 5

¹⁰¹ Sup58 of 2004ra Note 6

- a) If the person in possession of the property admits involvement in the alleged corrupt act and agrees to surrender such property to the Commission,
- b) If the rightful owner cannot be traced,
- c) If the rightful owner or the person in possession absconds,
- d) If the rightful owner who is the subject of an investigation in respect of an offence runs away from the country for the purpose of evading the consequences of such investigations or the trial of prosecution brought against him.

All property recovered by the Task Force is sold by open tender or auction and the proceeds applied to social sectors such as education and health. This is a Presidential directive¹⁰². It is contained in the statutory Instrument as a directive from the President.

The statutes that are used to seize property generally most require that:

- a) An application to the High Court is made,
- b) Notice by publication in the Gazette and one Daily Newspaper giving notice in which the property should be claimed.
- c) If no claim is made, property is forfeited and vested in the State.
- d) The claimant can challenge the decision to seize property by Law Enforcement Agency.

The seized property is maintained in its state and condition by the respective Law Enforcement Agency investigating until the case is disposed off. If the case is proved against the suspect or that the offence was generally committed, the property is forfeited. In Zambia the forfeited assets are vested in the state through the Ministry of Works and Supply.

¹⁰² Statutory Instrument No. 58 of 2004

4.6. THE RIGHTS TO PRIVACY AND PROPERTY

The rights to privacy and property are not only enshrined in the constitution, but are also found in statutes and judicial decisions. The Constitution provides that except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises. However, they are exceptions to the rights to privacy¹⁰³. The Criminal Procedure Code¹⁰⁴ provides that whenever a person is arrested the Officer who arrests him may search him and take all articles found on him except his clothes for safe keeping. The Task Force on Corruption has received some cases in which some people have tried to argue that their rights to privacy and property have been violated because they were not aware that such property received as a gift was as a result of a crime, but no court has agreed with them. Some of the cases are still in court. One such case is that of Xavier Chungu where one of his properties which was contested went against the State, and the State has appealed, the matter is still in court. The Task Force on Corruption agrees that all peoples' rights should be respected and the right to privacy and property is just one of them. However, they argue that proceeds of a crime cannot be enjoyed and just like any other rights, they are limitations. In cases where such recovered property is a house or flat and they are tenants living there, the Task Force Officers take time to explain to the tenant that such property has vested in the State and are told were to pay the rentals. The property will then be in government hands and the matter becomes an administrative issue such that all rentals shall belong to the State until the matter has been disposed off.

¹⁰³ Article 17(1) of the Constitution

¹⁰⁴ Section 22

CHAPTER FIVE

5. RECOMMENDATIONS AND CONCLUSIONS

The research paper undertook to identify the efforts made by the government to fight corruption and how the fight against corruption interferes with the rights to privacy and property of individuals. The government in its measures to fight corruption should not lead to violation of the rights to privacy and property. Anti- corruption measures should be compatible with human rights principles and should not lead to the violation of those accused of corruption. It is very important to develop an implementation program to fight corruption that ensures the protection of the rights to privacy and property. This paper analyzed the various legal instruments that are used to fight corruption in Zambia.

The institutions in the frontline in the fight against corruption, such as the Anti Corruption Commission need to be well funded, and its independence enhanced. The ACC should carry out its functions and duties independently without government interference. The ACC should not just concentrate on prosecution, but efforts at preventing corruption must also be intensified. Public education on the evils of corruption should be given special attention. The ACC should also work with the other law enforcement agencies such as the Police, Drug Enforcement Commission(DEC) and the Immigration Department This is because they are certain powers which the police have which the ACC can take advantage of for quicker investigations such as the power to search without a warrant. At times by the time the warrant is signed and issued, the suspect has been informed about it and may destroy the evidence.

5.1 THE ANTI- CORRUPTION COMMISSION ACT NO. 42 OF 1996

It has been observed that the Anti- Corruption Commission Act,¹⁰⁵ in its efforts to trace proceeds of corruption gives powers to investigations officers to investigate anyone whom they reasonably believe to have abused or misused his office to obtain property or profit directly or indirectly for himself. The officer should not just base his investigations on reasonableness of his judgment, but must have concrete evidence that the person abused or misused his office to obtain the property in issue. The officer must be able to connect the property to the person and also state when the property was acquired. One of the most successful ways to produce evidence against corrupt public officials is to conduct financial investigations to prove that they spend or possess assets beyond their incomes. This would help to produce evidence and can identify those illegal assets that might later be confiscated. It is also noted that suspects are unlikely to place the money which they receive corruptly into their bank accounts and instead may transform the proceeds into other forms of property¹⁰⁶. Therefore, financial investigations should also concentrate on the life styles and expenditures and property of the suspected persons. It would also be helpful during financial investigations to compare the amounts of money deposited in the bank accounts of suspects with deposits from previous years. In order to be effective, financial investigations should be extended to the suspected persons' family members and those living in the same house hold since they are often used as conduits of corruption proceeds. The officers should also not inform the suspects about the investigation during its early stage. When a suspect has knowledge of an investigation

¹⁰⁵ No. 42 of 1996

¹⁰⁶ United Nations Manual on Anti- Corruption Policy , Vienna 2001

prior to the time the officer secures sufficient evidence, the suspects might destroy evidence and warn other targeted persons to do the same.

