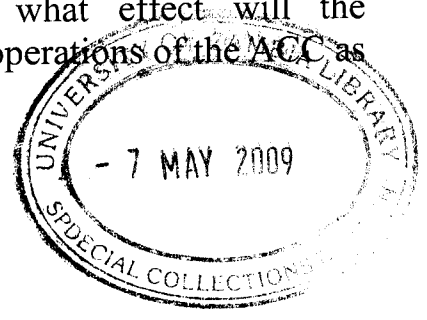


04/12/2009

The proposed amendments in the ACC Bill: what effect will the amendments have on the ACC Act and the way the operations of the ACC as an institution are undertaken.



By

Laura Inonge Malao (25094491)

A directed research essay submitted to the School of Law of the University of Zambia in partial fulfillment of the requirement for the award of the Degree of Bachelor of Laws (LLB)

**School of Law
University of Zambia
Lusaka
2009**

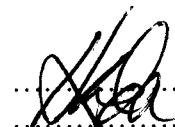
UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

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The proposed amendments in the ACC Bill; what effect will the amendments have on the ACC ACT and the way the operations of the ACC as an institution are undertaken.

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements pertaining to format as laid down in the regulations governing directed research.


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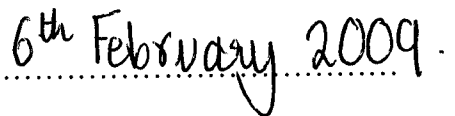
23rd Feb. 2009.
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DECLARATION

I, **LAURA INONGE MALAO**, do hereby declare that this research paper represents my own work, and where other people's work has been used, due acknowledgements have been made. This paper has not been submitted for any academic awards to the best of my knowledge.



.....
LAURA INONGE MALAO



.....
DATE

Abstract

Nobody needs to be lectured on the evils of corruption. Societies that have massive corruption suffer misery in a thousand ways. The assumption that "free" markets and non-intervention are the sole remedies against corruption is simply wrong. Each country produces its own type of corruption and no system is corrupt free. This also entails that each country should have laws that are best suited to combat corruption in the best way possible.

Corruption is a universal problem and is fast growing in many countries today. The definitions of corruption vary from one jurisdiction to another but all bear the same characteristics. Some of these are giving money or some valuables in return for a favour, abuse of one's official position for some benefit or some gain or benefit. Corruption can also be an act or practice marked by dishonesty and abuse of one's position and power, misuse of public office for personal or selfish gain, misconduct and maladministration. A general definition of corruption can be given as the giving of money or any thing valuable in return for a favor. Corruption also involves abusing one's official position for personal gain

This work will endeavor to ascertain whether the proposed ACC Bill will significantly revise the current Act and whether it will be more effective than the current Act. Its efficacy in helping to fight the scourge of corruption will also be determined. It is stated that the Corrupt Practices Act had far reaching provisions than the current ACC Act; the objective of this paper is to compare the present Act and the Proposed Bill to find out what effect the proposed Bill will have on the ACC Act, the way the ACC will be able to undertake its investigations, whether the new provisions will make the operations of the commission easier.

The paper is divided into five chapters. Chapter one has dealt with the introduction and it gives background information on the research subject. Chapter two will look at the new provisions in the ACC Bill that are not in the current ACC Act. Chapter three will look at how the existing provisions of the current ACC Act have been amended by the provisions in the ACC Bill. Chapter four will contain the analysis of the ACC Bill will have on the ACC Act, the way investigations are carried out by the commission and the effect that the new provisions will have on the general operations of the commission. Chapter five will give recommendations and a conclusion based on the findings.

An approach based on why the current Bill has been put into place to supersede the current ACC Act was taken. This entailed an extensive literature review of authentic knowledge undertaken prior to the passing of the Bill and also an analysis of the Bill in comparison with the current ACC Act. Literature review of whatever was published and which was relevant to this research topic was essential to deepen the framework of this paper. Furthermore some interviews were carried out in order to get views from the officials who work with the ACC and other stakeholders in order to ascertain what effect the proposed Bill will have on the operations of the ACC as an institution, on the ACC Act and on the general public.

DEDICATIONS

I would like to dedicate this work to my late father Silumesi Malao (12th February 1958-5th may 2008). Dad thank you very much for being the best father that I could ever have and for just always being there for me and telling me that education in one of the most important things in life and that hard work never kills. Words can not express all that I have to say. May your soul rest in eternal peace. Lots of love.

To my mother Rita .R. Namukoko, mum thank you for always trying to do the best for me and also for your Ernest encouragement and also for all the love that you show me.

To my brother and sisters, Pumulo Malao, Brian.M .Malao, Victoria Malao, Spalo Malao, Wamumbuwa Malao and Sitali Malao. You are the best family that anyone could possibly have and I thank God for all of you each and everyday.

God richly bless you.

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Special thanks go to my supervisor Judge Kabaso Chanda for supervising me in this work.

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I would also like to thank all my classmates for being such good and loving people. Lastly I would like to thank all those people who helped me in any way and have not been mentioned. May the good Lord bless you.

LIST OF ABBREVIATIONS

ACC	Anti-Corruption-commission
ACCES	Anti-Corruption Commission Enhanced Support
AU	African Union
APNAC	African Parliamentarians Network against Corruption
BAZ	Bankers Association of Zambia
CMZ	Chamber of Mines in Zambia
CPC	Criminal Procedure Code
CSO'S	Civil Society Organizations
DPP	Director of Public Prosecutions
DFID	Development for international Development
DEC	Drug Enforcement Commission
NCC	National Constitution Committee
NGBS	National Governance Based Survey
SACCORD	Southern Africa Centre for Conflict Resolution
SADC	Southern Africa Development Commission
TI	Transparency International
TCZ	Tourism Council of Zambia
TIZ	Transparency International Zambia
UNCC	United Nations Convention against Corruption
I.D	Identity
ZAM	Zambia Association of Manufacturers

ZAWA	Zambia Wildlife Authority
ZBF	Zambia Business Forum
ZCMSBA	Zambia Chamber for Medium and Small Business Associations
ZNFU	Zambia National Farmers Union
ZNS	Zambia National Service
ZNTB	Zambia National Tender Board
ZPS	Zambia Police Service
ZRA	Zambia Revenue Authority
ZSIS	Zambia Security Intelligence Services

DOMESTIC AND INTERNATIONAL LEGISLATION

1. criminal Procedure Code Cap 88
2. Penal Code Cap 47
3. Constitution of Zambia Cap 1
4. extradition Act Cap 98
5. Mutual Assistance in Criminal Matters Cap 94
6. Prohibition and Prevention of Money Laundering Act No. 4 of 2001
7. Corrupt Practices Act 1980
8. Anti-Corruption Commission Act, No 42 of 1996
9. Electoral Act, Cap
10. Kenyan Anti-Corruption and Economic Crimes, 2003
11. Nigeria Corrupt Practices Act, 2000
12. ACC Bill, 2005.

INTERNATIONAL CONVENTIONS AND PROTOCOLS

1. SADC Protocol against corruption
2. United Nations Convention on Corruption, 2003
3. African Convention Against Corruption, 2003

TABLE OF CASES

1. R v Kilworth 1981
2. The people v Mwenya 1973 Zambia Reports.
3. The People v Lieutenant General Funjika 2008 (unreported)
4. the People v Mushinge 1968 ZR 85
5. The People v Mukubesa 1976 ZR 78
6. Anti Corruption Commission V Xavier Franklin Chungu 2008 S.C.Z Appeal number 169/2006

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CHAPTER ONE

1. INTRODUCTION AND BACKGROUND

There is no single universally accepted definition of corruption. According to Transparency International (TI) source book; corruption involves behavior 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 public power entrusted to them.¹

The 19th Conference of European Ministers of Justice defined corruption as bribery and any other behavior in relation to persons entrusted with responsibility in the public or private sector which violates their duties that follow from their status as public officers, private employees, independent contractors or other relationship of that kind and is aimed at obtaining undue advantage of any kind for themselves or for others.² According to the Anti Corruption Act, Corruption is defined as the

soliciting, accepting, giving, promising or offering of gratification by way of a bribe or other personal advantage or gratification or the misuse or abuse of a public office for private advantage or benefit.³

The World Bank refers to corruption as the single greatest obstacle to economic and social development and bribery alone is the responsible for the global economic losses. Other studies have shown that corruption is the main reason for the common man not being able to receive the benefits of development. The tenets of good governance are many and varied but one of the most fundamental is the absence of corruption. Most African states have adopted various strategies which basically involve prosecution and prevention. The Anti Corruption Commission has adopted a three pronged attack which includes

1. Transparency International (TI) source book, National Integrity Systems, Transparency International Berlin(1997) PG 1

2. Conference organized by the council of Europe, the multidisciplinary group on corruption 14th June 1994, www.uncjin.org

3. Section 3 of the ACC Act no. 42 of 1996.

remain unsuccessful on account of static legislation and strategies employed by law enforcement Agencies. These strategies are stagnant and do not respond to the dynamic nature of crime.⁵ Regrettably this seems to be the position in Zambia's fight against corruption. This stagnation is manifested by the legislatures' unwillingness to enact relevant asset disclosure and freedom of information legislation which is the key to successful suppression of the mischief on which corruption thrives. The present day mischief which the Commission has to suppress is the lack of an effective asset forfeiture legislation to squarely address the dynamic nature of corruption.

1.1 TRADITIONAL APPROACH IN THE FIGHT AGAINST CORRUPTION VISA VI

RATIONALE OF RESEARCH

In view of the ineffective strategies, this research seeks to establish the root cause of the problem and will attempt to provide solutions which take into account and keeps pace with the ever mutating forms of corruption in line with technological advancements.

According to Gilton Chinuala⁶, corruption is an invisible thief and also an invisible target .It takes place between two consenting parties and its effects are normally difficult to see until after the deed is long done. Since corruption has been identified as a moving target it simply means that for any strategy to be effective it must keep pace with the dynamic nature of crime.

The problem which the research has identified therefore is that of ineffectiveness of the traditional method of tackling corruption .The traditional approach and pattern of fighting corruption has a very narrow and limited dimension which is having very little impact .Despite the numerous convictions the ACC has recorded , this has not assisted in reducing the fight for the simple reason that while criminals are serving in prison , their proceeds of corruption in form of property remain intact from seizure .

⁵ Cited in Constance Kunaka, the SADC Protocol against corruption, SAHRIT HARARE ZIMBABWE, 2002 pg 38

⁶ ibid p19

While prosecution of offenders is on the increase, the criminal establishment of criminals has remained intact. These establishments form the core of criminal activities which continue to thrive on illegalities even in the absence of the architects. In addressing this concern this research explores the various avenues to identifying an integrated and pragmatic approach of developing effective asset forfeiture strategies which will keep pace with the mutating nature of corruption. Secondly, in cases where the ACC closes a property related case on account of insufficient criminal evidence, there is no deliberate effort to have such property committed for possible forfeiture through civil litigation.

