



## REPUBLIC OF MALAWI

*The Ministry of Justice  
and Constitutional Affairs*



# REFERENCE GUIDE

## ON BEST PRACTICES IN FORFEITURE OF PROCEEDS AND INSTRUMENTALITIES OF FORESTRY OFFENCES





## FOREWORD

Effective action against forestry and wildlife crime must include measures to deprive perpetrators of the instrumentalities and proceeds of crime. Beyond seizing the contraband, (e.g. charcoal/timber/ivory etc.) asset forfeiture can be used to confiscate items used in committing the crime and the profits derived from the illegal activity. This can change the balance of the risk/reward equation of crime and increase deterrence, so these crimes are not viewed as low risk/high-profit activities. Seizing the proceeds of crime also reduces the risk of criminal proceeds being re-invested in further criminal activities.

Investigations and prosecutions of forestry and wildlife crimes in Malawi mainly focus on arrests and taking suspects to court to achieve a conviction and an appropriate custodial sentence or fine. However, in addition to penalties through fines and custodial sentences, and confiscation of contraband, Malawi law also provides for forfeiture applications to seize both the instrumentalities (items used to commit an offence) and the proceeds of crime (profits or benefits from criminal acts).

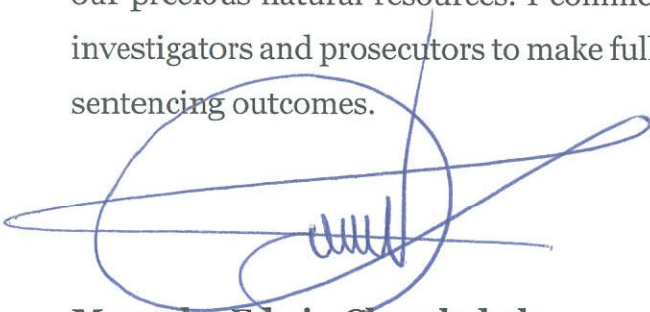
Despite increased awareness on the role of forfeiture in deterring forestry and wildlife crimes, forfeiture applications are not always made, even where the circumstances would allow. Additionally, there is a lack of consistency in how forfeiture applications are made by prosecutors and how they handled in courts. This has resulted in a general failure to use forfeiture mechanisms in the lower courts and sometimes the reversal of forfeiture orders by the High Court on technical grounds or a lack of supporting evidence.

Asset recovery is an important tool in combatting forestry and wildlife crimes. Failing to seize instrumentalities and assets results in offenders maintaining ownership of items necessary to commit further crimes and keeping the proceeds of crime. Offenders therefore continue to profit from these assets even while they are serving their sentence and can continue to enjoy the property or proceeds openly upon release.

The 'Reference Guide on Best Practices in Forfeiture of Proceeds and Instrumentalities of Forestry Offences' has been developed to provide a step-by-step guide for investigators and prosecutors on asset recovery and forfeiture processes.

The Guide explores the legal framework enabling forfeiture and asset recovery applications, discusses how to make the necessary applications before court and explores the current case law through case studies. Templates for the applications and orders are provided at the end of the Guide. Successful asset recovery requires significant care, attention, and skill on the part of both investigators and prosecutors. This Guide therefore provides the broad principles of the process, and investigators and prosecutors are advised to carry out the necessary independent research and seek further consultations with experts in the field as necessary.

It is hoped that this Guide will prove helpful as a starting point and quick reference for forestry and wildlife crime investigators and prosecutors to increase the use of asset recovery mechanisms where appropriate. We must ensure that full range of legal tools are used in such cases to further deter the commission of these crimes, which are depleting our precious natural resources. I commend the development of this Guide and urge all investigators and prosecutors to make full use of it in seeking the full range of appropriate sentencing outcomes.

A handwritten signature in blue ink, consisting of a large, stylized 'M' followed by a series of loops and a long horizontal stroke extending to the right.

**Masauko Edwin Chamkakala**  
**Director of Public Prosecutions**

## ABBREVIATIONS

<b>CPEC</b>	Criminal Procedure and Evidence Code
<b>Director</b>	Director of Forestry
<b>DNPW</b>	Department of National Parks and Wildlife
<b>DOF</b>	Department of Forestry
<b>DPP</b>	Director of Public Prosecutions
<b>FIA</b>	Financial Intelligence Authority
<b>FCA</b>	Financial Crimes Act
<b>IHL</b>	Imprisonment with Hard Labour
<b>NPWA</b>	National Parks and Wildlife Act
<b>UNCAC</b>	United Nations Convention Against Corruption
<b>VNRMC</b>	Village Natural Resources Management Committee

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## BACKGROUND

Malawi is a landlocked country, located in sub-Saharan Africa, with a population of 18.4 million, of which 14.7 million reside in rural areas.<sup>1</sup> In 2017, more than 97% of households in Malawi relied on illegally and unsustainably sourced charcoal and firewood for domestic cooking and heating, resulting in high levels of deforestation and subsequent environmental damage.<sup>2</sup> Malawi has several designated 'forests' and 'forest reserves' that contain a range of flora and fauna. The overwhelming majority of the said forests and reserves are surrounded by, and in some cases contain, human settlements. This proximity inevitably results in human-environment interactions.

In 2018, the National Money Laundering and Terrorist Financing Risk Assessment Report for Malawi<sup>3</sup> identified wildlife crime as a medium high-risk predicate offence, denoting that the risk posed by funds emanating from crimes to do with flora, fauna, and wildlife, is relatively high in contrast to other profit-generating offences. While this risk was lower than that posed by high-risk predicate offences such as corruption, the rating of medium-high risk is nonetheless significant. In the financial year 2020/2021, most forestry offences related to either illicit dealings in charcoal or wood.

In Malawi, forestry offences appear to be predominantly driven by a desire to make a profit, on the part of the perpetrators. The profits derived from these crimes by those that commit them for a profit may then be reinvested into criminal conduct and items intended to benefit the perpetrators.

A concerted and consistent implementation of asset recovery measures would, therefore, allow the relevant law enforcement agencies to combat the finances enabling the conduct and deprive the perpetrators of any material benefit from the offences. This implementation will not only disrupt the economic support for forest crimes, but it should also serve as a strong deterrent to current and prospective offenders.

Despite increased awareness on the role of forfeiture in deterring forestry and wildlife crimes, there is a glaring lack of uniformity in the approaches of investigators, prosecutors, and the courts regarding the implications of forfeiture as an element in criminal justice. The challenges emanate from an inadequate application of the relevant law and court procedures, as well as the challenges of management and disposal of assets upon seizure and confiscation. This situation has resulted in the

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<sup>1</sup> National Statistics Office, "Malawi in Figures" 2022 Edition.

