IN THE HIGH COURT FOR ZAMBIA
2012/HP/1584
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

IN THE MATTER OF: ORDER 6(2) OF THE HIGH COURT RULES CAP 27 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: SECTION, 4, 60 , 61 AND 86 OF THE ANTI CORRUPTION ACT NO. 3 OF 2012

AND

IN THE MATTER OF: AN APPLICATION TO REVERSE OR VARY THE RESTRICTION NOTICE ISSUED TO MPHUDU TRUST LIMITED DATED 4TH JANUARY 2012 AND RENEWED ON 1ST OCTOBER, 2012

BETWEEN:

MPHUNDU TRUST LIMITED	1ST APPLICANT
ACCESS BANK ZAMBIA LIMITED	2ND APPLICANT

AND

THE ANTI CORRUPTION COMMISSION	RESPONDENT

BEFORE THE HONOURABLE MR. JUSTICE D.Y. SICHINGA, SC
THIS 4TH DAY OF APRIL 2013 AT 08:40HRS IN OPEN COURT

FOR THE 1ST APPLICANT :PROF. P. MVUNGA, SC OF MESSRS MVUNGA ASSOCIATES
MR. S. SIKOTA, SC OF MESSRS CENTRAL CHAMBERS

FOR THE 2ND APPLICANT : MS. A. THEOTIS OF MESSRS THEOTIS MATAKA & SAMPA LEGAL PRACTITIONERS

FOR THE RESPONDENT : MR. K. PHIRI, CHIEF LEGAL AND PROSECTUTIONS OFFICER
MRS. E. ZIMBA, SENIOR LEGAL AND PROSECUTIONS OFFICER

MR. C. MOONGA, SENIOR LEGAL AND PROSECUTION OFFICER
MR. J. MATALILO, SENIOR LEGAL AND PROSECUTIONS OFFICERS

JUDGMENT

Cases referred to:

1. R vs Askew 178 4 Burr 2186
2. Lord Halsburgs dicta in Sharp vs Wakefield 1891 AC 179
3. Ghani vs Jones (1969) 3 All ER p. 1700 at P.1705
4. Anti-Corruption Commission vs Ng'ona Mwelwa Chibesakunda (Appeal No. 99/2003)
5. Zinka v Attorney – General (1990-1992) ZR 73
6. Anti-Corruption Commission vs Barnet Development Corporation Ltd (2008) ZR P.69

Other Authorities referred to:

1. De Smith 3rd Edition on Administrative Law at P246
2. Section 60(5) of the Anti – Corruption Commission Act No. 3 of 2012
3. Proceeds of Crime Act No. 19 of 2010 and the case of the DPP vs S.I. Limbada (1964) Ltd (1980) ZR Page 52

This matter is before this court by way of an originating summons pursuant to Order 6 Rule 2 of the High Court Rules Cap 27 of the Laws of Zambia. By this application, the 1st Applicant, Mphundu Trust Limited seeks:

(i) An Order to reverse the Restriction Notice issued to the Applicant dated 4th January 2012 and renewed on 1st October, 2012, or alternatively

(ii) An Order to vary the Restriction Notice issued to the Applicant and dated 4th January 2012 and renewed on 1st October 2012;

(iii) An Order that the Restriction Notice issued to the Applicant on the 4th January 2012 and renewed on 1st October, 2012 stopping the Applicant from leasing out or advertising for lease and doing all things necessary for the proper management of the property known as Stand No.1F/488A/29A is unreasonable, illegal and/or void and of no legal effect whatsoever

(iv) Damages for delay on its project

(v) Any other relief the court may deem just and equitable; and

(vi) Costs

On the 26th February 2012, I made an order for the 2nd Applicant, Access Bank Zambia Limited to be joined to these proceedings. By this application the 2nd Applicant herein seeks an order to quash or vary the Restriction Notice issued to the 1st Applicant and dated 4th January 2012 on 1st October 2012.

In support of this application the 1st Applicants and 2nd Applicant rely on the affidavit in support of Originating Summons dated the 26th day of December 2012 and sworn by one Thandiwe Chilongo Banda and affidavit in support of summons for nonjoinder dated the 6th day of February, 2013 and sworn by one Jekwu Ozoemene respectively, and submission by counsel.