The rationale of the study is to recommend more effective methods of fighting corruption and suppress the deficiencies associated with the current form of asset forfeiture legislation which currently applies to the Anti Corruption Commission Act as an incidence and of subordinate or subsidiary importance in the overall objective of the Act. Its efficacy is restricted to persons who have either not lodged a claim on property, have been convicted or have absconded from justice.⁷ Legislation thus lacks in using asset forfeiture as a deliberate and strategic means, measure or tool to fight corruption in such a manner that in any given property related inquiry, the thrust of such should be biased towards seizure and subsequent forfeiture of illegally obtained property through civil litigation which should be pursued alongside a criminal inquiry. This will ensure that in the event that a criminal is not convicted on criminal charges, such property on a balance of probability should be liable to forfeiture as an alternative to a conviction. Such legislation will undoubtedly suppress the mischief associated with the traditional approach of effecting forfeitures on the exceptional basis of convictions, absconding or non claims.

⁷ Statutory instrument number 58 of 2004 as read with corrupt practices (disposal of recovered property) regulations 1986

The objectives of this study are to examine how the fight against corruption has been conducted in Zambia since the inception of the Anti Corruption Commission. The study will further critically discuss how asset forfeiture has been used in the fight against corruption and the extent of its success. It will also highlight the deficiencies in the traditional strategies and provide knowledge on how the corruption fight may be improved. It will also determine whether there is political will for legislative reforms that foster the enactment of effective asset forfeiture legislation. Most importantly the study will make recommendations based on the findings.

The research was conducted by studying and analyzing various statutes, and materials that relate to asset forfeiture International instruments, foreign legislation relevant to the research were also considered. In the field research several institutions were visited such as the Drug Enforcement Commission , Anti corruption Commission ,Task Force on Corruption , DPPs Chambers and Transparency International where materials to guide the research and interviews with relevant functionaries were conducted . Through the internet, consultation was conducted with an asset forfeiture expert. Websites of particular relevance were also visited.

The justification for the research lies in the limited research associated with the law of asset forfeiture in Zambia. A review of existing works on the use of asset forfeiture as an effective tool in the fight against corruption reveals that comments on strategies of fighting crime are confined to prosecution, education, and prevention. The National Governance Baseline report aptly captures the state of corruption in Zambia. According to the survey findings, a cross section of the Zambian people acknowledges the existence of corruption and its impact on the Government delivery of services.⁸ However the report does not address the critical issue of asset forfeiture as an essential tool in the fight

⁸ Zambia National Governance survey report ,UNZA Dept of political and administrative studies ,August 2004 ,p4

against corruption. It only focuses on the causes of corruption and how the Zambia population perceives corruption in Government departments.

Furthermore the report on Government machinery for accountability⁹ recognizes political will and effective legislation as essential for the success of any anti corruption strategy. However the report focuses on an overview survey of existing laws and institutional framework in Zambia for combating corruption but does not give a critical analysis of using asset forfeiture as an effective tool in sustainable fight against corruption. In another study undertaken by the UNDP ¹⁰ it has been observed that corruption is a failure of institutions in particular those in charge of investigations, prosecutions and enforcement. Although this could to some extent be true, the main issue is lack of a well thought through anti corruption strategy which responds squarely to the dynamic nature of corruption as a moving target.

Matenga has further argued and rightly observed that in spite of the long time anti corruption measures that have been put in place in Zambia, these efforts have not been successful due to lack of strategy on how to fight corruption in Zambia. The focus of Matenga's¹¹ paper is a review of Zambia's anti corruption efforts. The paper examines some factors that account for failure of the anti corruption fight which inter alia includes weak institutional framework, defective legislation, the bureaucratic institutional framework and general weaknesses in forfeiture as a tool in the fight against corruption.

⁹ Published by Transparency International Zambia January 2003 ,p.27

¹⁰ Institutional arrangements to combat corruption, A comparative study, Keen Publishing house 9 Thailand) Co. Ltd, 2005, p27.

¹¹ C.R Matenga, Corruption; is it endemic in Zambia .Paper presented at the citizens forum discussion in Lusaka Zambia 28 Th February 1998 p15 -16 Friedrich Ebert Stiftung.

Furthermore, Nchekeleko an Afronet publication on corruption in Zambia¹² gives an analysis and overview of corruption in Zambia by looking at corruption in the political system, business places and corruption in the electoral system. Nchekeleko does not address itself to the subject of the study in issue. Nevertheless the authors concede that corruption is a disease that has acquired pandemic proportions especially in poor developing countries like Zambia. While recognizing the grave effects of corruption, the authors call for an emergency response .As to what constitutes an emergency response, this is not defined nor do they attempt to clarify and qualify the call for concerted efforts needed to effectively deal with corruption. The reform study report of 2003¹³ has also observed that waging successful fight against corruption, among other things requires a citizenry that understands and has knowledge about what corruption means, the various ways corruption manifests itself the institutions charged with the to deal with corruption .Although the study chronicles the peoples understanding of corruption in Zambia, it does not delve deep in critically examining the tools that are essential in fighting corruption.

In view of these inadequacies ,there is a growing trend by commonwealth countries in general to embrace international instruments which admittedly , encompass very constructive insight on what direction state members should take to make their fight more meaningful and sustainable. Although most SADCC countries have put in place their own anti corruption legal framework and have adopted various investigative tools which are used within the region, these fall short the provisions of the international instruments. In recognizing that corruption is exceedingly difficult to investigate and prove and offences of such nature take place in great secrecy and at times without witnesses, there is a growing trend to align legislative provisions to international instruments. This trend undoubtedly takes

¹² This is a publication be Afronet on corruption in Zambia, Afronet, Lusaka 2002, p.96.

¹³ Study undertaken by Afronet in 2003 entitled Anti Corruption Commission Act reform study report.

into account the fact that the traditional methods of fighting corruption are not only ineffective but do not take into account the fact that corruption is a shifty or moving target which can only be addressed by pragmatic measures which must respond to its dynamic nature.

The instruments emphasize that key to the existence of vibrant asset forfeiture legislation is the existence of political will and support legislation. The importance of support legislation such as disclosure laws, whistle blower protection legislation, strengthening of the Mutual legal assistance laws cannot be overemphasized. This relates specifically to weak asset disclosure laws which do not compel high risk sectors to disclose the nature of assets owned and the source of the funds in support of the acquisition.¹⁴ The impediment in current legislation is that although disclosure law exists, they are not enforceable in that none of the law enforcement organs are vested with powers to institute penal sanctions against offenders.¹⁵ In noting the non use of asset forfeiture as a deliberate strategy to fight corruption, the Asian Pacific Group/Financial Action Task force (APG – FATF) has endorsed the permanent deprivation of illegally obtained property but also attributed the lack of interest in research as a contributing factor in failure to develop effective systems. The strategic plan 2004-2008 of the anti Corruption Commission admit that part of failure of the commission is attributed to lack of asset forfeiture laws. This study therefore seeks to critically examine how asset forfeiture can be used as an effective and sustainable tool against corruption.

¹⁴ Otieno G, Lolojih P. 2007. Harmonization of initiatives to prevent corruption in Zambia - the way forward on anti-corruption. Anti-Corruption Commission, Zambia.p19

¹⁵ Chanda A.W , Position paper on disclosure laws in Zambia ,Transparency International , Zambia 2005 ,p.7

CHAPTER TWO

2. AN OVERVIEW OF THE BACKGROUND TO THE USE OF ASSET FORFEITURE IN THE FIGHT AGAINST CORRUPTION

2.1 THE CORRUPT PRACTICES ACT NO 14 OF 1980 AND THE LEADERSHIP CODE

Prior to the enactment of the Corrupt Practices Act of 1980, very little value was placed on the need to set up a formal structure with a specific mandate to fight corruption. Cases relating to corruption, abuse of office and money laundering were being handled by the Police Service under the Penal Code¹⁶ and the Prevention of Corruption Act, 1916,¹⁷ of the United Kingdom. Hitherto to Government's explicit effort to create the Anti Corruption Commission through an Act of Parliament, cases of corruption were not prominently considered nor did they constitute a priority and were hence treated like any other petty offence. The context and scope of corruption concerns was only limited to the public sector and did not extend to the private sector. The other serious limitation is that Legislation did not cover corruption in tender procedures; declaration of interest, voting in meetings. The fight against corruption was hence given subordinate importance. In attempting to justify this position, Matenga¹⁸ argues that in the first Republic, the existence of the Leadership Code acted as a code of conduct which required members of Government to exhibit the highest caliber of ethical and moral conduct. The importance of the leadership code is evidenced by the fact that it was codified in the Republican Constitution¹⁹. The Leadership Code was couched in such terms as to regulate conduct of public officials who by definition included Cabinet Ministers,

¹⁶ CAP 146 of the laws of Zambia

¹⁷ The Act applied by virtue of the British Acts Extension Act. It was repealed at the time the corrupt practices Act was enacted.

¹⁸ C.R Matenga; Corruption Is it endemic in Zambia, Paper presented at the Citizen's forum discussion in Lusaka 1998.

¹⁹ The Constitution of 1973, Part IV

Members of Central Committee, Statutory Corporations, Parastatals and any Commission established by law²⁰. The Code was strictly enforced and all public bodies who were amenable to its superintendence and were expected to yield strictly to its provision by demonstrating exemplary behavior during the tenure of their office. The Code also forbade leaders from owning real property outside Zambia or owning more than one piece of land in Zambia and engaging in productive businesses or earning extra money whilst in office. This measure was primarily and specifically instituted to prevent public officials from engaging in corrupt activities and acquiring properties corruptly. Any departure from its enforcement attracted punitive measures in a bid to keep public officials in check.

However, due to the narrow and non effective approach adopted by Government, incidents of corruption were growing disproportionately to the capacity to contain it. The notable creation of a mischief was manifested in the increase of private sector corruption which was fostered by the absence of a body with a formal structure of specialized expertise, mechanism and specific mandate to fight corruption. By and large Police incapacity to investigate cases of corruption was one of the main factors which finally prompted Government to pass a bill in Parliament that would seek to create the Anti Corruption Commission²¹. This led to the enactment of the Corrupt Practices Act²² and a body was set up with a specific mandate to investigate and prosecute offences of corruption. One of the notable changes was that the definition of corruption was broadened to include the private sector. This was however restricted to corruption cases only as cases of abuse of authority of office were restricted to public bodies only. The Corrupt Practices Act provided for the formation of the Anti corruption

²⁰ Leadership Code first schedule of the constitution of 1973.