<sup>2</sup> Ministry of Natural Resources, Energy and Mining, "National Charcoal Strategy 2017-2027".

<sup>3</sup> [National Money Laundering and Terrorist Financing Risk Assessment Report for Malawi \(Available @ \[fia.gov.mw\]\(http://fia.gov.mw\)\)](#).



failure to use the forfeiture mechanisms in the lower courts. Additionally, even where such decisions from the Magistrate Courts come for review or appeal in the High Court, certain avoidable omissions from the prosecution presentations pertaining to critical issues such as third-party rights and proportionality often result in the reversal of the forfeiture orders. Prosecutors need guidance on how to prepare well-grounded arguments based on the law for the court to make a forfeiture order, which, inherently, requires sufficient evidence justifying forfeiture provided by the investigative team. Consequently, investigator capacity should also increase as requests for more complete work at the appropriate time in the court case will come from prosecutors.

It has been highlighted<sup>4</sup> that failure to establish a more robust disposal system for forfeited forest produce such as charcoal, could be counterproductive as it results in a scenario where 'actors along the supply chain profit from illegally harvested products'; and 'potentially creates a perverse enforcement incentive and possible corruption'<sup>5</sup>.

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<sup>4</sup> LWT & Tetra Tech, 'Modern Cooking for Healthy Forests in Malawi- A Legal Assessment of the Forestry Act: Identifying Implementation & Enforcement Gaps and Challenges, December 2020, p.22.

<sup>5</sup> LWT & Tetra Tech, 'Modern Cooking for Healthy Forests in Malawi- A Legal Assessment of the Forestry Act: Identifying Implementation & Enforcement Gaps and Challenges, December 2020, p.22.



In view of the foregoing, this Reference Guide has been developed to assist prosecutors to prosecute forestry crimes more successfully, and specifically contribute to improvements in the success of cases of asset forfeiture.

**This Guide has been developed to assist investigators and prosecutors to:**

- 1) understand the legislative framework for asset recovery applications in the context of forestry offences;
- 2) appreciate the evidence required to support an asset recovery application;
- 3) understand interim and final asset recovery measures; and
- 4) appreciate applicable case law on asset recovery in respect of forestry offences.

This Guide is intended to serve as a practical support in recovering assets or proceeds associated with forestry offences and will also have relevance for wildlife cases. Due to the focus on asset recovery, substantive forestry offences shall not be considered in depth. This Guide is subject to review as and when circumstances warrant.

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## AN INTRODUCTION TO ASSET RECOVERY

### What is asset recovery?

Asset recovery is the process of identifying and confiscating proceeds of crime and any items (instrumentalities) used to commit the offence. The United Nations Convention against Corruption (UNCAC) in *Article 2 para G* states that ‘*Confiscation*’ is the permanent deprivation of property by order of a court or other competent authority. The asset recovery process requires investigators and prosecutors to work together to ensure that assets are identified, confiscated, and that the said assets are properly managed throughout this process. This process relies on extensive collaboration between the investigator and the prosecutor from the time of instituting an investigation, case registration in court and until the asset recovery processes are complete.

### Why should we recover assets?

The reason most people commit forestry crimes is to make a profit; the offender obtains the forest produce and sells it to a third party for money. If the offender did not benefit, they would not commit the offence; and the function of asset recovery, particularly the recovery of proceeds of crime, is to ensure that offenders do not keep any profit made from their illegal conduct.

In addition, the forfeiture of any item (instrumentality) used to commit the offence, deprives the offender of the tools used to commit the offence. For instance, where an offender uses logging equipment to illegally log trees in a forest, if the logging equipment is confiscated, the offender must find money to invest in new equipment before they can proceed in similar activities.

It is possible to pursue instrumentalities and proceeds of crime in one case. Using the illegal logging example cited above, if the offender has also had all the profits from their illegal logging confiscated, then it will take some time before they are able to engage in illegal logging again. Furthermore, before the offender, or anyone they know, attempts to log illegally again, they will have to consider whether they want to take the risk of investing money in equipment and time in the logging, only for law enforcement to confiscate their equipment and the money generated.

The impact of asset recovery as a deterrent for offending is significant and is a very important tool in combatting forest crimes.

### Who can carry out asset recovery measures?

Asset recovery measures can be separated into two distinct categories, namely interim or final measures. Interim measures are measures that enable a law enforcement officer to take **temporary** custody of an item away from the owner; or

require **temporary** restraint of disposal of the item by the owner. Final measures are measures that enable a designated person to take **permanent** possession of the subject of the property.

Interim measures are traditionally utilised by law enforcement officers through an investigator's powers to seize items. Items may be seized by investigators under a range of laws, including the Criminal Procedure and Evidence Code and Forestry Act. The important thing to note is that different individuals are empowered to seize items under different Acts, and it is, therefore, **critical** for every officer to be clear about where the power they are exercising emanates from. Law enforcement officers are also empowered to obtain freezing orders and preservation/restraining orders in court in respect of items or property that are of interest in an investigation.

Final measures, i.e., confiscation orders, are all ordered by a Court, as they involve issues of depriving a person of property which touches on the Constitutional right to property, among others. Some final orders require an application by the prosecutor and others do not. It is recommended, however, that regardless of whether there is a requirement for an application or not, the prosecutor should **always** draw the attention of the court to the need for a final order. The prosecutor should make a forfeiture application in **every case** where recoverable property is available. This helps to avoid situations where both the prosecutor and court miss an opportunity to recover readily identified property.

### What can be recovered?

Any item that was used to commit an offence, also referred to as an **instrumentality**, or any item that represents the **proceeds** of a crime may be recovered. This is in addition to the recovery of **contraband** which constitutes prohibited items and products. In this case, such contraband would be the prohibited forest or wildlife product such as charcoal, logs, live animals or their parts and derivatives etc.

The form of the proceeds may change along the laundering process. The initial proceeds may be in the form of cash that an offender earns through the sale of contraband or forest produce such as charcoal. The offender may use the cash to purchase a house for rental purposes, and the rental fees collected may be used to purchase a car and so on. All these different forms of assets constitute proceeds of forestry crime and are recoverable as such if the money movements can be traced and the items can be identified as proceeds.

