

ARTICLE

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Non-Conviction Based Forfeiture of Assets as a Tool to Fight Corruption: Some Policy Considerations

By Alex Muyebe S.J.

The general public has learnt that the Director of Public Prosecutions (DPP), Gilbert Phiri S.C. has applied for non-conviction-based (NCB) forfeiture order of property believed to have been acquired through criminal activity. Among the properties involved in the above case are 15 flats belonging to the former First Lady of Zambia, Esther Lungu; Crest Lodge in Ibex Hill belonging to Charles Phiri and lawyer Chiyeso Lungu; a house, three flats and a poultry belonging to Chiyeso Lungu; land in Ibex Hill belonging to Charles Phiri and a farm in Sinda, Eastern Province, belonging to Hon. Tasila Lungu, PF member of Parliament for Chawama Constituency.

Regarding the 15 flats belonging to the former First Lady, the Drug Enforcement Commission (DEC) had earlier repossessed these properties on 1 July, 2022. This new development is therefore the conclusion to a year-long investigation. Presumably that investigation led to the investigation of the properties belonging to Charles Phiri, Chiyeso Lungu and Tasila Lungu.

Though commendable in that something is being done, the route taken by the DPP, to pursue the non-conviction-based forfeiture against known owners, brings to the fore various policy considerations for our collective reflection as a society. How can non-conviction-based forfeiture be used as an effective anti-corruption tool while avoiding its chilling effect on property rights of those affected?

First things first, let us begin by defining what exactly is meant by non-conviction-based forfeiture. Simply put, a non-conviction-based forfeiture of an asset occurs when a court confiscates assets of a criminal nature, even where no conviction has been obtained in relation to criminal conduct. This is distinct from a forfeiture order where the court confiscates property after conviction of the person interested in the property for an offence in relation to that property.

It must be appreciated that international norms and instruments recognize non-conviction-based forfeiture as an important tool in the fight against corruption. The only legally binding universal anti-corruption instrument, the United Nations Convention against Corruption, provides for non-conviction-based forfeiture.

Domestically, non-conviction-based forfeiture is regulated by a complete Act of Parliament, the Forfeiture of Proceeds of Crime Act of 2010 which provides for the confiscation of the proceeds of crime, the deprivation of any person of any proceed, benefit or property derived from the commission of any serious offence and facilitates *the* tracing of any proceed, benefit and property derived from the commission of any serious offence. The Forfeiture of Proceeds of Crime Act of 2010 actually domesticates the provisions of the United Nations Convention against Corruption.

Non-conviction-based asset forfeiture provides an effective avenue for confiscation in situations where it is not possible to obtain a criminal conviction – whether the defendant is dead, unknown, missing, or immune from prosecution, or in cases where the statute of limitations prevents prosecution. It benefits from the lower evidentiary threshold required to obtain a confiscation order, when compared to proceedings designed to determine criminal liability

However, there are a number of criticisms and concerns which have been raised with regards to potential authoritarian misuses of non-conviction-based confiscation. These include the tensions between the anti-corruption and human rights agendas, the risk of political interference in judicial and court systems, and encroachments on both the right to a fair trial and to due process. There have also been concerns about self-incrimination and distribution of the burden of proof, the proportionality of asset forfeiture measures, compensation for third parties, and infringements of property rights. These issues are particularly prominent in the developing world, like ours, where weak institutions and rule of law deficits allow abuses to happen.

To avoid the dangers, a number of safeguards must be in place to ensure that non-conviction-based asset forfeiture is used in accordance with human rights standards. Independent institutions are key to avoiding political interference in investigations and judicial proceedings. Non-conviction-based forfeiture should be lawful and proportionate, and its proceedings should ensure the rights of due process and to a fair trial.

Article 54 of the United Nations Convention against Corruption (UNCAC) also cautions countries to “consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases” (art. 54, 1 (c)).

Where criminal prosecution can be pursued and against known property owners, it seems odd to pursue non-conviction-based forfeiture and may heighten concerns this type of forfeiture attracts worldwide.

Some questions can be raised by the latest development by the DPP.

Firstly, the application for non-conviction-based forfeiture has been made following investigations by law enforcement agencies including the Drug Enforcement Commission against known property owners. Having done their investigations, the law enforcement agencies must have passed on the results of their investigation to the Director of Public Prosecutions and the result is an application for a non-conviction-based forfeiture of the properties.

The crucial question this raises is why the DPP preferred to apply for the non-conviction-based forfeiture order of tainted property, rather than choosing the route of arraignment.

As Article 54 of the United Nations Convention against Corruption guides, the default position is to resort to criminal prosecution route of any suspects identified in the commission of an offence in relation to the property. If criminal guilty is proved, two proverbial birds, if not three, are killed with one stone. Criminal conviction results in: (1) the confiscation of the proceeds of crime; (2) the punishment of the perpetrators; and (3) a clear demonstration that no one is above the full force of the law.

Whatever the reasons behind the position taken by the Head of Criminal Prosecutions to choose not to prosecute any criminal breaches but go through a civil forfeiture, it is inadvisable to proceed with civil forfeiture where evidence is available against a known suspect. Forfeiture is always available to the DPP at the successful conclusion of a criminal matter. One of the most prominent drawbacks of civil forfeiture is its chilling effect on the right to property of citizens.

It was not the intention of the framers of the forfeiture law to clothe investigative agencies with wide discretionary powers to attach citizen's property without finding of guilty by a court of law, but is justified where the accused cannot be brought to account for one reason or another. Tampering with the right to property strikes at the heart of constitutionalism whose muddy waters have long roots in the well established position of great philosophers like Montesquieu, John Locke and Jean Jacques Rousseau that human rights and freedoms are intrinsically and ontologically connected to free ownership of property and free enterprise.

A perfect picture of lady justice shows her blind, so that no matter who is subject of her court is treated just the same as the next one. This always a good reminder for society to reflect on its actions for collective improvement.

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