²¹ Although it was envisaged that the commission would be autonomous, its operations were subject to the directives of the President

²² Corrupt practices Act Number 14 of 1980

Commission in 1982 and it repealed the provisions of the Penal Code on corruption offences. The effect of the applicability of the Prevention of Corruption Act also ceased. The thrust of the Act was on investigations, prosecutions and education. The Act also gave powers to the Commissioners to authorize any officer of the commission to investigate, carry out bank searches, and obtain documents or articles as may be required for evidential purposes²³. The Act further stipulated that the ACC shall be a Government department under the control and supervision of the President and further that the President may on such terms and conditions as he thinks fit appoint a Commissioner who would be responsible for the administration of the Commission, subject to any specific general directions of the President.²⁴

The Act further had provisions which related to the promulgation of legislation for the effective carrying out of Commission duties. The Act provided that the Commissioner subject to any specific or general directions of the President, by Statutory instrument, make regulations generally for the effective carrying out of the provisions of the Act under specified circumstances²⁵

Regulations 63 (1) and (2) empowered the Commissioner, under the directive of the President to make regulations generally for the effective carrying out of the provisions of the Act which regulations may include.....the disposal of recovered gratification and gifts²⁶. The obvious weakness of the Act was its lack of provision for a strong asset forfeiture regime as a deliberate tool to fight corruption. The creation of such legislation was subject to the limited directives of the President which basically gave him wide and subjectively discretionary powers which were subject to abuse. During the entire subsistence of the Act, the President never promulgated any statutory instrument to specifically provide for the use of asset forfeiture as a

²³ Ibid section 11

²⁴ Ibid section 5(2)

²⁵ Regulation 63 of the corrupt practices Act.

²⁶ Ibid regulation 63 (2)

deliberate strategy to widen the scope of mandate in the fight against corruption.²⁷ However, in 1986, the only regulations which were promulgated in connection with asset forfeiture are the Disposal of recovered property regulations under statutory Instrument Number 194 of 1986. The circumstances under which property would vest in the state was only limited to circumstances where recovered property which was subject of investigations was recovered and was to be forfeited if unclaimed within 90 days of advertising, a person could not be located and if the property is subjected to forfeiture by virtue of been abandoned.²⁸

2.2 ASSET FORFEITURE LEGISLATIVE AND INSTITUTIONAL STRUCTURE DURING THE

SECOND REPUBLIC

In 1991, when the Movement for Multi Party (MMD) took over, the Leadership Code was scrapped and the leaders were free to own or run businesses whilst in office and also earn an extra income in whatever manner they could. All restrictions of property accumulation were removed and this brought about accumulation of wealth which a majority of leaders could not satisfactorily account for and in many cases the value of the wealth was disproportionate to the legitimate incomes of most public functionaries.²⁹

Due to the decline in political will in the fight against corruption, most high profile politicians were perceived to be insulated from prosecution. Although a lot of politicians were investigated for corruption related offences which predominantly included possession of unexplained property

²⁷ This position was confirmed in the discussion I had with Mr. Nixon Banda the former Director General Anti Corruption commission.

²⁸ Statutory instrument number 194 of 1996

²⁹ Chanda Alfred position paper on disclosure laws in Zambia, p

suspected to have been corruptly acquired, most of the cases were not prosecuted as evidenced by a classic example of the high profile investigations instituted against Michael Chilufya Sata the then Local Government Minister who was under investigations for abuse of authority of office.

The allegations related to abused of office in the manner he awarded a contract for the construction of some council houses .Mr. Sata allegedly benefited from the transaction through bribes which were invested in the acquisition of properties. The Anti Corruption Commission recommended prosecution of Mr. Sata after establishing a prima facie case but the then Attorney General Mr. Ali Hamir directed the Director of Public Prosecutions not to prosecute Mr. Sata on public interest considerations.³⁰

Furthermore the case relating to the alleged corrupt acquisition of Manchinchi bay Lodge by the late Ben Mwiinga, then Minister of Local Government and Housing, generated controversy after the then President ordered the Anti-Corruption Commission to terminate the inquiry although evidence was glaringly clear to the effect that the properties were acquired from proceeds of crime.

Due to mounting pressure largely from the donor community which was desirous in seeing an autonomous body ,the Corrupt Practices Act was , in 1996 repealed and replaced by the Anti Corruption Commission Act number 42 of 1996 which established an autonomous body corporate with perpetual succession and a common seal ,capable of suing and being sued in its corporate name.

³¹The ACC was created as an autonomous body which was not subject to the control of external bodies. The Act however did not have any provision which provided for the use of asset forfeiture as a tool in the fight against corruption and the Act was interpreted together with the provisions of the statutory instrument number 58 of 2004 regulations which provided for forfeiture of property in limited circumstances such as, absconding of the suspect with view of evading justice, admission of guilt and voluntary surrender of property, failure to claim property within a prescribed period.³² Due to

³⁰ The post Newspaper ,Friday 2 1994 , “Government shields corrupt leaders says ACC”

³¹ Anti corruption Commission Act Number 42 of 1996 section 4(1)

³²statutory instrument number 58 of 2004

pressure from the donor community, the Government further enacted legislation which would promote transparency and accountability in inter alia compelling public officers to disclose their assets and liabilities at specific intervals. Article 52³³ of the Constitution obliged Cabinet members to yield to a Code of Conduct to be promulgated by Parliament and this led to the enactment of the Ministerial and Parliamentary Code of Conduct³⁴ while Article 71³⁵ of the Constitution covered members of the National Assembly. The Constitution further obliged the President to make a statutory declaration of the assets and liability owned.³⁶ However public officers were not and are still not obliged to divulge information relating to the source of funds for the acquisition of assets.

To date no attempt has been made to codify asset disclosure regulations as part of the legislative framework. Moreover non compliance of the said regulations does not attract punitive measures. Closely related to regulations governing disclosure of assets is the creation of the Electoral code of conduct regulations which was aimed at reducing corruption during the electoral process.³⁷ The Code of Conduct Regulations³⁸ forbids the abuse of public resources for election campaigns. However the Code of Conduct is not enforceable and is consistently flouted by the ruling party which has been identified as the culprit. The code has consistently been flouted by politicians who usually employ devious means of assuming public office. Through the flagrant breach of the electoral code of conduct, many morally challenged politicians have assumed high office and have amassed wealth

³³ Article 52 of the republican constitution

³⁴ The Parliamentary and Ministerial code of conduct

³⁵ Article 71 of the Republican constitution.

³⁶ Article 34(5) (b) of the republican Constitution.

³⁷ Austin Mbozi ,Report and recommendation on the declaration of assets in Zambia ,transparency international ,2002

³⁸ Statutory Instrument number 179 of 1996

disproportionate to their legitimate incomes. To date, no politician has been indicted for electoral corruption despite overwhelming evidence presented by courts.³⁹

2.3 The Anti Corruption Commission Act Number 42 of 1996

The Anti Corruption Commission Act of 1996 gives broad investigative powers to the officers to inter alia investigate cases of corruption and abuse of office ,abuse of powers to obtain wealth ,property ,advantage or profit directly or indirectly for another person.⁴⁰ Law enforcement officers through the limited use of the Prohibition and prevention of money laundering Act No 14 of 2001 also have powers to seize properties based on reasonable grounds to have been derived or acquired from the proceeds of crime. ACC seizures are however not supported by explicit provisions in the Act. However under section 24 of the ACC Act, the Director General may restrict the disposal or dealing with a property which has been placed under restriction. The *lacuna* inherent in the law is that it does not specify and prescribe how illegitimately acquired properties are to be forfeited to the state. Secondly a restricted property such as a movable asset like motor vehicles is not restricted from crossing borders. Furthermore, restricted properties during the subsistence of investigations still yield returns which are enjoyed by the suspect. The Act does not provide for speedy recourse to forfeiture justice but lends itself to tedious bureaucratic forfeiture procedures which exists solely as an incident to the Act and whose applicability and efficacy is only restricted to circumstances where the rightful owner of a property cannot be traced ,has absconded from justice ,has not claimed the property within the specified period or has voluntarily surrendered the property failure to which the property must be returned to the rightful owner .

³⁹ Austin Mbozi, report and recommendations on the declaration of assets in Zambia, Transparency International Zambia, 2002. this position was also confirmed by this author after an extensive review of all the ACC end of year reports which do not justify the failure to subject to civil litigation property related inquiries which are terminated inquiries which are terminated at investigations level for want of evidence reasonable doubt

⁴⁰ Section 37 of the ACC Act no 42 of 1996

Evidently section 24 is deficient as it does not satisfactorily compliment the very essence of the existence of section 37 of the Act which provides for investigation of illegally acquired property. The deficiency lies in the lack of means to enforce section 37. The interplay between investigating offences relating to the acquisition of illegally obtained wealth on one hand and providing the means through which the properties may be recovered is thus lacking. The lack of an asset forfeiture strategy suggests serious defects in the efficacy of the Act which deficit is manifested in the lack of success by the Commission to convict on an offence of abuse of authority of office (Possession of Unexplained property). Evidently where the Commission has terminated a property related inquiry for want of evidence, the Commission has never subjected such to civil proceedings.⁴¹

Although in 2004 President Levy Mwanawasa signed statutory instrument number 58 of 2004 which covers asset Forfeiture, the Act is a “word for word “replica of the 1994 disposal of recovered property regulations which does not address the critical concerns as highlighted. The Statutory Instrument was passed to suppress the technicality of drawing its efficacy from a repealed Act i.e. the Corrupt Practices Act .Hence the considerations which motivated the enactment are purely technical with no bearing of improving on the effectiveness of the Act to bring it in consonance with the dynamic nature of crime .The inevitable result is that while criminals have devised advanced means of enriching themselves, legislation is static and does not keep pace.

2.4 The Task Force on Corruption

The Task Force on Corruption which was set up to investigate high profile crime has undoubtedly scored reasonably successful fight against corruption .Key to the investigative strategy is the need to

⁴¹ The legal and prosecution officer of the Anti Corruption Commission attributed this to lack of sufficiently qualified advocates of the high court coupled with deficiency in financial; investigations. Apart from that no policy guideline exists to guide how cases are to be processed to the High Court.

have forfeited to the state as many properties as possible. When weighing the success scored by the Task Force, it is interesting to note that many of the forfeited properties were forfeited using the ACC regulations on the disposal of properties. Interestingly the forfeited properties did not have claimants or were owned by suspects who fled the jurisdiction.⁴² For example the recent Supreme Court judgment in the case of Anti Corruption Commission V Xavier Franklyn Chungu (2008)⁴³ qualifies the narrow context within which the regulations may be applied. In this case, the Supreme Court ordered the forfeiture of Mr. Xavier Chungu's property after he fled the Jurisdiction in 2006. The forfeiture was only made possible on account of the fact that Mr. Chungu had fled the jurisdiction from an inquiry which had a causal link with the acquisition of the property in issue.