It is important to note that in certain circumstances, even items that are not proceeds of the crime may be used to recover the value of the benefit obtained by the offender. This is referred to as **property of corresponding value**. For instance, an offender may benefit 20 Million Kwacha from Forestry offences and spend the money on irrecoverable expenses such as air tickets, hotels and school fees for his children. An investigator and/or prosecutor can recover the full amount of the



criminal benefit by confiscating any assets that belong to the offender, or by seeking a **pecuniary penalty order** that requires the offender to pay to the State the value of the criminal benefit. This is a mechanism under section 51 of the Financial Crimes Act which prosecutors must utilise to recover the value of proceeds of forestry crime, in situations where the actual proceeds cannot be traced or are not available for confiscation.

Thus, in one case, it is possible to recover a motor vehicle that is used to transport charcoal (**instrumentality**); a television set that an offender has purchased using proceeds of charcoal sales (**proceeds**) and some of the unsold charcoal (**contraband**).

### THE ASSET RECOVERY PROCESS IN A NUTSHELL:

- 1) Identify the items used to commit the offence (instrumentalities).
- 2) Trace and identify the proceeds of crime if any.
- 3) Use interim measures to take temporary custody of the items (including the contraband).
- 4) Manage items under temporary custody.
- 5) Use final asset recovery measures to take final custody of the items.
- 6) Manage or dispose of the assets.

**Figure 1:** Forestry crime asset recovery process in a nutshell

## THE LEGISLATIVE FRAMEWORK

The fundamental legislative framework in Malawi consists of the Constitution, the Forestry Act, the National Parks and Wildlife Act, the Financial Crimes Act and the Criminal Procedure and Evidence Code, among others.

### The Constitution

The right to acquire property is enshrined in section 28 of the Constitution which states as follows:

*“28. (1) Every person shall be able to acquire property alone or in association with others.*

*(2) No person shall be arbitrarily deprived of property.”*

Since forfeiture involves depriving a person of property, any forfeiture order that is deemed to violate the right to acquire and to own property under section 28 of the Constitution can be challenged. The right to property guaranteed under section 28 may however be limited. In **DPP v Norman Chisale and 6 Others Constitutional Reference 1 of 2021**, the High Court sitting as the Constitutional Court held that the recovery of property acquired from the proceeds of crime did not amount to arbitrary deprivation of property. This is because one cannot claim property rights over property that they earned from illegality or criminal activity. It is easier for a prosecutor to make such an argument if the investigator has done a thorough job to establish that the property in question indeed derived from a criminal activity.

### The Forestry Act (CAP 63:01 of the Laws of Malawi)

The Forestry Act is the primary piece of legislation providing for the designation, protection and conservation of forests in Malawi. It also provides for the requirement for licenses for harvest, transport and processing of forest produce.

#### What is protected under the Forestry Act?

Section 2 of the Forestry Act provides the definitions that should be used to interpret the Act. Of particular note are the definitions for “forest” and “forest produce”. The word “forest” is defined to mean land proclaimed as a forest under the Act or any un-proclaimed land with trees on it. The words “forest produce” are defined to include a range of items, including trees, firewood, charcoal, horns, ivory and any other produce designated under the Act. This is very important as it means that the Forestry Act may be utilised to address criminal actions against almost everything that may be found in a forest.



## What powers do officers have?

Any individual appointed under section 4 as an employee of the Department of Forestry, including the Director, is an officer under the Act. Pursuant to section 6, any officer may ask any person carrying out an act which requires a licence under the Forestry Act to produce the said licence. An officer may, without a warrant, stop and inspect any "carrier or vehicle" **reasonably suspected** to be carrying forest produce and enter into any place to ensure compliance to the Act.

### Case 1: Search and Seizure of vehicles and carriers in protected areas

THE STATE (ON APPLICATION OF EINSTEIN CONSTRUCTION LIMITED) V ATTORNEY GENERAL JUDICIAL REVIEW CAUSE NO. 2 OF 2021 MZUZU HC, BEFORE KONDOWE J	
<b>Facts:</b>	Two trucks, belonging to the Claimant, were stopped at a roadblock by forestry officers in Chikangawa Forest and were found to be carrying quarry. The drivers of the trucks indicated that the Claimant had purchased 120 metric tonnes of quarry from a quarry belonging to a 3rd party, which was demonstrated to not have a license to mine quarry in the Forest at the material time. The two trucks were seized and detained by the forestry officers. The Claimant applied for leave to judicially review the Defendant's decision and an interlocutory injunction to release the vehicles.
<b>Findings:</b>	The High Court in denying both applications, held, among other things, that: Section 6 (b) of the Forestry Act empowers a forestry officer to stop and inspect any carrier or vehicle, which the officer reasonably suspects to be carrying forest produce. "To grant an interlocutory injunction in the particular circumstances of this case would be a mockery of the statutory mandate of the [Department of Forestry]".
<b>Observations:</b>	<ol style="list-style-type: none"> <li>1) The Court observed that currently while there is a requirement for an issuance of a certificate of forfeiture upon a seizure being made, there is no specified form, timeline or identification of whom the certificate should be served on. This is a significant gap in the law and may result in appeals for breaches of natural justice, the right to property and section 44 right to fair trial considerations. It is therefore strongly recommended that procedures regulating the issuance of certificate of forfeiture be developed by the Department of Forestry.</li> <li>2) The High Court endorsed the right to stop, search and the seizure of any vehicle or carrier carrying out illegal activity in a protected area.</li> </ol>

In exercise of section 8, an officer may also search any person or their property, if the officer has **reason to believe** that an offence under the Act has been committed. Section 9 confers an extensive seizure power on officers and police officers to **seize and detain** any forest produce or any article which has been used in the commission of an offence under the Act. It must also be noted that a Village Natural Resources Management Committee (VNRMC) may also seize and detain any forest produce which they **reasonably suspect** to have originated from the village forest area in contravention of the Committee's rules.

Section 11 provides that any items seized are to remain in the custody of an officer or a VNRMC, although the Director may order a seized perishable item to be sold or disposed of in some other manner. All money raised from disposal of seized forest produce must be paid into the Forest Development and Management Fund.

Section 75 provides that officers of the rank of Principal Forestry Officer and above may, on authority of the Director and written consent of the offender, compound offences and issue a fine not exceeding one and a half times the maximum fine imposable under the Act. Any items seized in relation to a compounded offence shall be returned to the owner.

The DPP may, in exercise of his/her power under section 14 appoint any officer as a prosecutor under the Act.