In opposing this application, the Respondent, Anti –Corruption Commission rely on the affidavit in opposition of originating summons sworn by one Chola Kasongo dated the 7th day of February 2013, and on submissions by counsel.

From the affidavit evidence, I find the following facts to be common cause:

1. That the 1st Applicant, Mphundu Trust Limited is the legal owner of the property known No. 1 F/488A/29A. Lusaka

2. That the 2nd Applicant, Access Bank (Zambia) Limited is a financial institution and company incorporated in the Republic of Zambia that lent a sum of United States Dollars One Million (US$1,000,000=00) to the 1st Applicant and created a mortgage over the remaining extent of Subdivision ‘A’ of Subdivision No. 29 of Farm No. 488a Lusaka.

3. That the Respondent did on the 4th day of January 2012 enter and serve on the 1st Applicant a restriction notice pursuant to the Anti-Corruption Act No 38 of 2010.

4. That on the 17th day of September 2012 the Respondent issued a fresh restriction notice pursuant to the Anti-Corruption Act No. 3 of 2012

5. That on 29th March 2012, the 1st Applicant through its advocates wrote to the Respondent seeking permission to lease out the property subject of these proceedings. (Exhibit "TCB6" refers.)

6. That on 19th April 2012 the Respondent replied to the 1st Applicant requesting that it be furnished with the details of the account where the rentals would be deposited.

7. That on 7th May 2012 the 1st Applicant through its advocates furnished the Respondent with the details of the account where the rentals would be deposited. (Exhibit "TCB7"refers).

8. That on 9th May 2012 the Respondent gave the 1st Applicant conditions to fulfill before the subject property could be leases out (Exhibit "TCB8" refers)

Whether or not the 1st Applicant complied with the precondition set by the Respondent to lease the subject property, and whether or not the Restriction Notice ought to be reversed or alternatively varied is a matter for determination before this court.

On behalf of the 1st Applicant, Professor P. Mvunga, State Counsel (SC) made lengthy submissions. The gist of his submissions is that the State's Restriction Notice is unreasonable and defies logic. It was State Counsel's submission that any investigations being carried out by the Respondent would not be hindered by the

leasing out of the subject property. He submitted that the Respondent's unreasonable conduct was unequivocally revealed by the fact that the unserviced loan to the 2nd Applicant was accumulating interest which must be added to the principle at great cost and was a burden to the 1st Applicant which burden could have been offloaded had the Respondent allowed the 1st Applicant to lease the flats. State Counsel submitted that the exercise of such power by the Respondent under the cited Act, Number 38 of 2010 was not without restriction. He stated that the power exercised by the Respondent had limitations which the Respondent acknowledged. He said it was clear from the wording of Section 56(4) and 56(5) of Act No. 38 of 2010 that the Director-General of the Respondent did not have absolute powers to issue unfettered restrictions.

In support of his arguments Prof. Mvunga, SC cited the learned authors of De Smith 3rd Edition on Administrative Law at P246 where it states,

"The exercise of a discretion may be impugned directly or indirectly… A person aggrieved by
the exercise of a discretionary power may, instead of attacking the merits of the exercise of the
discretion, contend that the depository of the discretion has acted without jurisdiction or ultra
vires because of the non-existence of the discretion depends. Or he may contend that
the repository of the discretion has failed to observe the rules of natural justice (if a duty to
act judicially has been cast upon it) or other essential procedural requirements.

Professor Mvunga, SC further cited the cases of R vs Askew 178 4 Burr 2186 to demonstrate the limits of discretionary power.

Furthermore he relied on Lord Halsbury's dicta in Sharp vs Wakefield 1891 AC 179 where he stated,

> *"Where Judicial discretion is exercised, the action should be according to the rules of reason and justice, not according to private opinion; according to law and not humour. In other words, discretion ought not to be arbitrary, vague and fanciful, but regular and legal."*

It was State Counsel's submission that the Restriction Notice issued on the 4th January 2012 was so vague and broad and lacked specificity. State Counsel contended that, the Respondents investigations apart from being vague did not seem to have any time limit, the effect of which was punitive.