The inherent weakness therefore is that other properties owned by the fugitive which may be remotely connected to investigations at the time he fled the jurisdiction may not be liable for forfeiture. The inevitable practical difficulty which the Task force on Corruption currently faces is that cases where properties have been contested are being pursued without a benefit of clearly defined robust Legislation which aggressively sets the contours of the circumstances when properties may be forfeited on the basis of evidence weighed on a balance of probability. The absence of such legislation invariably brings into play the dire need of a comprehensive legislation which takes into account a more pragmatic and holistic approach which squarely addresses the lacunas which, if left unchecked, has the propensity of buyoncing crime. In critically weighing the efficacy of asset forfeiture legislation in its present form and the lack of appreciation of its limited achievements, it is therefore deemed appropriate that due consideration be paid to carefully evaluate the importance of the immediate revision of the current asset forfeiture regime.

⁴² This information was confirmed by Victor Muhamba Makai, the head of the Asset forfeiture unit at the Task Force on corruption.

⁴³ S.C.Z Appeal number 169 /2006

CHAPTER THREE

3. INTERNATIONAL INSTRUMENTS RELEVANT TO THE FIGHT AGAINST CORRUPTION.

The fight against corruption, as already alluded to, has increasingly assumed heightened importance as evidenced by integrated and robust approaches regional bodies have sought to adopt. International instruments are a means through which the deficiencies associated with the traditional approach of tackling corruption in a segmented sense are highlighted. In appreciating the failures associated with the traditional approach, it has been noted that the traditional approach does not take into consideration the fact that white collar crime is rarely confined to one country but may include multiple jurisdictions and this invariably calls for an integrated, uniform and systematic approach in tackling it.

In as much as it is appreciated that most countries have embarked on national strategies to deal with corruption, such strategies remain isolated and not sufficiently cohesive to address white collar crime involving multiple jurisdictions. The instruments therefore seek to act as an umbrella framework from which different jurisdiction may not only draw different ideas but may also use as models in the domestication of such. It further seeks to create comparability in the manner anti corruption strategies may be implemented. Conventions therefore do not only serve as a blueprint guide of an anti corruption model, but also seeks to supplement where domestic legislation is lacking or deficient. The only problem is that while most countries have endorsed or ratified these conventions, very few countries have domesticated them to the extent that they are of a compelling or binding effect in the adjudication process.

The provisions of these instruments, especially in particular reference to the use of asset forfeiture to fight corruption, somewhat addresses the structural and legislative inadequacies many jurisdictions are identified with and thus directly responds to those deficiencies.

Three prominent multilateral instruments which are of material relevance include the Southern African Development Community (SADCC) Protocol against Corruption, the African Union (AU) Convention on Preventing and Combating Corruption and the United Nations (UN) Convention against corruption (UNCAC). All the three instruments criminalize corruption and aim at finding solutions that would minimize it. The three instruments are balanced, strong and pragmatic. In a nutshell the conventions introduce comprehensive set of standards, measures and rules that all countries can apply in order to strengthen their legal and regulatory regimes to fight corruption. They broadly criminalize the most prevalent forms of corruption both in the public and private sectors. The major breakthrough in the provisions is that they require member states to return assets obtained through corruption to the country from which they were stolen. These provisions introduce a new fundamental principle as well as framework for stronger cooperation between states to prevent and detect corruption and to return the proceeds. In order to have a reasonable appreciation of the applicability and effect of the instruments, it is vitally important to examine the legislative provisions relevant to the discussion.

3.1 AFRICAN UNION (AU) CONVENTION ON PREVENTING AND COMBATING CORRUPTION

The African Convention on Preventing and Combating Corruption was adopted by African heads of state in July 2003. It was entered into force on the 5th August 2006. The Convention provides an ideal platform for regional cooperation among African states in the fight against corruption. It has the potential of becoming an effective means of assisting Governments in implementing practices that will promote accountability and transparency. The convention covers a number of areas including money laundering, bribery and diversion of property by public officials. The Prime objective of the convention is 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 the measures to be taken.

Four main approaches have been identified in combating corruption and these are punishment, cooperation, prevention and education. In particular, the convention establishes the laundering of proceeds of corruption as an offence ⁴⁴. This provision is premised on the belief that proceeds of corruption should not be enjoyed as they are illegitimately acquired. It further provides for mechanisms for the confiscation and forfeiture of the proceeds of corruption and other related offences in its measures for detecting and investigating corruption and other related offences, each state party is to adopt measures which are necessary to empower the courts or other competent authorities to order the confiscation or seizure of banking, financial or commercial documents. ⁴⁵

The convention further makes a very interesting contribution in illicit enrichment. It defines illicit enrichment as the significant increase in the assets of a public official or and other person which he or she cannot reasonably explain in relation to his or her income and state parties must make this a crime. ⁴⁶ This provision compliments the provisions of section 37 of the ACC Act as it obliges state parties to formulate some regulatory mechanism to ensure that certain categories of public officials are under obligation to disclose their assets / incomes and the source of funds used for the same. The African Union Convention also addresses the issue of confiscation and forfeiture of corrupt proceeds, bank secrecy, cooperation 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 the expiry of their term of office. ⁴⁷

3.2 SADC PROTOCOL AGAINST CORRUPTION

⁴⁴ African convention on the prevention and combating of corruption Article 6

⁴⁵ Ibid article 17

⁴⁶ Ibid article 1

⁴⁷ Ibid article 6 and 7

The SADC Protocol against corruption focuses on strengthening mechanism to prevent, detect, punish eradicate corruption in the southern region of Africa. The primary objective of the protocol is to improve and harmonies anti corruption policies and laws in and across the region and to facilitate regional cooperation. SADCC takes into consideration the fact that each member state has a unique system in place in terms of legislative framework and it does not aim at imposing the convention but rather encourages member states of the need to bring their domestic legislation in line with the protocol and harmonize mutual legal assistance mechanisms .Each member state should develop a detailed framework for combating corruption in both the private and public sectors.⁴⁸

The protocol also states that each state party should adopt measures to ensure as may be necessary to enable the confiscation and seizure of proceeds of an offence under its law. In very broad terms the protocol further emphasize the importance of employing effective tools with which corruption is to be tackled .Some of the ways in which investigations are to be done are through search of premises and offices which right to search is given to officers who are specially trained and authorized by law to carry out the work. Some of the powers which the officers of the special investigations agencies have are powers which include restraints of assets found, conduct of searches without warrants compelling of suspects to produce documents without recourse to court, compel banks and other financial institutions to release information of evidential value.

3.3 THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

The UNCAC has been termed as the most relevant and effective anti global anti -corruption instrument .It 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. It establishes for the first time legal mechanism for the return of assets that have been

⁴⁸ Ibid article 4

transferred to other countries .The convention defines property as an asset of every kind, whether corporal or incorporeal, movable or immovable, tangible or intangible and legal documents or instruments evidencing title to or interests in such assets.⁴⁹UNCAC also encourages cooperation in investigations, prevention, and prosecution of corruption, aid also in asset recovery and further urges the state parties to consider the adoption of legislation and other measures that would establish illicit enrichment as an offence and has wide and robust provisions of asset recovery.

In order to make this possible, the convention has a number of provisions which have been provided for. For example, In the case of embezzlement of public funds, the confiscated property would be returned to the state requesting it.⁵⁰ As for the proceeds of any other offences covered by the convention the property would be returned provided the proof of ownership or recognition of the damage caused to as requesting state. The convention also provides for the 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 property in its court to or ownership of property acquired through the commission of an offence. ⁵¹Furthermore, each state party is to take measures as may be necessary to enable the identification, tracing, freezing or seizures of any item suspected to have been corruptly acquired for the purpose of eventual confiscation.⁵² Further, each state party is to adopt in accordance with its domestic law such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized, or confiscated property. ⁵³ Furthermore if such proceeds of crime have been transformed or converted in part or in full into other

⁴⁹ UN Convention Against Corruption, Article 2

⁵⁰ Ibid section 51

⁵¹ Ibid section 53

⁵² Article 31 1 (a)

⁵³ Ibid section 3

property such property shall be liable to the measures as may be directed.⁵⁴ If such proceeds have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to the freezing or seizure, be liable for confiscation up to the assessed value of the intermingled proceeds. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable in the same manner and to the same extent as proceeds of crime.⁵⁵

The Convention further provides that each state party shall endeavor, where appropriate and in accordance with the fundamental principal of its domestic law ,to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding , inter alia , their outside activities ,employment , investments , assets ,and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials .For those public officials who violate , a set code of conduct such should be punished criminally.⁵⁶ The convention also contains elaborate measures to regulate and supervise regime for banks and non banking financial institutions to prevent the occurrence of money laundering. Other areas which the convention attaches cardinal importance relates to issues of International cooperation ,extradition ,mutual legal assistance , prevention and detection of transfers of proceeds of crime, measures for direct recoveries of properties ,mechanism for recovery of property through international cooperation in confiscation ,international cooperation for the purposes of confiscation ,return and disposal of assets.⁵⁷ All these provisions are

⁵⁴ Ibid section 4

⁵⁵ Ibid section 5

⁵⁶ Ibid section 7

⁵⁷ Article 51 – 59 of the UN Convention Against Corruption.

contained in Chapter V of the Convention which Chapter is wholly devoted to elaborating asset recovery measures and mechanisms to be adopted by state parties.

It is however worth noting that although the instruments state that each state party should adopt measures as may be necessary to enable the confiscation and seizures of proceeds of an offence under its law, it does not specify the effective strategies to be adopted. It is thus couched in broad terms. State parties are merely advised to adopt measures as may be deemed necessary which suggests that these measures are to be implemented in line with the existing environment .The convention takes into account the diverse institutional and legal framework which govern different jurisdictions and therefore recognizes the need to encourage state parties to realign the local framework and develop a receptive environment that will facilitate the smooth incorporation of the instruments and takes into consideration potential conflicts and duplicity in enforcement. Such alignment can only be addressed through research which takes into account peculiar mischief's that exists on case to case basis in different countries. The Instruments, though couched in broad terms, and nevertheless encompasses useful ideas which may give very constructive insight on what direction state members should take to make their fight more meaningful and sustainable. While domestication of the instruments would be good, it is important to further examine the compatibility between existing institutional framework and imported legislation.