SECTION OF THE FORESTRY ACT	WHO CAN USE THIS SECTION?	WHAT CAN THEY DO?
6 (a)	An officer	Demand production of a licence from anyone carrying out an act that requires a licence under the Act.
6 (b) (i)	An officer without a warrant	Stop and inspect any "carrier or vehicle" reasonably suspected to be carrying any forest produce: <ul style="list-style-type: none"> <li>• obtained in contravention of the Act; or</li> <li>• for which a transportation document is required under the Act.</li> </ul>
6 (b) (ii)	An officer without a warrant	Enter any forest reserve, village forest area, protected forest area, or any land or premises where an activity licensed under the Act is conducted
6 (b) (iii)	An officer without a warrant	Enter any land, building, tent, carriage, vehicle, trailer, aircraft, boat or locomotive to: <ul style="list-style-type: none"> <li>• ensure compliance with the Act; or</li> <li>• to detect an offence under the Act</li> </ul>



SECTION OF THE FORESTRY ACT	WHO CAN USE THIS SECTION?	WHAT CAN THEY DO?
6 b (iv)	An officer without a warrant	Enter any land or premises to inspect silvicultural <sup>6</sup> , forest harvesting and forest procedure processing activities.
7	An officer, upon consultation with the highway authority	Place a barrier, which is approved by the highway authority, across a road for the purpose of examining or searching any motor vehicle or questioning any person in relation to the Act.
8	An officer	May search any person, their property or property in the possession or control of the person, where the officer has reason to believe that the person has committed an offence under the Act.
9 (1)	An officer or police officer	May seize and detain: <ul style="list-style-type: none"> <li>a) any forest produce which the officer or police officer reasonably suspects has been obtained or removed in contravention of this Act;</li> <li>b) (b) any article which the officer or police officer reasonably suspects has been used in committing an offence under this Act.</li> </ul>
9 (2)	An officer or police officer	Shall issue a seizure certificate for any forest produce or article seized under section 9 (1).
9 (3)	A village natural resources management committee	May seize and detain any forest produce or article which the village natural resources management committee reasonably suspects has been obtained or removed from the village forest area in contravention of rules made by the village natural resources management committee.
10	An officer, police officer or village natural resources management committee	All items seized pursuant to section 9 must be kept with an officer or a village natural resources management committee and they shall ensure the safety of said items.
11 (1)	An officer or village natural resources management	Shall retain custody of items in their custody until the relevant case is concluded or there is a decision not to prosecute.

<sup>6</sup> Defined in the "Dictionary of Agriculture and Land Management" Oxford University Press 2019 as "the care and cultivation of "forest" trees with a primary objective being the production of timber products."

SECTION OF THE FORESTRY ACT	WHO CAN USE THIS SECTION?	WHAT CAN THEY DO?
11 (1) (a)	An officer or village natural resources management	If a person is prosecuted and found guilty or they are acquitted but do not claim the seized item, the Director has discretion to dispose of the items.
11 (1) (b)	An officer or village natural resources management	If a decision not to prosecute is made, the item may be returned to the owner.
11 (1) (c)	Director	If the item is perishable, the Director may order that it be sold off or disposed of in some other manner.
12	An officer or village natural resources management	All money realised shall be payable to the Forest Development and Management Fund (section 55).
13 (1)	An officer, without a warrant	May arrest any person found committing or reasonably suspected of having been or being about to commit an offence under this Act.
13 (2)	An officer	Must ensure that any person arrested pursuant to section 13 (1) is charged with an appropriate offence before a Court.
14	DPP	May designate any officer or class of officers as prosecutors under this Act.
75 (1)	Director, a Principal Forestry Officer or their senior	If the Director is satisfied that an offence under this Act has taken place, the Director may authorize an officer to compound the offences, by charging a sum of money that does not exceed one and a half the maximum fine prescribed for the offence and no further court proceedings shall be instituted.
75 (2)	An officer or village natural resources management	Any item seized in relation to the offences compounded under section 75 (1) shall be disposed of in accordance with section 11.

**Figure 2:** Searches, Seizures and Forfeiture under the Forestry Act

### An officer's powers and asset recovery

In practice, these powers enable officers to identify offences while they are taking place or soon thereafter and empowers the officers to seize what is material to the offence. This means that officers are best placed to ensure that:

- i) evidence is not lost;
- ii) the proceeds are not dissipated; and



iii) instrumentalities are recovered.

Every officer at the scene of an offence or during a search should consider whether any item they find was used to commit the offence or points to how the proceeds of the crime were dealt with. Examples of what evidence may be available in some common items is captured below:

EXAMPLES OF EVIDENCE THAT MAY BE AVAILABLE	
<b>Bank statements:</b>	<ul style="list-style-type: none"> <li>• Payment of school fees?</li> <li>• Payment to car suppliers?</li> <li>• Repetitive credits from a possible employer?</li> </ul>
<b>Receipts:</b>	<ul style="list-style-type: none"> <li>• Payment for axes and logging equipment?</li> <li>• Payment for vehicle hire?</li> <li>• Payment for labour costs?</li> </ul>
<b>Vehicles:</b>	<ul style="list-style-type: none"> <li>• Registration and VIN number?</li> <li>• The name on the insurance disk?</li> <li>• Documents in the car?</li> </ul>

**Figure 3:** Evidence for Asset Tracing

The unexpected nature of a search means that there is a strong possibility that the subject may not have had an opportunity to dispose of evidence of their offence. For example, where Person A is caught illegally transporting firewood. During the search an axe and a saw are found next to the firewood and Person A informs the officer that the vehicle is his and he only bought it to help him transport the firewood into town. When the search is finished, the firewood is seized, but the axe, saw and vehicle are returned to Person A. The seizure of the produce under section 9 (1) (a) is excellent; however, under section 9 (1) (b) the axe, saw and vehicle could also have been detained as instrumentalities. Unfortunately, even if officers go to Person A's residence at another time, they are not assured that they will find the axe, saw or vehicle. It is, therefore, **critical** that officers use their powers to search and detain to collect as much evidence of the substantive forestry offence, as well as the instrumentalities and proceeds.

