



ZIMBABWE ANTI-CORRUPTION COMMISSION

"Refuse, Resist and Report Corruption"

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Enactment of Law on Unexplained Wealth Orders a Boost to Anti-Corruption Drive

By Commissioner John Makamure

The anti-corruption drive was last month given the much-needed boost through the enactment into law of the unexplained wealth orders. The Orders were enacted into law through insertion of a new Chapter IIIA into the Money Laundering and Proceeds of Crime Act of 2013. The High Court is now empowered to make court orders designed to elicit explanations from persons who exhibit possession of great wealth without having apparent lawful means of obtaining such wealth. The Act came into operation on 21 February 2020, the day it was gazetted.

The law has come at the right time when the Zimbabwe Anti-Corruption Commission (ZACC) is stepping up asset recovery from proceeds of corrupt activities. The Commission has targeted to recover ZWL 300 million worth of assets in 2020. We have already conducted asset tracing investigations in a number of high profile cases, and drafted asset forfeiture applications for submission to the National Prosecuting Authority. Several of these cases are at various stages of trial in the courts. The unexplained wealth orders should enable us to surpass the target we have set for this year.

An unexplained wealth order, which can be obtained by specified authorities (Zimbabwe Revenue Authority and National Prosecuting Authority) without prior notice to the person concerned, requires a person to explain his or her wealth, and provide supporting documentation showing it was lawfully obtained. The aim is to combat money laundering, terrorist financing, tax evasion and corruption. If no satisfactory explanation is provided, forfeiture of property may follow.

Unexplained wealth orders are a relatively new development in confiscation and forfeiture jurisprudence, targeting the proceeds derived from criminal activities. Unexplained wealth orders' primary objective is to deprive criminals from acquiring wealth or benefiting from unlawful activities.

By using unexplained wealth orders, the State does not have to first prove a criminal charge, as is the case with conviction-based forfeiture. Likewise, the State does not have to first prove that the property in question is the instrument or proceed of a crime. Unexplained wealth orders differ from traditional forfeiture laws in another important respect: they shift the burden of proof to the property owner who must prove a legitimate source for his wealth, and the forfeiture proceeding is instituted against a person rather than against the property.

These seemingly radical features of unexplained wealth order laws (no proof of the property being connected to a crime and a reversed burden of proof) are a powerful tool for seizing assets where traditional methods would likely have been ineffective.

While several countries have debated the possibility of introducing unexplained wealth orders into their legal systems but decided to maintain traditional confiscation regimes, the Zimbabwe Government decided to follow the more radical route in order to demonstrate its total commitment to the fight against corruption which has had devastating social and economic impacts. Examples of countries that have adopted the full regime of unexplained wealth orders include Australia, Colombia and Ireland.

Other countries have, under the umbrella of the United Nations Convention against Corruption (UNCAC), enacted illicit enrichment offences targeting the proceeds of corruption where the reversed burden of proof is part of the offence, but yet apply only to political officials and not to all crimes and individuals as do unexplained wealth order laws. A similar approach was followed by France with an amendment to its criminal code which introduced reversed burden of proof forfeiture measures targeting certain specific criminal offenders but it is still a post-conviction method.

The history of unexplained wealth orders in Zimbabwe is that the Money Laundering and Proceeds of Crime Amendment Act [Act 11/2019] enacted into permanent law the temporary regulations introduced by Statutory Instrument 246/2019 under the Presidential Powers (Temporary Measures) Act on 9th November 2019 – Presidential Powers (Temporary Measures) (Amendment of Money Laundering and Proceeds of Crime Act and Exchange Control Act) Regulations, 2018. The regulations were gazetted on 9th November 2018. Under the regulations, those authorised to apply for unexplained wealth orders were the Zimbabwe Anti-Corruption Commission, the National Prosecuting Authority, the Commissioner-General of Police and the Zimbabwe Revenue Authority. As temporary measures, the regulations were valid for only 180 days from 9th November 2018 unless re-enacted by Act of Parliament. They expired at midnight on Thursday 8th May 2019.

The re-enactment of the whole of SI 246/2018 was catered for in the Finance (No. 3) Bill of December 2018, but the provision for unexplained wealth orders was not approved by Parliament, on the ground that it should not have been included in a

Money Bill. Members of Parliament argued successfully that it was fundamentally wrong for a Finance Bill to include clauses having nothing to do with revenue matters. The Minister of Justice, Legal and Parliamentary Affairs conceded to the argument and accepted the deletion of the clause, and promised that a separate Bill would be introduced to confirm the provision on unexplained wealth orders.

Unlike under the regulations where ZACC, the NPA, the Commissioner-General of Police and ZIMRA were cited as specified authorities, only the NPA and ZIMRA are entitled to apply to the High Court for an unexplained wealth order against a person who is reasonably believed to hold property greater in value than US\$100 000 if there are reasonable grounds for suspecting

- (a) that the known sources of the person's lawfully obtained income would have been insufficient to obtain or hold the property, and
- (b) that the person, or a person connected with him or her, is or has been involved in serious crime whether inside or outside Zimbabwe.

A simultaneous freezing order may also be imposed prohibiting the movement or sale of the property. The orders may be applied for, and made by the court, *ex parte* (i.e. without prior warning to the person concerned). Failure to respond to an unexplained wealth order may lead to forfeiture of the property in question under another Chapter of the Act. A false and/or misleading response can result in up to two years' imprisonment or a fine not exceeding 20 % of the value of the property, or both.

The removal of ZACC and the Commissioner-General of Police as specified authorities when the Bill went through the legislative process in Parliament was ill-advised in my view. Enforcement of the law would have been strengthened by retaining the investigation agencies of the criminal justice system as specified or enforcement authorities.

Having said that, we are still going to investigate suspected cases of wealth accumulation through illicit means, and refer the matters to ZIMRA and NPA who are the enforcement authorities under the unexplained wealth orders. We already have memorandums of understanding with the two agencies which ensure that we collaborate in the enforcement of the unexplained wealth orders.

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