3.4 OBSERVATIONS

The international instruments undoubtedly provides a common platform through which “home grown” anti corruption efforts in order to strengthen the anti corruption efforts .Although most SADCC countries have put in place their own anti corruption legal framework and have adopted various investigative tools which are used within the region , these fall short the provisions of the international instruments. In recognizing that corruption is exceedingly difficult to investigate and

prove and that offences of such nature take place in great secrecy and at times without witnesses, there is a growing trend to align legislative provisions to international instruments. This trend clearly takes into account the fact that the traditional methods of fighting corruption are not only ineffective but do not take into account the fact that corruption is a shifty or moving target which can only be addressed by pragmatic measures which respond to its dynamic nature.

Notwithstanding the aforementioned, it is imperative that the protocols and conventions need to be incorporated into national laws. Zambia has ratified the UN Convention against Corruption. The ratification has however remained confined to paper since it has not been domesticated. This could largely be on account of the lack of existence of a National Anti Corruption Policy coupled with the wide gap which exists between the Protocols and the existing legislation.

CHAPTER FOUR

4. AN ANALYSIS OF THE LEGAL FRAMEWORK OF ASSET FORFEITURE LEGISLATION IN ZAMBIA

It is estimated that about US\$500 billion - US\$ 1 trillion is laundered annually globally. Out of this amount, about US\$ 300 billion is traced to corruption related offences as predicate offences to money laundering.⁵⁸ As a predicate offence, corruption is therefore a factor that precipitates money laundering activities world wide. This is on account that when corruption is not adequately suppressed at its infancy; it graduates into money laundering which tends to be more complex and difficult to control. Suppression of money laundering is therefore best done through the forfeiture of illegitimately acquired property before it develops crime multiplier effect capacity.

In Zambia, asset forfeiture is not regulated by a single law but is governed by six pieces of legislation which are basically Acts of Parliament. All these are administered by different law enforcement agencies. These include the Narcotic Drugs and Psychotropic Substance Act Chapter 96 of the Laws of Zambia, the Prohibition and Prevention of Money Laundering Act No. 14 of 2001 and the Anti Corruption Commission Act No. 42 of 1996. Others include the Penal Code Chapter 87 of the Laws of Zambia, the Customs and Exercise Act Chapter 322 of the Laws of Zambia, and the Zambia Wildlife Act No. 12 of 1998. In addition, Government has enacted several pieces of legislation which supplements enforcement of asset forfeiture legislation and these include the Parliamentary and Ministerial code of conduct⁵⁹, and the Electoral Code of Conduct⁶⁰. For purposes of this discussion, the Customs and Excise Act and Zambia Wild Life Act will not be considered. As already noted,

⁵⁸ World bank report 2003

⁵⁹ Chapter 16 of the Laws of Zambia

⁶⁰ Chapter 10 of the Laws of Zambia

Zambia has a weak asset forfeiture regime which is fragmented and isolated .Most of the legislation has not been amended to address present needs. Basically two

Types of forfeitures are followed in Zambia and these include criminal forfeiture (*in personum*) and civil forfeiture which is in *rem*. Legislation broadly provides that proceeds of crime, instrumentalities of crime and facilitating property may be subject to forfeiture. Legislation such as the Anti - Corruption Act is however silent on the exact circumstances and extent to which converted, intermingled or transformed property may be forfeited .This area of the law is open to interpretation by the courts on a case to case basis.

Civil forfeiture is done against property which has been proved to be connected to an illegality and usually involves a summary process wherein a case is subjected to administrative judicial process of proving the illegality on a balance of probability. The process basically involves filing a complaint for forfeiture, litigating the case and if successful final judgment of forfeiture grants title rights to Government. Generally speaking, this process is rarely followed. The benefits of a civil forfeiture is that the conviction of a criminal defendant is not a prerequisite as property may be seized immediately and it also allows for a quick default judgment where the subject is a fugitive, missing, dead or has fled the jurisdiction.⁶¹ Statutory instrument number 158 of 2004 as already discussed relates to descriptive forfeiture which may arises out of a criminal action. The provision is descriptive as opposed to being prescriptive in that it only describes an administrative process to be followed as opposed to detailing the circumstances when a property is liable to be forfeited.

As with criminal forfeiture, the process is different in that consideration of criminal forfeiture relates to the allegation as contained in the indictment and requires a conviction prior to the forfeiture taking

⁶¹ united States v Ursery 518 US 267,284 1996

effect. The whole process is governed and bound by criminal rules of evidence. Where there is no freezing order which restricts the disposal of property such as a non fixed asset, the danger is that a property may be disposed in the course of the adjudication process. The process usually involves four stages and these include investigations, pre trial restraint of property, confiscation and execution. One very interesting feature of the Zambian law is that illegal seizure of property does not immunize the property from confiscation as long as evidence independent of the illegal seizure can support it. ⁶²

One prominent mischief which has to date not been addressed is that criminal forfeiture only relates to what the indictment contains. In the event that one is discharged or acquitted, then the property is not liable for forfeiture unless the restrictive circumstances under statutory instrument No 58 of 2004 are applicable and invoked. One who is discharged on a technicality may hence quickly sell the property to avoid it being forfeited through other avenues. The standard of evidence in criminal cases is higher and difficult to prove and thus even where evidence exists to suggest that a property was corruptly acquired; such may not be forfeited unless the matter is proved beyond reasonable doubt. It is therefore imperative that asset forfeiture should be part of the investigative process in terms of planning, strategy and management of investigations to the extent that at the end of the inquiry the inquiry should adduce sufficient evidence to support a civil forfeiture using the findings of a criminal case which may not necessarily be subjected to prosecution ⁶³. However this is currently difficult to achieve considering the rigidities and limitations in the laws which are couched in a stringent

⁶² Attorney General v C and S Investments (2005)

⁶³ Under section 13 of the South African Prevention of Crime Act Number 121 of 1998, it provides for criminal confiscation and civil forfeiture of proceeds and instrumentalities of crime. This is made possible by using the findings of a criminal investigation to have property forfeited civilly on a balance of probability.

In order to appreciate the same, it is important to critically examine the practical effects of Zambian legislation in general in support of forfeiture.

4.1 ANTI CORRUPTION COMMISSION ACT NUMBER 42 OF 1996 AS READ WITH STATUTORY INSTRUMENT NUMBER 58 OF 2004

Sections on forfeiture include section 24, 37, 41 of Anti corruption Act number 42 of 1996.

Section 41 provides for an instance when property can be forfeited if a person is convicted of a Corrupt Offence and it states that any person who is guilty of an offence under part four shall be liable.

In addition to any other penalty imposed under this Act, it also provides for forfeiture to the State of any pecuniary resource, property, advantage, profit or gratification received in the Commission of an offence⁶⁴. A simple interpretation of the section means that forfeiture must be preceded by a conviction failure to which no property may be forfeited to the state, regardless of the circumstances under which one is acquitted or discharged.

Further section 37 of the Act provides that the Commission may investigate a public officer who has abused his office to obtain property, wealth, advantage or profit directly or indirectly or maintains a standard of living above his commensurate official emoluments or is in control of property disproportionate to his official emoluments. Any such officer who violates the above shall be charged for an offence and be liable for conviction unless he gives a reasonable explanation on how the properties were acquired.⁶⁵ The obvious weaknesses associated with this section are that it only applies to public bodies and not private bodies or organizations. The Commission does not have jurisdiction to investigate private bodies that abuse their office and derive a benefit in tangible form. Furthermore, the provision uses abuse of office as a precondition or predicate offence in order to prove possession

⁶⁴ Section 41 of the Anti Corruption Commission Act Number 42 of 1996

⁶⁵ Section 37 of the ACC Act no 42 of 1996

of unexplained property. This is a very serious *lacuna* which is twofold. Firstly all offences relating to abuse of authority of office which arise from private institutions cannot be addressed and may hence breed money laundering. For example, functionaries under the Food Reserve Agency are defined as private bodies under the Act⁶⁶ despite the institution being wholly funded and controlled by Government. Does it then mean that such officers although public in nature are insulated from prosecution under section 37 of the Act.

Secondly possession of unexplained property is only tied to abuse of authority. In the absence of abuse of office; it becomes difficult to investigate possession of unexplained property as a stand alone offence. The Act somewhat precludes the investigation of property remotely connected to abuse of office. This invariably restricts the applicability of the provision as possession of unexplained property always has to be tied to or arising from abuse of office. Thirdly the Act does not provide for forfeiture of the property believed to have been corruptly used to illegitimately acquire or commit other illegalities. Fourthly, it does not detail guidance on how issues relating to intermingled or divested property is to be considered. This is a serious weakness. Fifthly the standard of proof required is very low on the part of the suspect who is required to give only a reasonable explanation of the source of funds used for the acquisition of property. The term reasonable explanation is relative and may be construed in a subjective sense in the adjudication process. What may be reasonable to one judge may not be to another. Further it does not specify the basis upon which the reasonable explanation is premised. Is it the net worthiness of the individual under probe or merely an explanation which any suspect may manufacture?⁶⁷ Resulting from the deficiencies, the Anti corruption Commission has to

⁶⁶ Section 8(5) of the Food reserve Act CAP 255 of the Laws of Zambia defines agency staff as private body's. Staff under the Parliament Act are also defined as private bodies.

⁶⁷ Mr. Nchima Nchito in his paper "Zambian legal basis for seizures and forfeitures suggest that the law should provide for a net worth analysis.

date not successfully registered a conviction under possession of unexplained property charges for the simple reason that the section is very hard to prove as any reasonable explanation given by suspects may be given a benefit of doubt by the Courts⁶⁸. Development of jurisprudence in this area is hence stagnant.

Furthermore Section 24 of the ACC Act provides for restriction of disposal of property suspected to have been corruptly obtained. Property includes cash held in the bank or stock, shares and movable property. Disposal of restricted property constitutes an offence which attracts penal sanctions. Such proscribed property may be forfeited to the State as provided for under statutory instrument No. 58 of 2004 Regulation 3. The regulations do not provide for forfeiture of property which has been illegitimately acquired or used as an instrumentality of crime.⁶⁹ The inherent weakness of section 24 is that it does not stop a restricted movable asset from crossing borders, does not detail who has beneficial interest in profits and other incomes in an ongoing concern from the time it is restricted up to the time the property is forfeited.⁷⁰

4.2 PENAL CODE

Under the Penal Code, the provisions are basically the same as those relating to the Anti Corruption Act in that it provides for forfeiture in instances only after one is convicted. Section 29 provides that where a person is convicted for an offence, the court which convicts the person shall in addition to any other penalty imposed, order the forfeiture of all property which

⁶⁸ This position was confirmed by the former Director General Mr. Nixon Banda. A review of the ACC end of year report confirmed this position. Further Makumba Gwendolyn Kashishi in her paper 'The Anti Corruption Commission Act VIS The African union Convention on Preventing and combating corruption :Identifying the missing links P 40 suggest that the section be amended or removed as it is a difficult section.