**Case 2:** *When to consider seizing a vehicle***PATRICK NKOSA V THE REPUBLIC CRIMINAL APPEAL NO. 9 OF 2021 IN THE PRINCIPAL REGISTRY (UNREPORTED), PATEMBA J**

<b>Facts:</b>	Appellant was convicted of the offence of being found in possession of forest produce contrary to section 68 (3) (a) of the Forestry Act and was sentenced to 36 months imprisonment with hard labour. The Appellant's truck was detained with charcoal in it. When the Appellant was asked about the charcoal, he claimed that he had received the charcoal from a friend in Mozambique and was on his way to a Forestry Office in Chikwawa when he was arrested.
<b>Findings:</b>	<p>The High Court upheld the conviction and sentence and found that:</p> <ol style="list-style-type: none"> <li>1) "Making of charcoal from exotic and indigenous timber or trees requires one to have a licence from the Director of Forestry."; and</li> <li>2) The Appellant should have produced information from the Malawi Revenue Authority indicating that he had paid duty to establish that the charcoal was imported.</li> </ol>
<b>Observations:</b>	<ol style="list-style-type: none"> <li>1) In this case the prosecutor should have applied for forfeiture of the vehicle and the charcoal, in the absence of an application the Court may not always, as occurred in this case, order forfeiture on its own motion.</li> <li>2) Officers operating along borders should always ensure to request licenses, Malawi Bureau of Standard clearances and Malawi Revenue Authority receipts for any forest produce alleged to have been imported.</li> </ol>



**Case 3:** *Considerations when confiscating an instrumentality*

<b>BESTER AND IWALANI V THE REPUBLIC CRIMINAL APPEAL NO. 31 OF 2022 LL HC, MVULA J</b>	
<b>Facts:</b>	The Appellants were truck drivers convicted of trafficking in forest produce without a license contrary to section 68 (3)(a) of the Forestry Act and were fined MK150, 000 each, in default of which they would serve a 9 month sentence. The Court also ordered forfeiture of the charcoal and the truck transporting said charcoal.
<b>Findings:</b>	<p>Mvula J, in overturning the forfeiture order held that:</p> <ol style="list-style-type: none"> <li>1) The trial court had no evidence before it that the owner of the truck was involved in the offence, nor did the court allow the owner an opportunity to defend himself. "Unless there is evidence that the owner was the one who found the hire, and told the driver to carry the load, it is the driver of his own accord who offends the Forestry Act."</li> <li>2) To establish that property is an instrumentality "the link between the commission of the crime and the property must be reasonably direct". The usage of the property should not be isolated but rather be periodic or systematic.</li> <li>3) A person has a constitutional right to pursue economic opportunities and the right to property by renting out his truck to make money and should not be subject to arbitrary deprivation of property.</li> </ol>
<b>Observations:</b>	<ol style="list-style-type: none"> <li>1) Investigators should, as soon as possible, enquire into how the contraband came into the custody of the person in whose custody it is found: <ol style="list-style-type: none"> <li>a. A driver should be asked who hired the vehicle, whether the hire was direct or through a third party and whether this is the first time dealing with this client; and</li> <li>b. The registered owner of any instrumentality which is used for business purposes, such as a residence or vehicle, should be asked how the person using it got it in their custody.</li> <li>c. In case of a vehicle, enquire whether the particular vehicle has been stopped before on similar grounds, and if so, how many times and what warning action was given to the owner. This would help to dispel the idea the owner was not aware of the vehicle being used in to carry illegal forest products.</li> </ol> </li> </ol>

Prosecutors must also be involved as soon as possible, to ensure that, where necessary, search and seizure warrants are drafted as broadly as possible to ensure that as much potential evidence about instrumentalities and proceeds can be collected during a search and seizure exercise. Warrantless seizures should also be properly supported, by furnishing the Court with an affidavit explaining the reasons for the search and seizure and providing a list of all detained items. This ensures that there is always a clear chain of evidence, thereby safeguarding the evidence and the officers.

A tactic utilised by some investigators in Malawi is to, where possible, record or photograph the proceedings of a seizure to afford the Court an opportunity to appreciate the scene as it was. This can be very helpful where an instrumentality is found at the scene and found to have been hidden or altered to aid in the commission of the offence. Examples of this are a vehicle with a hidden compartment, a room in a house dedicated to storage of illicit products, a garage fitted out with machinery for processing etc. While this may not be sustainable in all cases, it remains helpful and can be utilised to counter arguments that a person was an innocent party in relation to an offence and the use of an asset in the commission of the same.

Upon seizing and detaining property, all officers must ensure that they **properly secure all documentation**, including any warrants, seizure certificates and evidence. This is key in ensuring that all evidence relied on by the prosecution at trial is supported by the legal authority relied on to obtain it. This also ensures that when final asset recovery applications are commenced, the prosecutor can fully support their application.

### Final Applications

Part X of the Forestry Act, namely sections 63 to 75, provides for a range of offences and the applicable penalties.

Section 64 of the Act prohibits any:

- a) direct or indirect, unlawful interactions with trees, vegetation or forest property in a forest reserve or protected forest area;
- b) unlawful occupation or construction in a forest reserve or protected forest area; and
- c) unlawful interaction with the land for any purpose, including for a road or the grazing of livestock.

Section 64 (2) provides that in addition to the penalty imposed, the Court **MUST** order that "any crop, structure or equipment involved in the commission of the offence shall be confiscated and forfeited to the State." This provision captures the confiscation of both instrumentalities of crime and contraband.

**Case 4:** *An example of successful confiscation*

<b>THE REPUBLIC V GWENDE AND 2 OTHERS CRIMINAL CASE NO. 590 OF 2020 SRM SITTING AT DEDZA, H/W CHAMWENDA</b>	
<b>Facts:</b>	The three accused persons were convicted of a variety of offences contrary to sections 64 and 68 of the Forestry Act. The 1st accused was a guard in Dzalanyama Forest Reserve who connived with the 2nd accused to log trees in the forest. The 2nd accused then hired the 3rd accused to transport the logged trees in his vehicle.
<b>Finding:</b>	H/W Chamwenda ordered the 1st convict to pay a fine of MK300, 000.00, the 2nd accused to a fine of MK200, 000.00 for each count and the 3rd accused of MK200, 000.00. The Court also ordered the forfeiture of the 3rd accused's motor vehicle and the logged trees.

Section 74 provides for further orders that a Court may make once a person has been convicted. Section 74 (1) confers discretion on the court to make 6 specific types of orders, upon conviction, namely:

- a) forfeiture of any forest produce used to the Government;
- b) order for compensation, by the convict, for all forest produce damaged, injured, or removed in the commission of the offence;
- c) order for payment of ten times the applicable royalty and other fees that would have been applicable if the convict had duly applied;
- d) the demolition of any building or structure erected, standing or that is within an area in contravention of the Act;
- e) the destruction or removal of any crop within an area, in contravention of the Act; and
- f) the seizure of any carrier or vehicle which has been used in committing the offence.

Section 74 (2) provides that produce or compensation associated with an offence against forest produce in a village forest area must be forfeited to the VNRMC. Section 74 (3) provides that the Minister may direct the manner in which property forfeited pursuant to section 74 (1) is dealt with.

Whilst section 75 provides an alternative to prosecuting an individual, by compounding offences in order to avoid prosecution by payment of a set charge; it must be noted that confiscation measures may not be taken where compounding has occurred. Compounding is the practice of allowing an accused person to admit to other offences, for the penalty of an administrative fine rather than prosecution. This is utilised to avoid the time and cost of investigating and prosecuting a criminal offence. If section 75 is utilised, only non-conviction based forfeiture under the Financial Crimes Act may be utilised to recover proceeds of crime.