In summary he submitted that the thrust of 1st Applicant's contention was unreasonableness, unfairness, capriciousness and vindictiveness at apparently the instance of another body other than the Respondent. State Counsel prayed that the Restriction Notice be discharged or varied to allow the 1st Applicant procure rental proceeds and service its indebtedness to the 2nd Applicant. State Counsel further prayed for damages incurred for not having serviced the loan from 29th March, 2012 when the Respondent had been written to by the 1st Applicant's advocates seeking to lease out the property.

On behalf of the 2nd Applicant, Ms. A Theotis made lengthy submissions in which she argued that the 2nd Applicant is a bona fide registered mortgagee of the property subject to the Restriction Notice. She contended that the 2nd Applicant would not be able to recover the monies advanced to the 1st Applicant as long as the Restriction Notice was in force, or exercise its power of sale. Ms Theotis concurred with authorities cited by Prof. Mvunga. She submitted that whilst the Restriction Notice impacted on the 1st Applicant as opposed to the 2nd Applicant, as Amicus Curiae, learned counsel submitted that the initial notice in this matter was first issued on the 4th January 2012 under the repealed Act, No. 38 of 2010, now under Act No. 3 of 2012. She submitted that Section 56(3) of Act No. 38 of 2010 provided for the restriction to remain in force for a period of 9 months. However, it was counsel's contention that having been in force for more than 8 months, a new notice was issued under the new Act, which should have been renewed for a period of one month. She submitted that it was an abuse of power by the Respondent to use the new Act to extend the length of the Notice from that intended by the law without showing compelling reasons for them to do so. Counsel relied on the case of Ghani vs Jones (1969) 3 All ER p. 1700 at P.1705 for this submission. She contended that the Respondent had not shown any cause for the cause for the continued existence of the Restriction Notice.

It was further argued by Ms. Theotis that Section 60(5) of the Anti – Corruption Commission Act No. 3 of 2012 was meant to protect innocent 3rd parties with bona fide interest in the properties subject to Restriction Notices issued by the Respondent. She submitted that the said provision of the Act gives the Court the jurisdiction to vary or reverse any notice if it determines that a 3rd Party with bona fide interest would suffer damages as a result of the Notice being in effect.

Ms. Theotis further submitted that courts had always taken cognisance of and protected bona fide 3rd parties. She referred the court to Section 10(4) the forfeiture of Proceeds of Crime Act No. 19 of 2010 and the case of the DPP vs S.I. Limbada (1964) Ltd (1980) ZR Page 52.

She stated that the same principles applied to the case under consideration.

It was contended by counsel for the 2nd Applicant that variation of the Restriction Notice to allow the 1st Applicant to lease out the properties and meet its obligations to the 2nd Applicant would not compromise nor prejudice the Respondent's investigations in any way. Ms. Theotis argued that by refusing to let the 1st Applicant lease out the subject properties, the Respondent had acted in breach of its duty to act fairly and in accordance with the Rules of

Natural Justice. She relied on the provisions of Order 53 rule 14 sub Rule 30 of the White Book 1999 edition.

Ms. Theotis contended that by refusing to allow the 1st Applicant to lease out the property, the Respondent's decision had negatively impacted the 2nd Applicant who is not subject to the Respondent's investigations and who has a bona fide interest in the property.

Counsel therefore prayed for the court to vary or reverse the Restriction Notice with costs.

On behalf of the Respondent, Mrs. E. Zimba, Senior Legal and Prosecutions Officer submitted that on the 19th May 2012 the Respondent through its Director-General wrote to the 1st Applicant setting out conditions before the Restriction Notice could be varied. (Exhibit "TCB8" refers). She stated that the 1st Applicant failed to meet the condition.

She further submitted that the Respondent had been carrying out investigations which included interviewing the deponent of the affidavit in support. She relied on the case of the Anti-Corruption Commission vs Mwelwa Chibesakunda SCZ Appeal No. 99 of 2003 where it was held

"*To hold that issuing a restriction notice, the Director –General should specify the offence*

being investigated would limit the effective operation of S. 24(1)" (which is the same as
Section 56 of Act No. 38 of 2010).

It was counsel's submission that the exact offence committed would only become clear after investigations had been completed. Mrs. Zimba contended that the power of the Director-General under Section 56 was an investigative power and not an administrative one. She said the power was meant to preserve the property that is suspected to be proceeds of crime and where it was believed that proceeds or crime may have been used in acquiring or developing that property, then it would mean that persons would be allowed to benefit, and in the long run investigations would be prejudiced.