The ACC Act further gives officers powers to search any premises at any time if he has reason to suspect that property corruptly acquired has been placed, deposited or concealed. The Act has a weakness on this provision in that it does not state the time at which these searches should be done. It is not reasonable for officers to go and search some ones home at around 03:00 or 04:00. The constitution respects the right to privacy.

It has also been observed that the ACC gives powers to officers to interrogate any one and obtain a statement from the suspects. Before interviewing the individuals concerned the officers do not tell them their rights. The judges rules¹⁰⁷ provide that an accused person has a right to remain silent and the right to be represented by a lawyer if they so wish.

The other observation is that the cases at ACC take long to be completed once they go to court. A time frame must be placed on how long cases must take. The cases should be concluded within a year. During the time that such a case is in court, the accused person's liberty is restricted. He cannot enjoy life freely and from time to time he has to attend court. And if the officers confiscated and seized certain properties, they become damaged by the time the cases are concluded. The vehicle seized may loose parts and is just handed over to the person acquitted. There should be a better way of securing these properties so that they are not vandalized.

¹⁰⁷ These are rules of practice fro the guidance of the law enforcement officers, setting out the kind of conduct that could cause a judge to exercise discretion to exclude evidence in the interests of a fair trial.

The ACC Act does not protect whistle blowers. Legislation protecting whistle blowers who disclose information about improper, government and private sector misconduct should be enacted. This will guarantee their safety and more people will be willing to report cases of corruption without fear of being victimized. It is also important to protect the rights and reputations of persons against frivolous or malicious allegations. A whistle blower law should contain rules providing for compensation or reinstatement in case a whistleblower suffers victimization for disclosing the information¹⁰⁸. In addition, people who know about instances of corruption, but are reluctant to submit a complaint that would reveal their identity should be encouraged to come forward. Anonymous complainant should by all means be treated with utmost confidentiality. This is necessary to protect the reputation of allegedly corrupt individuals. Whistleblowers are also addressed in the African Union Convention against Corruption, and it requires that signatories adopt legislative and other measures to protect informants and witnesses in corruption and related offences, including protection of their identities and to adopt measures that ensure citizens report instances of corruption without fear of reprisals. Also witnesses must be protected against threats. The identity of the witnesses must be protected as much as possible when the case is still active and if possible if they are funds, to accommodate them for some time until the case is concluded.

The operations of the ACC must be strengthened in that the requirement for the commission to obtain consent from the Director of Public Prosecutions before prosecuting a matter must be done away with. This normally causes unnecessary delays in commencement of cases.

¹⁰⁸ Supra, note 2

5.2. GOVERNMENT GENERAL ORDERS

Under the General Orders which apply to the Civil Service, public officers are forbidden to give or receive valuable presents or goods except with the specific approval of the responsible officer of a ministry concerned in respect of an officer leaving service. This provision is not strictly followed. Most civil servants receive valuable presents which they do not disclose to their superiors. Gifts received are supposed to be recorded in a register, but this is not followed.

5.3 PROHIBITION AND PREVENTION OF MONEY LAUNDERING ACT

The Prohibition and Prevention of Money Laundering Act¹⁰⁹ gives powers to authorized officers to seize property suspected of having been derived or acquired from money laundering. If the property seized is not claimed or if there is no prosecution, such property is liable to be forfeited to the State. An asset forfeiture unit should be established under the prohibition and prosecution of money laundering Act. This unit should be responsible for all the forfeited property and there must be a register of all forfeited property and the officer in charge must be able to account for it if need arises.

5.4 THE PENAL CODE CAP 87

The Penal Code should include an offence of corruption which is applicable to all persons, not only public officials. It should also include an offence of unexplained wealth in accordance with the international instruments to fight corruption such as the United Nations Convention against Corruption. Also the offence of corruption should have stiffer punishment so that people are discouraged from committing such crimes.