**Case 5:** *The seizure of contraband and necessity of meaningful penalties*

<b>THE REPUBLIC V PRECIOUS JAKALASI CRIMINAL CASE NO. 888 OF 2021 IN THE CHIEF RESIDENT MAGISTRATE COURT SITTING AT DOWA, CRM CHILUNGA-CHIRWA</b>	
<b>Facts:</b>	<p>The accused, a driver, was arrested by Bunda Police while driving a truck that was loaded with 29 Misuku trees. The accused had no license to possess or transport the trees that he had collected from Dzalanyama Forest. The owner of the vehicle had no knowledge that the driver was transporting the trees.</p> <p>The accused was charged with one count of entering into a Protected Forest Reserve without permit or licence contrary to section 32 (1) of the NPWA, one count of being found in possession of forest produce without licence or permit contrary to section 68 (3) (b) as read with section 12 of the Forest (Amendment) Act No. 7 of 2020, and one count of trafficking forest produce without licence or permit contrary to section 68 (3) (b) as read with section 12 of the Forest (Amendment) Act No. 7 of 2020.</p>
<b>Findings:</b>	<p>CRM Chilunga-Chirwa held that:</p> <ol style="list-style-type: none"> <li>1) Courts have a role to play in protecting the environment, and that role is to "mete out meaningful penalties to convicted offenders, that will reflect not only the seriousness of the offences but also the efforts by society at large to curb these crimes".</li> <li>2) The convict should serve 18 months, 36 months and 48 months, respectively, to be served concurrently.</li> <li>3) Pursuant to section 74 (1) (a) of the Forestry Act the trees should be forfeited to the State, and to be dealt with in the manner the Minister for Natural Resources directed.</li> <li>4) The truck owner having neither permitted nor acquiesced for his truck to be used for transporting the logs, the truck should be returned to the owner.</li> </ol>

On the conclusion of all prosecutions, it is the **responsibility of all prosecutors to request that orders for forfeiture and seizure pursuant to section 74 be made.** In contrast to section 64 (2), the Court has a discretion whether to make an order under section 74 or not and therefore, the prosecutor must make arguments to persuade the Court to exercise the discretion to recover assets and instrumentalities. As a method of disincentivising the continued exploitation of forest produce, prosecutors

are also encouraged to apply for any other order that may be applicable under the circumstances.

***Prosecutors must note that the Forestry Act primarily enables the final confiscation of instrumentalities; however, investigators must utilise all the interim search and seizure powers to support final asset recovery measures available under other Acts, including but not limited to the Financial Crimes Act.***

## The National Parks and Wildlife Act (CAP 66:07)

The National Parks and Wildlife Act (NPWA) is primarily concerned with the conservation and protection of wildlife communities in Malawi.

The NPWA is implemented by the Director of National Parks and Wildlife, officers from the Directorate of National Parks and Wildlife, fisheries officers, forest officers, environmental inspectors, customs officers, police officers, Malawi Defence Force officers, Honorary Parks and Wildlife officers and any other officers designated by the Minister<sup>7</sup>. As such, although the NPWA is not as centred on forestry issues, the powers there under may be enlivened by the widest range of individuals.

### What is protected under the NPWA?

Section 2 of the NPWA defines wildlife as “any wild plant or animal of a species native to Malawi and includes animals which migrate through Malawi, and biotic communities composed of those species.” and plant as “any member of the plant kingdom and includes the seeds of any plant species”.

In contrast to the Forestry Act, the NPWA is focused solely on **wild, indigenous plants** and therefore cannot be utilised in respect to conduct relating to either domestic or non-native plants.

### What powers do officers have?

SECTION OF THE NPWA	WHO CAN USE THIS SECTION?	WHAT CAN THEY DO?
8 (1)	An officer without a warrant	Enter land, building, vehicle, container, aircraft or boat to ensure the provisions of the Act are being complied or to prevent or detect an offence under the Act.
9 (1) (a)	An officer without a warrant	Search land, building, vehicle, container, aircraft or boat if he has <b>reasonable ground</b> to believe that that an offence has been committed, is being committed or is about to be committed.

<sup>7</sup> Section 6 of the NPWA

SECTION OF THE NPWA	WHO CAN USE THIS SECTION?	WHAT CAN THEY DO?
9 (1) (b)	An officer without a warrant	Search land, building, vehicle, container, aircraft or boat to verify any document or matter purported to have been issued under this Act.
9 (1)	An officer without a warrant	Seize any specimen or article which appears to have been obtained, possessed, used or is about to be used for the commission of an offence.
9 (2)	An officer without a warrant	Shall issue a receipt for any item seized.
10	DPP, Director of Parks and Wildlife	The DPP may notify the Director in writing that no prosecution should be instituted in a specific case, thereafter the Director shall ensure that the seized items are returned to the owner within 14 days of receipt of said notification.

**Figure 4:** Searches, Seizures and Forfeiture under the NPWA Act

Note that in accordance with section 45, Part VII of the NPWA only applies to protected, endangered or listed species.

### Final Applications

Part XIII contains a significant proportion of the offences created under the NPWA and the applicable penalties. Section 113 of the NPWA specifically provides that a Court, may, upon conviction of any offender, forfeit any specimen, weapon or vehicle or any other item used in the commission of the offence to the Government.

On the conclusion of all prosecutions, it is the **responsibility of all prosecutors to request that orders for forfeiture and seizure pursuant to section 113 be made**. In contrast to section 64 (2), the Court has a discretion whether to make them or not and therefore, the prosecutor must make arguments to persuade the Court to exercise the discretion to recover proceeds and instrumentalities.

### Criminal Procedure and Evidence Code (CAP 8:08)

The Criminal Procedure and Evidence Code (CPEC) provides for how criminal proceedings are to be conducted. It is applicable to all criminal proceedings and may be utilised by all prosecutors in the Magistrate and High Courts of Malawi.

The CPEC provides general powers to search and seize and a general forfeiture clause that may be utilised in any circumstances which are not specifically catered for under other laws.