⁶⁹ In contrast to the 2004 regulations the POCA Act of South Africa specifically provides for forfeiture of illegitimately acquired property.

⁷⁰ The Supreme Court in Chibesakunda V Attorney General had the opportunity to give a wide interpretation of the Act but refrained.

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 powers 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 or conviction. ⁷¹ Apart from offences relating to theft, the target sections of the intendment of section 29 of the Penal Code include sections 318 and 319 of the Penal Code. Section 318 provides that any person who receives or retains property knowing or having reasons that to believe the same to have been unlawfully or converted or obtained in a manner which constitutes an offence is guilty and liable to the same punishment as the offender by whom the property was unlawfully obtained ,converted or disposed of ⁷². Section 319 provides that any person who shall be brought before court charged with having in his possession anything which may be reasonably suspected of having been stolen or unlawfully obtained and who shall give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanor. ⁷³

In comparison to section 37 of the ACC Act, section 319 has an advantage in that in any investigation relating to property, the burden of proof automatically shifts to the accused to give satisfactory account of how the property was acquired. While the prosecution may have the obligation of discharging the requisite burden of proof, it is incumbent upon the accused to give an account to the satisfaction of the court failure to which one will be convicted. ⁷⁴ Section 319 further provides that if such property cannot be forfeited or cannot be found, the court has powers to assess the value of the property and the payment of the assessed value may be

⁷¹ section 29 of the Penal Code

⁷² Section 318 of the Penal Code

⁷³ section 319 of the Penal Code

⁷⁴ It has however been argued that the provision is unconstitutional as every one is innocent until proven guilty

enforced in the same manner and subject to the same payment of a fine or conviction. This provision is lacking in the ACC Act.

4.3 THE PROHIBITION AND PREVENTION OF MONEY LAUNDERING ACT

NO. 14 OF 2001

This Law provides for money laundering activities and it provides for the prohibition and prevention of money laundering and for the forfeiture of property of persons convicted of money laundering activities. The Act provides for the seizure of property where an Officer has reasonable grounds to believe that the property is derived or acquired from money laundering activities⁷⁵.

Section 16 relates to release of seized property before it is forfeited and is similar to Section 31 of the Narcotic Drug and Psychotropic Substances Act 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 effected in good faith. It also provides for forfeiture of property where the property is seized and is in the possession or under the control of a person convicted of a money laundering offence. If it is proved that the property was derived or acquired from proceeds of the crime it will be liable for forfeiture by the Court.⁷⁶

The law further provides for forfeiture of property where there are no proceedings or claim.⁷⁷ This section is similar to Section 33 of the Narcotic Drugs and Psychotropic Substances Act. It further makes provision for the Commissioner to apply to Court after an expiration period of six months for an order of forfeiture of that property. 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. If there is a dispute as to Ownership or the Commissioner is unable to ascertain whether the property is liable to forfeiture, he shall refer the matter to the High Court who shall determine the matter.

⁷⁵ Section 15 of the prohibition and prevention of money laundering act no 14 of 2001.

⁷⁶ Ibid section 17

⁷⁷ Ibid section 18

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

The Narcotic Drug and Psychotropic Substances Act provide for, *inter alia*, the seizure and forfeiture of property relating to, or connected with unlawful activities involving Narcotic Drugs and Psychotropic Substances. Under Section 24(1) officers of the Drug Enforcement Commission have the powers to search and seize property liable to forfeiture under the Act⁷⁸

Furthermore any property which a Drug Enforcement Officer or Police reasonably suspects to be the subject matter of an offence under this Act, or which has been used for the Commission of that offence or is illegal property shall be liable to seizure.⁷⁹ The Law further provides for the forfeiture of property where there are no proceedings or claim⁸⁰.

Further Section 34(1) provides for the forfeiture of property on conviction. Furthermore the Director of Public Prosecutions may apply to the High Court for an Order of forfeiture of any property he believes to be illegal property.⁸¹ Where the owner is untraceable or has absconded or is outside Zambia and cannot be compelled to attend court after the forfeiture notice has been issued, the law provides for forfeiture of such property. In certain instances the law spells out circumstances under which property of equivalent value may be forfeited in lieu of property directly traceable to the offence.⁸² Section 38 provides for forfeiture of untraceable property by the High Court where the property forfeited cannot be located or traced or has been sold to a purchaser in good faith for valuable consideration and is outside Zambia or has been mingled with other property which cannot be separated or divided without difficulty. It is important to note that if a person whose property has been

⁷⁸ Section 24 of the Narcotics drug and psychotropic substances Act Chapter 96 of the laws of Zambia

⁷⁹ *ibid* section 31(1)

⁸⁰ *ibid* section 33

⁸¹ *ibid* section 35(1)

⁸² *ibid* section 37(1)

forfeited dies , the Order to that effect shall have effect against the deceased's estate. The High Court shall order that any other property of a similar value be forfeited⁸³. All the property that is forfeited under this Act is forfeited to the state.

The advantages which the Drug Enforcement legislation have over the ACC Act is that not only are they robust but they also more encompassing and provide for circumstances involving illegally obtained property which is subsequently intermingled ,divested. The efficacy of CAP 96 is however limited to cases where the predicate offence is related to drug abuse. Further more the Acc Act does not have any Powers of seizure save for the restriction notice which may result in movable property being taken to foreign jurisdictions without necessarily being disposed. Further the Act is silent on what happens in the event that the suspect dies before being convicted. Do investigations continue against the deceased estate or investigations automatically end. These are the serious lacunas which even the bill does not address.

4.5 PARLIAMENTARY AND MINISTERIAL CODE OF CONDUCT CHAPTER 16

OF THE LAWS OF ZAMBIA Disclosure of assets is an effective way of enhancing accountability and integrity in the Public service. Under the Parliamentary and Ministerial Code of Conduct⁸⁴, Ministers and Deputy Ministers are required to uphold high ethical and integrity standard .The Code requires them to disclose their pecuniary interests on any matter before the National Assembly or any of its committee's⁸⁵ .They are also required to declare their Government contracts to the Chief Minister.⁸⁶ A Minister risks losing his position if he

⁸³ ibid section 38(2)

⁸⁴Chapter 16 of the laws of Zambia

⁸⁵ Ibid section 5

⁸⁶ Ibid section 6

breaches provisions under the Code. If a Minister fails to disclose pecuniary interest in any matter before the Assembly will make him lose his position⁸⁷. The Constitution of Zambia also has provisions that require certain public individuals to file declarations of assets and liabilities. Article 34(5) (b) requires a Presidential candidate to make a statutory declaration of his assets and liabilities which shall be open to public inspections at such time and place as may be prescribed by Parliament. However backbenchers are not required to make similar declarations of assets and liabilities and this is a serious lacuna in the law as Members of Parliament play an important role in the operation of Government. Yet another shortcoming is that these provisions are not enforceable.

The Chief Justice is not vested with powers to investigate the veracity of the information contained in the declaration. Moreover the Chief Justice lacks the capacity to investigate given the lack of resources both human and financial. Furthermore there is no law that requires the President to file declarations of assets and liabilities after assuming office and for the duration of the tenure of office.⁸⁸

Furthermore, another shortcoming is that although 80 % of cases involving abuse occur in the public sector, there is no legislation that requires public officials to disclose their assets and liabilities.⁸⁹

4.6 INTERNATIONAL COOPERATION IN FORFEITURE CASES

International Cooperation in forfeiture cases in Zambia is done through Bilateral and Multilateral Agreements which Zambia has signed with several jurisdictions. The relevant Ministry and the responsible Minister for that Ministry signs the Agreement on behalf of the Government in the Bilateral or Multilateral Agreement. For issues relating to asset tracing in foreign jurisdictions the

⁸⁷ Ibid section 3

⁸⁸ Chanda A.W p.7

⁸⁹ Mboozu Austin p34.

procedure and authority is governed by the Mutual Legal Assistance in Criminal Matters⁹⁰. As for forfeiture assistance, generally the Zambian Government can respond to any request from outside (with the benefit of international instruments) to forfeit the proceeds, objects and instrumentalities which are or were part of the Commission of an offence.

The Mutual Legal Assistance in Criminal Matters Act provides that assistance under the Act may be made to a foreign State subject to such conditions as the Attorney General may determine.⁹¹ The Act further provides that a request by Zambia for International Assistance in Criminal Matter may be made by the Attorney General⁹². The foreign State can either agree or refuse to offer assistance to the Zambian Government. Worth noting is the fact that the growth of jurisprudence has widened the scope of admissibility of evidence obtained from abroad as was espoused in the case of **The People V LT General Wilford Funjika**⁹³ wherein the Courts held that affidavit evidence obtained from foreign jurisdiction is admissible in court without necessarily cross examining the deponent.

Enforcement of judgments is done through the agreed terms of Mutual Agreement between the Government and those of the other foreign party. It is legally possible to enforce a foreign judgment in the Zambia subject to registration of the same locally. This is evidenced by the London Judgment which was delivered in 2007 and has effect in Zambia. The judgment has so far been enforced against Atan shansonga who has lost 23 % of shares held in Lunsefwa Company Limited valued at K5 billion.⁹⁴

⁹⁰ Cap 98 of the Laws of Zambia

⁹¹ Section 8 of the Legal Mutual Assistance Act.

⁹² Ibid section 9

⁹³ High Court of Zambia HPR /02/08

⁹⁴ The Post Newspaper Article by Attorney General Mr. Mumba Malila when commenting on the process of registration of the London Court judgment and the defendants against whom the judgment has been enforced.

CHAPTER 5

5.1 RECOMMENDATIONS AND CONCLUSION

The research paper has undertaken to identify the mechanisms which the Government has put in place to fight corruption and has demonstrated the lack of capacity in using asset forfeiture as an effective tool in the fight against corruption. This has been largely been on account of weak institutional and legal mechanisms which have fettered prospects of effective use of asset forfeiture. This paper has analyzed the various legal instruments which are currently in place and the inherent weaknesses. It is an appreciated fact that corruption as a dynamic offence and shifting target requires the investment of an integrated approach which addresses the core motivating element of benefit. The basis of any criminal action lies at the benefit derived from crime. Criminal sanctions in the form of convictions although important do not address the core cause of corruption. While criminals are in prison, illegitimately derived wealth continues to flourish. To avoid this, the shifting focus entails that the establishment of an effective confiscation regime for domestic purposes is an effective step towards the elimination of profitability which is at the heart of so many international money laundering and corruption schemes.

The concept of financial disruption has taken centre stage globally as one of the most cost effective means of fighting crime. Focusing on the money concept was adopted by the Financial Action Task Force as a pivotal means of controlling crime⁹⁵. This is premised on the belief that criminal perpetrators want to stay away from the crime but not the money. Following the money will always lead you to a bigger picture of a criminal activity. Financial disruption aims at decreasing the returns

⁹⁵ The Financial Action Task Force is an international organization which raises complex crime awareness globally.

of criminals while increasing the risk of engaging in criminal activities. Economic deprivation is therefore the most effective tool against corruption.