Mr. C. Moonga, Senior Legal and Prosecutions Officer submitted that the current state of affairs was the existence of an investigation. Therefore the Respondent's action was taken in furtherance of the investigation. Counsel countered the Applicants arguments by stating that the Restriction Notice had a time frame which was indicated in the Act. On the issue of investigations being at the instance of another body, Mr. Moonga submitted that the Restriction Notice was specific that the Respondent was conducting investigations. Counsel reiterated submission by Mrs. Zimba that the 1st Applicant did not meet the conditions set by the Respondent.

Mr. J. Matalilo, Senior Legal and Prosecutions Officer made further submissions on behalf of the Respondent. He reiterated that the Respondent properly exercised its investigative powers. He stated that Section 56(5) of Act No. 38 of 2010 provides for remedies for any person dissatisfied with the decision of the Director-General. He submitted that if the property were leased out rights of 3rd parties would be affected. He contended that the Restriction Notice should be sustained until investigations are completed or until restriction notice ends.

In response to submission made by the 2nd Applicant's counsel, Mr. Matalilo submitted that the 2nd Applicant was a mortgagee in respect of the restricted property. He submitted that Act No. 3 of 2012 allows a party to request for a variation of the Restriction Notice. He said the 2nd Applicant had never engaged the Respondent to do so.

On the issue of the 2nd Restriction Notice subsisting contrary to law, learned counsel contended that Section 60(3) of Act No. 3 of 2012 provides a life span of 12months or until cancelled by the Director-General. He submitted that any subsequent notice to earlier notice was limited to a 6 month period. Mr. Matalilo contended that the repeal of Act No. 38 of 2010 and its replacement by Act No. 3 of 2012 did not affect the existence of the Restriction Notice issued in October 2012.

On the issue of unfair treatment to the 2nd Applicant, Mr. Matalilo submitted that there was no evidence to show that the 2nd Applicant had been unfairly treated. He contended that infact, the 2nd Applicant had been copied into the Notice.

In conclusion Mr. Matalilo submitted that the Respondent had not stood in the way of the 2nd Applicant as the Respondent was not party to the mortgage. He urged the court to refuse the 2nd Applicant's application with costs.

In reply, Professor Mvunga, SC made lengthy submission the gist of which was primarily that the Respondent had not shown any prejudice that would be done if the Notice was varied. Secondly, he submitted that it was trite that the terms of a statute is that the law exists as when the event occurred. He submitted that as the initial notice was issued under the 2010 Act, the computation of time ought to have been as per the 2010 Act. He submitted that if the renewal was in accordance with the 2012 Act then the court ought to reverse the Restriction Notice.

Thirdly, Professor Mvunga, SC argued that the refusal to vary the Notice was unreasonable because the rationale to service the loan had been put across to the Respondent. He submitted that there was no valid argument to ignore such an enormous burden on the 1st Applicant. He further submitted that the assertion that the 1st Applicant had failed to comply is misdirected, *mala fide*

and unreasonable. He distinguished the case of Ng'ona Chibesakunda cited by the Respondent that it did not address the issue of *mala fide*, and neither did it deal with variation but disposal.

Fourthly, on the issue of benefit, state counsel submitted that the Respondent should not determine the guilt or innocence of anyone at this stage. He submitted that in the case of Ng'ona Chibesakunda the Supreme court held that the final Arbitor is the court.

State Counsel urged the court to intervene in this matter by varying or reversing the restriction notice.

In reply Ms. Theotis on behalf of the 2nd Appellant submitted that the fact that the 2nd Applicant is a mortgage was laid bare in the affidavit in support of non joinder.

Secondly, she submitted on the length of time of the restriction notice. Counsel submitted that the initial Notice issued in January 2012 ought to have been in force for a period of 9 months and if the Director-General saw it fit to extend it, then the extension ought to have been for a period of 6 months.

She submitted that the 2nd Restriction Notice shows that it was not an extension but a fresh Notice under the 2012 Act which is

completely illegal. Counsel reiterated her prayer that the application be granted.

I have carefully examined the Applicant's pleadings together with the supporting affidavits. I have equally considered the respondent's pleadings and affidavit opposing the application. I have also considered the submissions by counsel on both sides.