SECTION OF THE CPEC	WHO CAN USE THIS SECTION?	WHAT CAN THEY DO?
113 (1)	A police officer	May apply for a search warrant by providing an affidavit that: <ul style="list-style-type: none"> <li>• States the grounds for the application and the law under which the warrant should be issued</li> <li>• Specify the premises which are intended to be searched; and</li> <li>• Identify, as far as practicable, the items or persons being searched for.</li> </ul>
113A (1)	A court	May issue a warrant authorising a search where there are reasonable grounds to believe that: <ul style="list-style-type: none"> <li>• An offence has been committed;</li> <li>• There is evidence at the premises of the search that may be of value to the prosecution; and</li> <li>• The items are not subject to any legal privilege.</li> </ul>
149 (1)	A court	Has the discretion on conclusion of a trial or inquiry, to make an order for forfeiture, confiscation or delivery to any person for: <ul style="list-style-type: none"> <li>• Any "property or document" before it or in its custody; or</li> <li>• Any "property" used in the commission of an offence.</li> </ul>
149 (3)	A court	An order under section 149 (1) shall not be carried out until the period allowed for an appeal has expired, or if applicable, until an appeal has been disposed of. This does not apply if the property is livestock or is subject to a speedy and natural decay.
149 (4)	A court	In section 149 "property" includes any property "into or for which the [original property] may have been converted or exchanged and anything acquired by such conversion or exchange".

**Figure 5:** Searches, Seizures and Forfeiture under the CP&EC

It is critical that prosecutors when drafting their applications, also consider what information is necessary for the Court to grant an application. For example, in the case of a warrant pursuant to section 113(1), in addition to the information required, it is necessary that the affidavit also contains an indication that the items sought are not subject to any legal privilege.<sup>8</sup>

<sup>8</sup> Legal privilege generally covers any communication between a client and their lawyer and such communications cannot be accessed without the permission of the client.

## Financial Crimes Act (CAP 7:07)

The Financial Crimes Act is primarily concerned with addressing money laundering and terrorist financing from a regulatory and prosecutorial perspective. The scope of this Act is the primary legislation that provides for a comprehensive forfeiture regime in Malawi.

Section 48 extends the confiscation procedures in the FCA to confiscations occurring under other statutes generally and, in section 48 (1), those confiscations under section 149 of the Criminal Procedure and Evidence Code in particular.

Sections 107 and 108 provide a scheme for the application and grant of applications for interim orders, which are called preservation orders within the FCA:

SECTION OF THE FCA	WHO CAN USE THIS SECTION?	WHAT CAN THEY DO?
107	All competent authorities, which includes a police officer, the office of the Attorney General, the office of the DPP, the FIA and any other person authorized by them to act in that behalf. <b>The Director of Forestry is not a competent authority.</b>	Make an application to restrain disposal of targeted assets and state grounds for the belief that: <ul style="list-style-type: none"> <li>the defendant is convicted of or charged with an offence to which the property relates;</li> <li>that the property is tainted;</li> <li>in case of proceeds, that the defendant derived benefit directly or indirectly from the offence;</li> <li>if in possession of another person, that the defendant is in full control of the said property;</li> <li>that a confiscation or pecuniary order is likely or may be made.</li> </ul>
108	The court	May make an order if it is satisfied with the threshold of evidence laid by a competent authority in accordance with section 107 above.
48	The court	Must order confiscation of instrumentalities, tainted property and proceeds of crime upon conviction.

**Figure 6:** Searches, Seizures and Forfeiture under the FCA

It is important to note that section 113 of the FCA provides for the steps that a party interested in restrained property may take.

SECTION OF THE FCA	WHO CAN USE THIS SECTION?	WHAT CAN THEY DO?
113 (1)	Any person with an interest in property subject to an order under section 108	Apply for an order of variation or revocation under s113 (4).
113 (2)	Any interested person, A competent authority, court	A court shall not hear an application under s113 (1) unless the competent authority has had <b>three clear days'</b> notice, <b>in writing</b> , of the application.
113 (3)	A court	A court may hear anyone who the court opines to have an interest in the property.
113 (4)	A court	May vary or revoke a s108 order, including by: <ul style="list-style-type: none"> <li>a) Requiring the applicant to provide a security; or</li> <li>b) Varying the order to provide for reasonable living expenses for the applicant and their dependants, and the applicant's reasonable business or legal expenses.</li> </ul>
113 (5)	A court	May only make an order under s113 (4) where it is satisfied that: <ul style="list-style-type: none"> <li>a) The applicant is the lawful owner or entitled to lawful possession <b>and</b> the applicant appears innocent of any complicity or collusion in the offence; and</li> <li>b) The property is not required for any further investigation.</li> </ul>

**Figure 7:** Searches, Seizures and Forfeiture under the FCA



## THE APPLICATIONS

### Interim Applications

An interim application is a mechanism used to ensure that assets are not dissipated or destroyed by an accused person before the conclusion of the trial. They are an important way of making sure that there is real substance to rulings obtained, rather than legal victories. Consider a case where, after a lengthy investigation and trial, a Court orders that an accused person should forfeit all their vehicles to the Malawi Government. However, when the officers go to collect the vehicles, they cannot find any.

It is best practice for both investigators and prosecutors to commence a coordinated approach as soon as possible. This ensures that the investigators are collecting all relevant information and the prosecutor can assist regarding court applications, whilst ensuring that the evidence obtained supports the substantive criminal trial and the asset recovery proceedings as well.

It is also strongly recommended that investigators fully coordinate with and utilise the different skills and information available to other law enforcement actors, including the Malawi Revenue Authority, the Financial Intelligence Authority amongst others. Regardless of what mechanism initially utilised to effect a seizure of property, it is strongly recommended that prosecutors also make an application under the Financial Crimes Act, as the section 108 order persists until the close of the prosecution.

#### **An interim application must always be made *ex parte* and must be composed of:**

- a) An affidavit laying out the basis for the application, in accordance with the legal requirements of the section being relied upon; and
- b) Skeleton arguments supporting the application.

The affidavit above must be thorough and indicate, amongst other things, the evidential trail that ties each item to the initial offence, including but not limited to:

- Bank statements showing the movements of the proceeds of crime;
- Registration certificates for companies, vehicles, and other assets;
- Revenue authority records indicating a person or companies' declared income; and
- Any statements by the owner regarding the source of income of the funds.

As the applications are made *ex parte*, it is **critical** that a prosecutor disclose all available information, including information in the favour of the accused. A failure to disclose all information may result in an order being set aside later once the Court becomes aware of the hidden information.

See Appendix B for an example of an affidavit in support of an application for an interim order.

### **Non-conviction-based forfeiture interim orders**

Where a competent authority seeks a non-conviction-based forfeiture of an asset, it shall obtain a preservation order under section 65 of the FCA. Preservation orders may be obtained in relation to both proceeds and instrumentalities of crime. In an application for a preservation order, a competent authority needs to prove that there are reasonable grounds for believing that the property in question constitutes either proceeds or instrumentalities of crime. In reference to Forestry offences, the State may submit that a particular motor vehicle is an instrumentality of crime as it was used to transport charcoal, or that a defendant purchased a motorcycle using proceeds of illegal logging. Once the court is satisfied, it may order the preservation of the said asset. The court may make an ancillary order requiring the competent authority to seize and take custody of the asset, pending conclusion of forfeiture proceedings.