Zambia like many other countries should keep pace with international trends in the realization of a zero tolerance against corruption vision which has been enshrined in the Fifth National Development Plan. However the plan is couched in broad terms and glosses over the importance of strategic planning in the use of asset confiscation. The plan merely recommends the traditional method which is confined to prosecution, education and Prevention. This unfortunate position is compounded by the fact that the draft National Anti Corruption Policy does not address the importance of the issue. Furthermore the delay in the release of the final document raises anxiety as to the level of commitment and political will the Government has towards the commitment Government has in fighting corruption. Key to the development of a vibrant asset forfeiture regime is Government's unequivocal support in stimulating initiatives that will foster the adoption of effective strategies. Without Government support, no meaningful results can be achieved. It is recommended that the following measures be taken as an initial step towards the setting up of an environment that will encourage the use of asset forfeiture as an effective strategy.

5.2 LEGISLATIVE REFORMS

The fight against corruption has taken centre stage in Zambia. However the Government has paid very little attention to legal framework for combating corruption. It is important not only to punish acts of corruption but also to prevent acts of corruption from taking place.⁹⁶ As was already noted the, the current asset forfeiture legislation is not only weak but is also fragmented and isolated. Legislation has

⁹⁶ Chanda , A.W p.5

for sometime now been stagnant and does not address the modern and present concerns to keep pace with the dynamic nature of crime. The seriousness of the fight against corruption largely depends on the political will of the leadership to put in place both institutional and legislative framework that will facilitate the eradication of the vice failure to which the fight will be rhetoric.

5.3 THE ANTI CORRUPTION COMMISION ACT NO 42 OF 1996 (DISPOSAL OF RECOVERD PROPERTY REGULATIONS STATUTORY INSTRUMENT NUMBER 58 OF 2004

As already discussed the regulations only apply as an incidence and in a restrictive sense on the basis of goodwill of the suspect. Secondly the provision is descriptive and does not prescribe an action to be taken where a property has been proved to have been illegally acquired. Ideally, forfeiture should have been the natural recourse where property has been proved to be the proceeds of crime or where it has been used as an instrumentality to crime.

The obvious advantage is that such a provision acts as safeguard against the current mischief which occurs whenever a person is acquitted or discharged in a criminal matter involving property acquired dubiously or where investigations relating to property are discontinued on account of lack of evidence to prosecute such a person. Such properties are retained by owners. To avoid this situation it would be more beneficial to pursue a property civilly on a balance of probability as opposed to waiting for a person to be convicted first before forfeiture may be effected.

This lack of prescription (in prescribing forfeiture as a natural consequence) was challenged in the matter of **St George v Attorney General**⁹⁷ where it was contended by the respondent that his property was wrongly advertised for seizure as it did not fall within the circumstances outlined in the

⁹⁷ Attorney General V St George Fisheries (2004)

property was acquired, such property should be liable to forfeiture.⁹⁹ Furthermore tempering with forfeited property must also be criminalized.

It should be noted that the success of any asset forfeiture strategy depends on the ability to preserve an earmarked property in its form to prevent it from being stripped or sold prior to the forfeiture being effected. Section 24 notices should therefore be broadened to restrict the transportation of movable property from a jurisdiction and should also prescribe how restrictions on business entities must be invoked in terms of whether the profits, in the event that the property is subsequently forfeited, must be kept by the owner. In most cases the Criminals enjoy the profits from businesses while the property is under restriction and by the time the property is finally taken over, it would have degenerated into a loss making entity. Government thus loses the opportunity of recovering the profitability of the company. Furthermore interest which accrues from seized bank accounts, in the event that the account is forfeited, must be retained by Government. The application of section 24 only applies to offences under part IV of the Act .There is need to widen the scope of its application to make it more effective. Furthermore, there is need for the amendment of section 37 (2) (d) of the ACC Act in order to make its elements more practically possible to prove a case. The Act does not define the term reasonableness the section should not provide for the courts acceptance of any reasonable explanation given by the accused. The term reasonable explanation is relative and may be construed in a subjective sense in the adjudication process. What may be reasonable to one judge may not be to another.

The Anti Corruption Commission has to date not secured a conviction on Section 37 for the simple reason that it is not an easy undertaking to prove that one is living beyond his past and present

⁹⁹ This provision will help reduce on cases where there is connivance between criminals and third parties who maybe acting as trustees of the criminals. This may also involve lifting the veil of a limited liability company .See also section 5 of the POCA ACT No121 of 1998.

emoluments. In analyzing this section, it has been suggested that the law should prescribe for a reversal in the discharge of burden from the prosecution to the suspect who must show documentary proof in support of the legitimacy of funds used to acquire properties under investigations.¹⁰⁰ While the prosecution must prove its case producing evidence in terms on income /expenditure analysis, such properties should be subject to forfeiture on a balance of probability, in the absence of a reasonable explanation. In comparison to section 319 of the Penal Code which obliges the suspect to discharge the burden by accounting for unexplained property, this section does not and must hence be amended. Secondly possession of unexplained property under section 37 is not a stand alone charge as it requires the existence of a predicate offence which resulted in the amassing of unexplained property. This poses a serious challenge as it entails that in the absence of an illegality such as corruption or fraud being the basis of the acquisition, it means prosecution cannot succeed on possession of unexplained property charge in isolation with adding to the indictment the predicate offence.

Furthermore , the law does not cover private bodies and this should be remedied to include private bodies .The present mischief is that public functionaries such as Food Reserve Agency employees who are defined by their Act as private bodies are deemed as insulated from investigation and prosecution under section 37. ¹⁰¹ Secondly the Act does not provide for forfeiture of the property believed to have been corruptly acquired or used as an instrumentality of crime. Thirdly, it does not detail guidance on how issues relating to intermingled or divested property is to be considered. Fourthly the standard of proof required is very low on the part of the suspect who is required to give only a reasonable explanation of the source of funds used for the acquisition of property. The term

¹⁰⁰ Mwenda Kenneth, Legal aspects of combating corruption. The case of Zambia ,Cambria Press ,New York 2007 p.101

¹⁰¹ See the people V Grieve Sibale. (1999) Mr. Sibale who was charged under section 37 of the ACC Act was discharged by court on a technicality that the FRA Act defined him as a private body. The ACC has no jurisdiction to arrest him."

reasonable explanation is relative and may be construed in a subjective sense in the adjudication process. What may be reasonable to one judge may not be to another. Further it does not specify the basis upon which the reasonable explanation is premised. Is it the net worthiness of the individual under probe or merely an explanation which any suspect may manufacture.

It has also been suggested that section 37 provisions should be biased towards seizure and subsequent forfeiture of illegally obtained property through civil litigation which should be pursued as arising out of the criminal inquiry.¹⁰² This will ensure that in the event that a criminal is not convicted on criminal charges, such property on a balance of probability should be liable to forfeiture as an alternative to a conviction. The forfeiture should be premised on the evidence that the property is a proceed of crime or was used as an instrument to perpetrate crime. It should also provide for intricate situations involving properties which are intermingled or divested in the process of investigations. Also value based confiscation must be encouraged. The principal may apply to make criminals pay for the value of the bribe where a criminal conviction is not possible. Such proceedings are to be commenced civilly.¹⁰³ Such legislation will undoubtedly suppress the mischief associated with the traditional approach of effecting forfeitures on the exceptional circumstances of convictions. It has been argued that in the event that Dr.Kashiwa Bulaya and Samuel Musonda were not convicted, their properties would not have been forfeited to the state. The suspects would have had the opportunity of selling the properties to deprive Government of any Claim.

5.4 THE PARLIAMENTARY AND MINISTERIAL CODE OF CONDUCT

¹⁰² Under Chapter V of the Proceeds of crime Act of South Africa, this procedure has been successfully employed.

¹⁰³ Ibid Chapter 5

The Parliamentary and Ministerial Code of Conduct must extend to the Republican President who should be obliged to disclose his income assets and liabilities at regular basis and these should be filed with the Anti Corruption Commission and not the Chief Justice¹⁰⁴. Furthermore the Act places the obligation of ensuring accuracy of the declarations on the Chief Justice. However the Chief Justice is not vested with powers to investigate the veracity of the information contained in the declaration. Moreover the Chief Justice lacks the capacity to investigate given lack of resources both human and financial. The other provision of the Act to be changed is that it does not prescribe any sanctions that may be meted out to an errant Minister who is in breach of the Code. The President further has the prerogative of deciding whether a Minister is to be disciplined or not. This subjective discretion enjoyed invariably implies that the President may not discipline colleagues. The enforcement mechanism therefore lacks effective checks and balances. It has therefore been recommended that the assets and liabilities be filed with the Anti Corruption Commission rather than the Chief Justice¹⁰⁵. This will entail an expansion in the capacity of the Commission. A special unit within the ACC may be created to deal with the declarations. Once the declaration is filed, the ACC would have to verify the accuracy of the data without waiting for a complaint to be lodged.

Furthermore, the Act does not prescribe penalties either for failure or delay in submitting the declaration to the Chief Justice. The Act should further be specific on the value of gifts allowed to be given to Ministers and the same must be of modest or nominal value. Ministers are known to have received gifts but no one has ever been punished for soliciting and receiving gifts of significant value. Backbenchers should equally be obliged by law to make similar declarations of their assets and liabilities. Such declarations should cover assets and liabilities of spouses and children above 18. It

¹⁰⁴ Chanda A.W p. 28

¹⁰⁵ Ibid p.28

was further observed that although there is legislation that prohibits public officials from accepting gifts, there is no monitoring mechanism to ensure that rules are complied with. Gifts given to Ministers and public officials must have a prescribed value to distinguish between a casual gift and a bribe meant to influence a decision.¹⁰⁶ The disclosure of assets is an effective way of promoting accountability and integrity among the public service. Disclosures assist the officers to know assets owned by public officers which knowledge should be used to probe the source of money used to acquire the assets. This requires that officers conduct investigations to trace the source of the money used and in the event that it is proved that the value of the property exceeds the value of the legitimate earnings, then the suspect may be asked to account of the source of the money used to acquire the property. The law should further oblige Civil servants to declare their assets and the source of the fund used to acquire the same failure to which must be criminalized in terms of the truthfulness and non compliance. Such declarations should be admissible in a court of law as evidence as may be deemed necessary.¹⁰⁷ The only provision which currently exists as an accountable mechanism for civil servants is contained in the Government General Orders which applies to civil servants. Public officials are forbidden to give or receive valuables except with specific approval of the responsible senior officer. Most civil servants receive presents which are never disclosed to their superiors.¹⁰⁸ The obvious weakness of this provision is that it is not criminally enforceable.