From the facts of this case the Restriction Notice first in contention was issued pursuant to Section 56(i) of the Anti-Corruption Act No. 38 of 2010 which provides:

"56(1) The Director-General may, by written notice to a person who is the subject of
an investigation in respect of an offence alleged or suspected to have been committed under
this Act, or against when a prosecution for an offence has been instituted, direct that such
person shall not dispose of, or otherwise deal with, any property specified in such notice
without the consent of the Director-General."

The notice issued in respect of this provision was served on the 1st Applicant on 4th January 2012, and states as follows:

REPUBLIC OF ZAMBIA
ANTI-CORRUPTION COMMISSION

CONFIDENTIAL

OFFICE OF THE DIRECTOR-GENERAL
P.O.BOX 5048
LUSAKA

4th January, 2012

Mrs. Thandiwe Chilongo Banda
Director
MPHUNDU TRUST LIMITED,

LUSAKA

RESTRICTION NOTICE ISSUED UNDER SECTION 56(I) OF THE ANTI – CORRUPTION
ACT NO. 38 OF 2010

This Commission is conducting investigations into offence alleged or suspected to have been committed under Part IV of the Anti-Corruption Act No. 38 of 2010.

In exercise of the powers conferred on me by Section 56 of the Anti-Corruption Act No. 38 of 2010, I hereby direct that you shall not dispose of or otherwise deal with, without my consent, Property Number F/488a/29/A along Leopards Hill Road, Lusaka.

For your own information, Section 56(4) and 56(5) of the Anti –Corruption Act respectively provides as follows:
…

Rosewin M. Wandi
DIRECTOR GENERAL
cc. The Bank Manager,
Access Bank (Zambia) Limited
Lusaka "
…

It was argued by Professor Mvunga, SC on behalf of the 1st Applicant that the said notice was so vague and broad and lacked specificity. From the wording of Section 56, referred to above, there is no prescribed format of a Restriction Notice, in terms of detail and or specificity. The fact that the Restriction Notice specifically stated the property not to be disposed of or dealt with, would, in my assertion, reasonably suggest that investigations were in respect of the property stated in the said Notice. In fact, it is deposed to in paragraphs 18, 19 and 20 of the Affidavit in support that the Applicant's Director had occasion to be interviewed on specific issues regarding the history of the

Applicant and its sources of funding. I therefore find that first and foremost, the Respondent through its Director-General acted within the provisions of *Section 56 of the Anti-Corruption Act* when it issued the Restriction Notice marked as exhibit as "TCB5".

The said Notice shows that the Respondent was conducting investigations into offences alleged or suspected to have been committee under Part IV of the Anti-Corruption Act No. 38 of 2010. The Notice further directed the 1st Applicant not to dispose of or otherwise deal with the subject property without the consent of the Director-General. There is no requirement, so far as the wording of Section 56 goes, for the specific details of the nature of the investigations to be disclosed. The second leg of my consideration is the Applicants' contention of the period the Restriction Notice would remain in force. Section 56(3) of Act No. 8 of 2010 (now the repealed Act), provided for the Restriction Notice to remain in force for a period of nine months or until cancelled by the Director-General. There was a proviso in Section 56 that where the initial period expired, the Director-General had the power to issue a fresh notice for a further final term of six months. On the facts of this case, the notice having been in force for a period of about eight months was cancelled and renewed on the 1st of October 2012 pursuant to a new Act No. 3 2012 which provides in Section 60(3) that a notice shall be in force in for nine months with respect to investigations within the jurisdiction and

twelve months with respect to investigations outside jurisdiction. The extension for both periods is a final term of six months.

Under the repealed Act, a person would be subject to a total period of investigation of fifteen months. Under the current Act the total period envisaged for an investigation is fifteen months for investigations within jurisdiction and eighteen months for investigations outside jurisdiction. Save for a lengthened period of restriction for investigations outside jurisdiction in the current Act, the two provisions in the repealed legislation and the current law are similar and save the same purpose.