¹⁰⁹ Chapter 16 of the Laws of Zambia

5.5 PARLIAMENTARY AND MINISTERIAL CODE OF CONDUCT

The disclosure of assets is another effective measure to enhance accountability and integrity of public servants. Disclosure of assets can also assist in the investigation of corruption allegations and may provide evidence for subsequent prosecution. The Parliamentary and Ministerial Code of Conduct for Ministers and Deputy Ministers should be enforced by creating a system of enforcing it. The current law which states that Ministers who do not disclose their interests in Government contracts is not enforced and the Ministers who are get involved in government contracts still continue to serve as Members of Parliament. The Ministers are only investigated after they leave office instead of having been dealt with at the time they were serving as Ministers. Apart from this, public officials, and private sector employees should have codes of conduct. This should be implemented to establish standards of behavior consistent with organizational and ethical principles of justice, integrity and loyalty towards the organization, diligence, transparency, accountability and responsible use of the organization's resources. Any member of the organization who becomes aware of allegations of unethical, improper, criminal or unprofessional conduct by officials should be obliged to immediately take adequate steps to report to the appropriate body. Employees should also receive regular training on issues of integrity.

The law enforcement officers must also be trained so that they are able to understand the importance of respecting human rights as they are carrying out their duties. This should be made part of their training. And they should be able to explain to affected people that their rights to privacy and property are curtailed in the public interest if they are required to make a declaration of income and assets. Also, at every stage of the investigations, the

officers must explain to the suspects their rights and they must put it on record that their rights were read to them and the subsequent response. This is to avoid the situation where suspects complain in court that their rights were violated. The right to privacy is fundamental in any society. Even during search and seizure of property, the law enforcement officers must explain to the suspects the purpose of the search and after the search, suspects must always sign a form or indicate how the search was conducted, how many people were conducting the search and if it was done, how long it took. The owner or occupant of the premises being searched has the right to be present during the search. Also there should be reasonable grounds for conducting the search otherwise the search will be illegal. The officers should also obtain a search warrant from a magistrate before proceeding with the search. The warrant should only be issued out when the officer swears on oath that what he is looking for may be in the named place, building or vessel.

5.6. INTERNATIONAL INSTRUMENTS ON CORRUPTION

Asset forfeiture and recovery of proceeds of corruption placed in foreign nations must be brought back to the home country. The Corruption may have been committed by with a foreign investor, and the money might be located in a country other than that where the bribe is paid, or the bribe might be transferred directly into the recipient's foreign bank account. If such a situation occurs, there should be mutual co-operation and understanding between countries. The investigators and prosecutors must also be trained on mutual legal assistance and exchange of information procedures at international level. UNCAC has a provision of asset recovery in a foreign country and all parties to this convention should abide it by providing assistance in recovery of assets.

5.7. TASK FORCE ON CORRUPTION

The Task Force was created without legislative backing for its composition. It is an illegal institution which is answerable only to the President. There is need to legalize the Task Force. The Task Force uses different laws according to the situation at hand. The ACC Act, Prohibition of Money Laundering Act, or the Penal Code. The Task Force does not have clear guidelines. Its operations must however conform with the laws of the country. They should not misuse their powers to abuse people. The officers attached there should also be trained in human rights issues. The law creating it should provide for its independence and the methods by which it is accountable to the community. The performance of the Task Force should also be enhanced. The Task Force arrests a lot of people yet when the cases go to court, they take too long to complete. Most of their cases have ended up in acquittals. The investigations of the Task Force have been selective. They have concentrated on investigating most former Ministers in the Chiluba government. They should also investigate and prosecute top public officials in the current administration. The Task Force has seized a lot of property from suspects and those convicted. A record of these assets must be made available to Cabinet Office, so that interested people can have access to this information.

5.8. CONCLUSION

There is no single factor which causes corruption. Any effort at corruption reduction must take into consideration that they are a variety of factors that endanger corruption. Corruption cannot be eliminated, but can be reduced. The belief that corruption can be eradicated quickly and permanently leads to false hopes and expectations. It must be understood that curbing corruption requires adequate time, resources, dedication and

integrity. Corruption has negative effects upon society. It undermines the efficient allocation of financial resources for economic development and alters the composition of public expenditure. A number of mechanisms exist to fight corruption at various levels within the private and public sectors. There are also international instruments, in the form of declarations, conventions and codes to promote transnational co-operation and delineate prohibited and punishable offences. Countries have agreed to co-operate in the fight against corruption, including prevention and investigation activities, and the prosecution of offenders. The conventions also bind countries to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court and to extradite offenders. Corruption and the laundering of corruption proceeds are addressed by a variety of international instruments. Successful implementation of these instruments requires strong collaboration between and amongst the member states. If there is no political will such legal instruments are not going to help countries to prevent and control corruption as well as to prevent the illegal transfer of corruption proceeds and the repatriation of such proceeds. There is also at the international and national levels laws to criminalize the possession of unexplained wealth by introducing offences that penalize any public servants who are or have been maintaining a standard of living or holding pecuniary resources or property that are significantly disproportionate to their present or past income and who are unable to produce a satisfactory explanation for this. Several norms and standards have been introduced at the international level. The fight against corruption must involve every one and the instrument used to combat it must be compatible with human rights. These rights must only be violated if they are exceptional circumstances for justice to be done.

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Anti- Corruption Commission

Task Force on Corruption

Transparency International Zambia Office