The weakness of the system may be demonstrated in the case of Machungwa, Katele Kalumba and the late Mandandi who, despite being found guilty by the tribunal for violating the Code never lost their

¹⁰⁶ Hansungule Michelo, A study into the legislative review of the anti corruption Commission Act, comparison and commentary

¹⁰⁷ Supra note p.9

¹⁰⁸ Siyomunji Sally, The protection of the rights to privacy and property in the fight against corruption in Zambia UNZA 2008, p46.

seats. Secondly although allegations were leveled to the effect that some money could have been stolen from the K2 Billion, no investigations were instituted to prove whether the money was invested in the acquisition of properties. By and large the idea behind the enactment of this law is good but the enforcement mechanism should be strengthened and the loopholes must be sealed in order for the law to acquire effectiveness. As was observed by the National Integrity System (NIS) report¹⁰⁹ in Zambia there is no comprehensive national strategy to fight corruption. Such a strategy should be formulated as the umbrella framework which should *inter alia* prescribe and regulate conduct in the public service. In addition it is imperative that Government administrative activities be opened to public scrutiny, through the enactment of the long elusive Public Information Act which should give information held by the state as well as any information that is held by another person and that is required for the exercise or protection of any right.

5.5 INSTITUTIONAL REFORMS

The success of any asset forfeiture strategy largely depends and requires expertise knowledge on the part of investigators who working on a case involving property. In this vein training is an integral component of capacity building. The Anti Corruption Commission has not embarked on any financial investigations training for its officers. To date the financial investigations strategy has not been developed to ensure that officers have the capacity to investigate complex financial investigations which may involve multiple jurisdictions. The Anti Corruption Commission enjoys a lot of donor support which has been channeled in the traditional strategies of basic investigations, corruption prevention and education. The Commission therefore needs to engage the donors on the need to support a change of strategy in ensuring that officers are adequately trained to undertake complex financial investigations training. Investigators need to be competent in adducing evidence which will

¹⁰⁹ A report on combating corruption in Africa Issues and challenges 2006

assist in proving that a property was acquired using illegitimately acquired resources. Where direct evidence is lacking on the source of money used to procure properties, investigations must have specialized knowledge in income /expenditure analysis which should disprove any assertion or claims by the owners of the property to the effect that the property was legitimately acquired. Once officers have been trained in the necessary field, the Commission needs to set up two strategic units namely the financial investigations unit and asset forfeiture unit with specialized staff. The Anti Corruption Commission must endeavor to create an asset forfeiture unit which will consist of experts with specialized knowledge on financial investigations and application of forfeiture laws in investigating not only politically exposed individuals but people and enterprises who have been identified as exposed to corruption risks. This may only be possible through the creation of an effective asset tracking mechanism which would work in liaison with a national financial Investigations and intelligence unit.¹¹⁰ The problem presently is that the country does not have a Financial Intelligence Unit. An FIU basically exist to make its collected information on financial profiles available to investigating Authorities. It also processes analyses and interprets financial information and disseminates the same to enforcement agencies, and also gives advice to law enforcement on the best practices and policies for the identification of proceeds of unlawful activities and to combat corruption. The absence of a financial information unit does not however stop the ACC from creating the two units already alluded to.

Closely connected to this issue is the need to attract lawyers who are advocates of the High Court¹¹¹ and may defend property related cases in the High Court. It is interesting to note that the ACC has

¹¹⁰ Desk review report on consultancy to provide layman's draft of the revised anti corruption commission act June 2004

¹¹¹ Kenneth K Mwenda p. 100

to date not taken a single case to the High Court for adjudication to pursue a possible civil forfeiture. Most cases end at criminal investigations which in most cases are done unprofessionally for want of experience in financial investigations knowledge .This worrisome position calls for the immediate engagement and training of legal and financial experts in both prosecutions and the asset forfeiture unit to be created. Furthermore it is usually said that justice delayed is justice denied .Most of these plunder cases which are before courts are taking a very long time to be concluded .It would be a good idea to create commercial crime courts to speedily dispose financial related matters .

In the same vein, it is vitally important that other stakeholders who are involved in the monitoring activities should also increase their capacity .These partners include banks, who should report suspicious deposits, the Road Traffic Commission who should be vigilant in monitoring public functionaries in public service who own numerous vehicles and indeed Ministry of Lands to monitor ownership of properties.

5.6 BANK OF ZAMBIA

The Bank of Zambia should strengthen its inspectorate unit in ensuring that Banks are compliant in maintaining standards which do not compromise the integrity of the financial system by being open to fraud and money laundering activities. There is also urgent need to arrest capital flight which is currently arising from relaxed fiscal regulations which are exploited by people who transfer huge sums of illegitimately acquired wealth abroad .Criminals have long established that investments in foreign jurisdictions /tax havens with secrecy law such as the Cacaos and Turk Island is an effective way of insulating illegitimately obtained wealth from being confiscated by the Government .Prevention is therefore far more effective in putting in place a rigorous system which restricts the amount of money that an individual may take out of the jurisdiction .

Banks are very important stakeholders in arresting capital flight which currently poses a serious problem to the fight against corruption and money laundering. Currently the Task Force on Corruption is struggling to recover funds which were invested in blacklisted jurisdictions such as the Cacaos and Turk Islands. In most cases the resources were moved by banks in Zambia without notifying the Drug Enforcement Commission .There should therefore be a law that criminalizes the movement of certain amount of money from Zambia without notifying the Anti Money laundering unit. The banks should be made to pay heavy penalties and the officers who participate and authorize such transactions should be held criminally and personally culpable.

Legislation does not cover third parties who may be allied to an offence such as the parties who have knowledge of the illegal circumstances under which a property was acquired and refrains from reporting the same. There is therefore urgent need to revise the law to criminalize such conduct which if left unchecked may fuel crime.

5.7 INTERNATIONAL INSTRUMENTS ON CORRUPTION

The instruments must be domesticated to enable the Anti Corruption Commission adopt effective means of confiscating tainted properties. According to a press statement by Transparency International President Mr. 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 vice¹¹². These sentiment were also echoed by Mr. Nkole the Task Force Chairman who stated that the ratification of the African Union (AU) convention on the Prevention and the Combating of corruption and accession to the United nations (U.N) Convention Against Corruption will enable it to arrange the extradition of fugitives ...and the

¹¹² The Post news Paper Monday 17th December 2007

Government will no longer incur huge costs in hiring private investigators to probe cases in foreign jurisdictions.....¹¹³ The benefits of domesticating the international instruments are evident and it is incumbent upon the Government to act decisively in ensuring that the instrument become legally binding as domestic law.

5.8 CONCLUSION

One of the tenets of good governance is to ensure that corruption levels are brought to a manageable level .That corruption not only eats away the moral fabric of society but also deepens the anguish of socio-economic poverty is sufficient cause for this study to have been undertaken. Corruption, as a complex and dynamic offence must be addressed with an integrated and systematic approach aimed at eroding its principal cause; benefit. Failures of the past are but lessons to be used to reposition the fight against corruption in a tangible one with sustainable benefits.

¹¹³ Munthali ,Task force Intensifies Shansonga's extradition ,Zambia Daily Mail (Monday) 15th January 2007

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APPENDIX

Questionnaire

These questions are based on the current provisions of the Anti Corruption Commission forfeiture regulations.

1. Please explain what you understand by a) Criminal forfeiture.....
b) Civil forfeiture
.....
2. What do you think is the practical advantage of using civil forfeiture as opposed to criminal forfeiture
3. Do you think the ACC has been active in promoting the use of asset forfeiture as a deliberate means or strategy against corruption.....
4. If the answer to the question is no what measures do you think the ACC should engage in to facilitate or enhance such strategy.....
5. Do you think government would support an initiative of using asset forfeiture to fight corruption.....If no please explain.
6. Do you think the current Government has demonstrated sufficient political will to support the use of asset forfeiture as an effective strategy?
7. What legislative reforms would you like to see in order for such strategy to be effective
8. Do you think the ACC has the capacity to use asset forfeiture as a strategy in the fight against corruption
9. The current asset forfeiture regulations are descriptive rather than prescriptive .How do you think this has affected the use of asset forfeiture as an effective tool in the fight against corruption.

What provision would you recommend be added to add to the efficacy of the Act?

1. Do you think the current asset forfeiture regime is sufficient to act as an effective mechanism to fight corruption?

2. Do you think the current Act is adequate in meeting the mutating nature of corruption?

- If the answer to the question is no please explain

3. What provisions should be added or amended to make the Act more effective

4. Do you think that international conventions should be domesticated as part of legislation.....
5. What impact do you think such a move would have on the use of asset forfeiture as an anti corruption strategy.....

QUESTIONNAIRE 2

1. Could you state your length of service in the Commission?
2. Do you have any qualification or exposure to financial investigation training?
3. if yes please explain the nature of training
4. What do you understand by possession of under section 37 of the ACC Act?
5. Have you ever investigated an inquiry relating to possession of unexplained property?

If the answer to your question is yes ...what was the outcome of the matter.....

Are you familiar with the use of net worth analysis?

If the answer to your question is yes did you use a net worth and concealed income analysis in your inquiry?

What practical difficulties did you encounter in the inquiry?

Please explain the current difficulties experienced in financial investigations

6. Do you think the provisions under section 37 of the Act are easy to prove
.....

If the answer to your question is no what reforms would you like to see in the said section.
.....

.....
Have you ever indicted a suspect for possession of unexplained property?

If yes was that suspect convicted

If the answer to the question is no what were the reasons for terminating the case

Was the case subjected to civil process in a bid to recover the tainted properties?

Do you think it is easy to discharge the burden of proof in such an inquiry

If the answer to your question is no please give reasons for your answer

Do you think the burden of proof should be; lowered.....

What do you think would be the practical effect of such an action?

What is your comment on the proposal to reverse the burden of proof from the prosecutions to the suspects

Do you think the provisions under section 24 are a sufficient compliment to an inquiry of possession of unexplained property?

PART 2

Do you think the current asset forfeiture regime in its current form is sufficient to act as a deterrent to corruption.....

What actions if any should the ACC take to make its asset forfeiture provisions more effective?

Do you think that public bodies should be obliged to declare their assets

If the answer to the question is yes, why do you think such a provision would be important?

Under the proposed Anti corruption Bill the provisions relating to asset forfeiture have been lifted from the prevention and prohibition of money laundering ACT. Do you think this will usurp the powers of the prohibition and prevention of money laundering Act.....Please explain your answer.

What safeguards does u think the Government should embark on to promote accountability in the ownership of property in Zambia?