The savings provision of the repealed Act are contained in *Section 95 of Act No. 3 of 2012* which provides:

> *"95(1) The Anti-Corruption Act, 2010, is hereby repealed.*
> *(2) Notwithstanding subsection (1), all the investigations, prosecutions and other*
> *legal proceedings, instituted or commenced under the repealed Act, and*
> *pending immediately before the commencement of this Act by or against the*
> *Commission, may be continued by or against it".*

It is clear from the evidence on record that the Respondent sustained the investigations instituted under the repealed Act. Having done so, the Respondent in my assertion ought to have sustained the period of the notice as there is an identical provision if the current Act and thereafter, the Respondent would have been perfectly entitled to extend the period upon expiry to a further six months to facilitate the conclusion of any investigation.

To renew the period under the new Act for a period of nine months or twelve months (if investigations are outside jurisdiction) would potentially subject the 1st Applicant to a restriction period of Twenty-Six (26) months. This is not what was envisaged by the legislators in both the repealed Act and the current Act No. 3 of 2012. To extend time as was done in this case would be prone to abuse and lead to injustice not supported by law. Prof Mvunga, SC argued that the time period of the Restriction Notice ought to have been computed under the 2010 Act. He argued that it would be fatal to extend the period by renewing the notice under the 2012 Act. Whilst I agree that a renewal of Notice under the new Act is potentially fatal, I am not of the view that time should be computed under the repealed Act for the simple reason that it is no longer the law.

From the evidence on record, particularly from exhibit "TCB14" I find that there were investigations by the Respondent outside the jurisdiction that were being carried out. I therefore, hold that the 2010 Act having been so repealed was no longer law and deem the first restriction notice to have been issued by virtue of Section 60(3) of Act No. 3 of 2012. This means that at the expiration of twelve (12) months from the 4th January 2012, the restriction notice would be subject to a further final term of six months to facilitate the conclusion of any investigation.

Once again, I do not accept the learned State Counsel's position that the renewal should have complied with the provisions of Section 56(3) of repealed Act because it was for all intents and purposes it is no longer the law. I am fortified in my findings by the provisions of Section 11 of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia which provides:

> *"11. Where any written law repealing in whole or in part any former written law is itself*
> *repealed such last repeal shall not revive the written law or provisions before repealed*
> *unless words be added reviving such written law or provisions."*

The repealed provision of Section 56(3) by virtue of which the Restriction Notice was issued did not remain in force as it had been replaced by provisions of Section 60(3) which are now currently in force for the time being. The Restriction Notice issued on the 4th January 2012 is thus held to be sustained by virtue of Section 60(3)(b) of Act No. 3 of 2012 for the period 4th January 2012 to 4th January 2013 and deemed renewed by virtue of the proviso in Section 60(3) of Act No. 3 of 2012 for a further final six months.

Finally, I will consider the affidavit evidence on record. It is not in dispute that the restricted property is legally registered in the name of the 1st Applicant, and that the 2nd Applicant is a bona fide registered mortgagee of the property subject to the restriction notice. Exhibits "TCB1", "JO1, and "JO2" refer.

Further, the affidavit evidence shows that on 29th March 2012, the 1st Applicants through its advocates wrote to the Respondent

seeking consent to have flats built on property Number F/488a/29A along Leopards Hill in Lusaka leased out to enable the 1st Applicant service a loan owed to the 2nd Applicant. (Exhibit TCB5).

On the 9th May 2012, following other correspondence between the 1st Applicant and the Respondent, the latter gave the conditions for the 1st Applicant to abide by before the flats could be leased out. As listed in Exhibit "TCB8", there were five conditions as follows:

1. That the 1st Applicant provides the Respondent with all documents in respect of the details of the lease Agreements to be entered between the 1st Appellant and would-be tenants.

2. That the 1st Applicant provides proof of rentals made by tenants;

3. That the 1st Applicant provides proof that proceeds of the rentals would be deposited in a specific Mphundu Trust Account at the 2nd Applicant Bank;

4. That the 1st Applicant provides proof that the rentals are exclusively channeled towards the servicing of the loan facility obtained from the 2nd Applicant; and

5. That the 1st Applicant provides documents in respect of one million (1,000,000=00) US Dollars loan facility obtained from Hands Industries LK of Dubai.

Subsequently, the 1st Applicant provided a letter of confirmation from a company called Hands Industries L.L.C. of Dubai that they availed a loan to the 1st Applicant. Exhibit "TCB11" refers. On

23rd November, 2012, the Respondent's Director-General wrote to the1st Applicant through its advocates informing them that the letter from Hands Industries, exhibit "TCB11" was being verified from its source, and further that the Restriction Notice was still in effect. The letter by the Respondent is contained in exhibit "TCB14"

In my assertion of the evidence before me, the conditions set forth by the Respondent, particularly conditions 1 to 4 could hardly be met without first finding the tenants to occupy the flats, and the 1st Applicant was not in a position to satisfy the Respondent's conditions without entering into the necessary tenancy agreements with tenants. In so far as condition 5 is concerned, I find that the 1st Applicant had availed some information to the Respondent. It was not what the Respondent expected. However, it is information which they state in their letter "TCB 11" they would verify.

In my view, it was incumbent upon the Respondent to consider that the 1st Applicant was the title holder of the subject property. From what I can decipher from the affidavit in opposition, the deponent Chola Kasongo alleges that the investigations relate to corrupt activities involving Mphundu Trust Ltd and dealings with third parties. There is no averment that the investigations relate to allegations of the corrupt acquisition of property Number F488a/29A along Leopards Hill Lusaka neither is any reference

made, in the affidavit in opposition to property number F/488a/29A Lusaka.

Section 33 of the Lands and Deeds Act, Chapter 185 of the Laws of Zambia provides that a certificate of Title shall be conclusive evidence of ownership of land by the title holder. Whilst it is trite that title can be challenged based on fraud, there is no prima facie evidence in my view to show that title is in fact an issue based on fraud.

I am alive to the fact, and this sentiment has been expressed in similar cases, that by their very nature investigations are carried out discreetly in order not to prejudice their conclusions. However, by the same token, the status quo prior to investigations must be guarded as closely possible in such cases. This must be so for that simple but basic principle espoused by the Constitution in Article 18(2)(a) which provides:

> *"Every person who is charged with a criminal offence –*
> (a) *Shall be presumed to be innocent until h e is proved or has pleaded guilty,"*

Whilst the Respondent does possess the power to carry out investigations make restrictions that power must be exercised judiciously and must not, in my view prematurely, impugn guilt on those being investigated. I am fortified in my views by the Supreme Court's obiter in the case of the Anti-Corruption Commission vs Ng'ona Mwelwa Chibesakunda (Appeal No. 99/2003) where the court said:

"... The nature of criminal proceedings is such that the investigating authority does not fully
decide the fate of the person being investigated. The final arbiter is the Court where the
accused will be given the opportunity to be heard."

In the main, I accept the submissions made by Professor Mvunga, SC on these considerations of the evidence on record that the exercise of a power must take into account and appreciate the circumstances surrounding a particular case. I accept the authorities cited in this respect. In the case of Zinka v Attorney – General (1990-1992) ZR 73 it was stated that

"Prima Facie a duty to act judicially will arise in the exercise of a power to deprive a person of
his livelihood or of his legal status where that status is not merely terminable at pleasure;
or to deprive a person of liberty on property rights or any other legitimate interest or expectations
or to impose a penalty."

In casu, the 1st Applicants obligations do not appear to have been a part of the Respondent's considerations, and as such I find that the duty to act judicially was not properly exercised.

From the evidence on record it was also incumbent upon the Respondent to consider the rights of third parties. The 2nd Applicant contend that the Restriction Notice be varied to either allow the 1st Applicant to service its loan to the 2nd Applicant or reversed to enable the 2nd Applicant take possession and sale in order to offset liabilities due to it. It was submitted that the 2nd Applicant is an aggrieved person and entitled to make such

application. Section 60(5) of the Anti-Corruption Act No 3 of 2012 provides:

"(5) A person aggrieved with the directive of the Director-General issued under subsection (1)
may apply to the High court for an order to reverse or vary the directive."

Subsection (7) provides:

"*(7) The High Court may, on the hearing of an application under subsection (5)*
(a) confirm the directive
(b) reverse the directive and consent to the disposal of, or other dealing with, any
property specified in the notice, subject to such terms and conditions as it thinks fit; or
(c) vary the directive as it thinks fit."

I thus would agree with the submissions of Ms. Theotis to the extent that this provision gives the Court the jurisdiction to vary or reverse any notice if it determines that a third party with bona fide interest would suffer damages as a result of the Notice in effect. From the evidence on record I therefore find that the 2nd Applicant has sufficient interest to seek the remedies prayed.

I refer to the case of the Anti-Corruption Commission vs Barnet Development Corporation Ltd (2008) ZR P.69 where the Supreme Court interpreting section 24 of the Anti-Corruption Commission Act Number 42 of 1996 held inter alia:

"Section 24 (1) of the Act does not expressly give powers to the Director General to
restrict the respondents right to access the rent realized from the properties the subject of

investigations, during the currency of the restriction notice."

In considering this issue the supreme Court had this to say,

"'In our view ... the words "... shall not dispose of or otherwise deal with any property
specified in such notice...' found towards the end of Section 24(1) are crucial to the resolution
of the issue at hand. This section generally forbids a person who is under an investigation
for an offence alleged or suspected to have been committed under the Act or is under
prosecution from disposing of or otherwise dealing with the property specified in the
restrictive notice. The words "dispose of" as used in the section mean to sell, transfer or part
with possession or ownership of the property. The words 'deal with" mean in their ordinary
usage, to manage the property. Further, "manage" means to be in the charge or make
decisions in a business or an organization. So the act of obtaining a mortgage or collecting
rent in respect of the property, the subject of investigations, is to deal with or manage the property.

Our understanding of the restriction of the restriction notice is that once it is in force, the freedom
of the party affected to dispose of or deal with the property specified therein is limited as
every activity on the property specified therein is limited as every activity on the property is
subject to the consent of the Director-General. You cannot rent the property and collect rent
or mortgage or transfer it without the consent of the Director-General. We note, however, that
in this particular case the Director-General did allow the respondent to collect rent on
the understanding that the rent collected was to be deposited in the account controlled by
the appellant. We do not think that the measures taken were contrary to the spirit and intent
of Parliament..."

In view of the forestated, it is my finding that this is an apt case for this court's intervention to vary the directive of the Director-General. I thus make the following orders:

1. The Restriction Notice issued by the Director-General of the Anti-Corruption Commission on the 4th of January, 2012 pursuant to the Anti – Corruption Act No. 38 of 2010 is hereby deemed to have been commenced pursuant to Section 60 of the Anti – Corruption Act No. 3 of 2012 for a period of twelve months, and subsequently renewed by a fresh notice upon expiry of the previous notice for a further final term of six months in order for investigations to be concluded.

2. The Restriction Notice issued by the Director-General of the Anti-Corruption Commission directing Mphundu Trust Limited through its Director not to dispose or otherwise deal with Property Number F/488a/29/A Leopards Hill Road, Lusaka is hereby varied as follows:

   (a) The 1st Applicant shall be permitted to lease out the thirteen flats at Property number F/488a/29A Leopards Hill Road, Lusaka.

   (b) Copies of the lease Agreements between the 1st Applicant and would – be tenants shall be availed to the Respondent.

   (c) All rental proceeds shall be deposited in Mphundu Trust Account Number **011001129311** held at Access Bank main Branch, Lusaka.

   (d) The proceeds of rentals deposited in the said account shall be exclusively channeled towards the armortisation of the loan facility owed to the 2nd Applicant, Access Bank Zambia Limited.

(e) Save for proceeds of rentals servicing the loan facility from Access Bank Limited, all excess funds shall remain in escrow in the said account pending the outcome of investigations or criminal proceedings.

I note that the said Hands Industries is not a party to this action, and neither is its interest registered in these proceedings. However, my findings are without prejudice to any interest they may have in the subject property and further without prejudice to the Respondents investigations in this matter which are on going.

Lastly, the 1st Applicant prayed for damages occasioned by the Restriction Notice. This action was made pursuant to Sections 4, 60, 61, and 86 of the Anti-Corruption Act, No. 3 of 2012. Pursuant to Section 60 which gives this Court the jurisdiction to vary or reverse the directives of the Director-General, there is no power for this Court to award damages. As such I decline to award the same. However, this is without prejudice to the Applicants' right to seek damages or other relief in a fresh action.

I further awards costs to the Applicants, to be taxed in default of agreement.

Leave to appeal to the Supreme Court is hereby granted.

Delivered this 4th day of April, 2013.

D.Y. SICHINGA, SC
JUDGE