### **Applications by 3<sup>rd</sup> parties or owners of preserved and restrained assets**

When an interim order is obtained, it is important to ensure that the order is served on all known affected persons. This affords all interested parties an opportunity to indicate whether the application will be opposed and ensures that any defences to the application are disclosed to the State as soon as possible. Prosecutors must ensure that all interested parties are heard and thereby not subject to the arbitrary deprivation of their property.

Section 113 of the FCA provides that an interested party may apply for the variation or revocation of an interim order obtained under section 108 of the FCA. Although, there is no similar statutory requirement in the Forestry Act, in **Bester and Iwalani v The Republic**<sup>9</sup> Mvula J emphasised the necessity of affording an interested party the due process of law and having a pre-sentencing hearing under section 260 of the CPEC.

In terms of the non-conviction-based preservation order in section 65 of the Financial Crimes Act, third parties are allowed to present their claims pursuant to section 66(3). The interested party is required to satisfy the court that the property in question is not tainted and, therefore, must be excluded from the process. To ensure third party interest protection, the same section 66(1) mandates the competent authority that obtains a preservation order to publish the order in order to ensure that interested parties are made aware of the process that has an impact on their interests in the targeted property.

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<sup>9</sup> Criminal Appeal No. 31 of 2022, Paragraph 5.4.

Prosecutors must therefore ensure that all interested parties are served with notice of an interim order as soon as practicable and informed of their right to appeal the order.

## Final Applications

A final application is the first step to concluding an asset recovery proceeding. As stated above, final applications **must** always be initiated by the prosecutor, even where it is only a reminder to a court to exercise its jurisdiction to forfeit. An application for a final order, should always be made *inter partes* and should be composed of:

- a) all applicable interim orders;
- b) an affidavit outlining the factual basis for the forfeiture of the items; and
- c) skeleton arguments supporting the application.

The affidavit above must restate the basis of all interim orders obtained to date and re-outline the evidential trail that ties each item to the initial offence, including but not limited to:

- a summary of any interested parties claims to the property and the basis for said claim **and** the State's position on said claims;<sup>10</sup>
- any new information obtained from asset tracing and investigations since the interim application;
- a copy of the judgment, if available, or a reference to the case citation and date of conviction, if the judgment was oral; and
- an outline of any money released to the subject for living costs or legal fees during the course of the proceedings.

Where a final confiscation order is granted, the prosecutor must confer with any relevant offices to develop an asset management or disposal plan. This is intended to ensure that where assets have been seized, they do not simply deteriorate in State custody.

The Laws of Malawi provide a comprehensive scheme for which offices certain property vests in, which means assets forfeited to the Government must be channelled to the lawfully designated offices. To ensure that all transfers are done in compliance with the law, it is recommended that prosecutors seek advice from the Attorney General when in doubt.

See Appendix for an example of an affidavit in support of a final confiscation order.

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<sup>10</sup> Note that it is possible to acknowledge that an interested party does hold interest in a proportion of the property that is the subject of the application.



## Asset Recovery Case Law

In handling asset recovery cases it is important to emphasise that forfeiture is **not** a punishment, it is rather an attempt to rebalance the scales.

### Burden and Standard of Proof

In **Republic v Lutepo Criminal Case No. 2 of 2014 (Unreported)**, Kapindu J in considering **the burden and standard of proof** in asset recovery proceedings held that: *“The burden of proof lies primarily on the State to demonstrate that the property to be confiscated is tainted and thus liable to confiscation...where the tainted property is owned, held, controlled or otherwise managed by the convict, the standard of proof is the ordinary balance of probabilities”*.

The onus is therefore always on the State to show that on the balance of probabilities property is tainted or is proceeds of crime.

### Applications must be thorough

It bears repeating that in asset recovery, to fail to prepare is to prepare to fail. In **Republic v Caroline Savala Criminal Case No. 28 of 2013** Mwale J noted that *“the State should have been prepared for the possibility of a conviction and for all eventualities subsequent to a conviction under that Act...An application for restitution [under section 148 CPEC] must be specific and relate to specific property or a specific sum of money”*. In this case, a delay by the State in filing applications for confiscation under section 48 of the Money Laundering, Proceeds of Crime and Combating Terrorist Financing Act of 2006, resulted in the Court not proceeding to hear the State’s confiscation application.

### The right to property and asset recovery

In **DPP v Norman Chisale (supra)** the Constitutional Court, in upholding a preservation order obtained by the Director of Public Prosecutions held that:

- 1) the obtaining of a preservation order *ex parte* did not violate the human rights, including the right to a fair hearing, of the custodian/title holder of the property, also noting that this had already been clarified by the Supreme Court in **Jeffrey and another v The Anti-Corruption Bureau [2003-2003] MLR 90 (SCA)**;
- 2) by virtue of the fact that asset recovery proceedings are an instrument for combatting criminal offences, the DPP had standing to handle all matters, including civil ones flowing from the criminal prosecution; and
- 3) interim orders being temporary, a custodian/title holder could not plead that they had been arbitrarily deprived of their property.

## Due process and the Right to be Heard

In implementing asset recovery measures, investigators and prosecutors must ensure that due process is followed. In **R v Flora (1923-60) ALR Mal. 394**, a shotgun, the property of A, was handed by A's wife to a third party; allegedly without the knowledge of A. During trial of the wife for assigning the firearm without a permit, the Court ordered that the gun should be forfeited. Her husband was not present at the trial and was given no opportunity to be heard. Spencer-Wilkinson, CJ, on review, observed that it is a fundamental principle that no man should be condemned to a penalty unheard.

Similarly, in **Tarmahomed v R (NO.2) (1964-66) ALR Mal. 457** the Magistrate ordered the vehicle which the appellant hired and was travelling in when the offence was committed, be forfeited and detained for a period not exceeding 30 days, during which time, the owner of the vehicle, a third party, should be able to redeem it. The High Court quashed this order and ordered that the vehicle in question be released either to the appellant or to the lawful owner upon proof of ownership. As the appellant said in evidence that he had hired the vehicle and the court said: *'No forfeiture can take place without giving the owner the right to be heard'*

In **Watson and another v Republic (1994) MLR 383**, the Court stated that an accused person should first be given the opportunity of making representations against the making of a forfeiture order before the order is made.

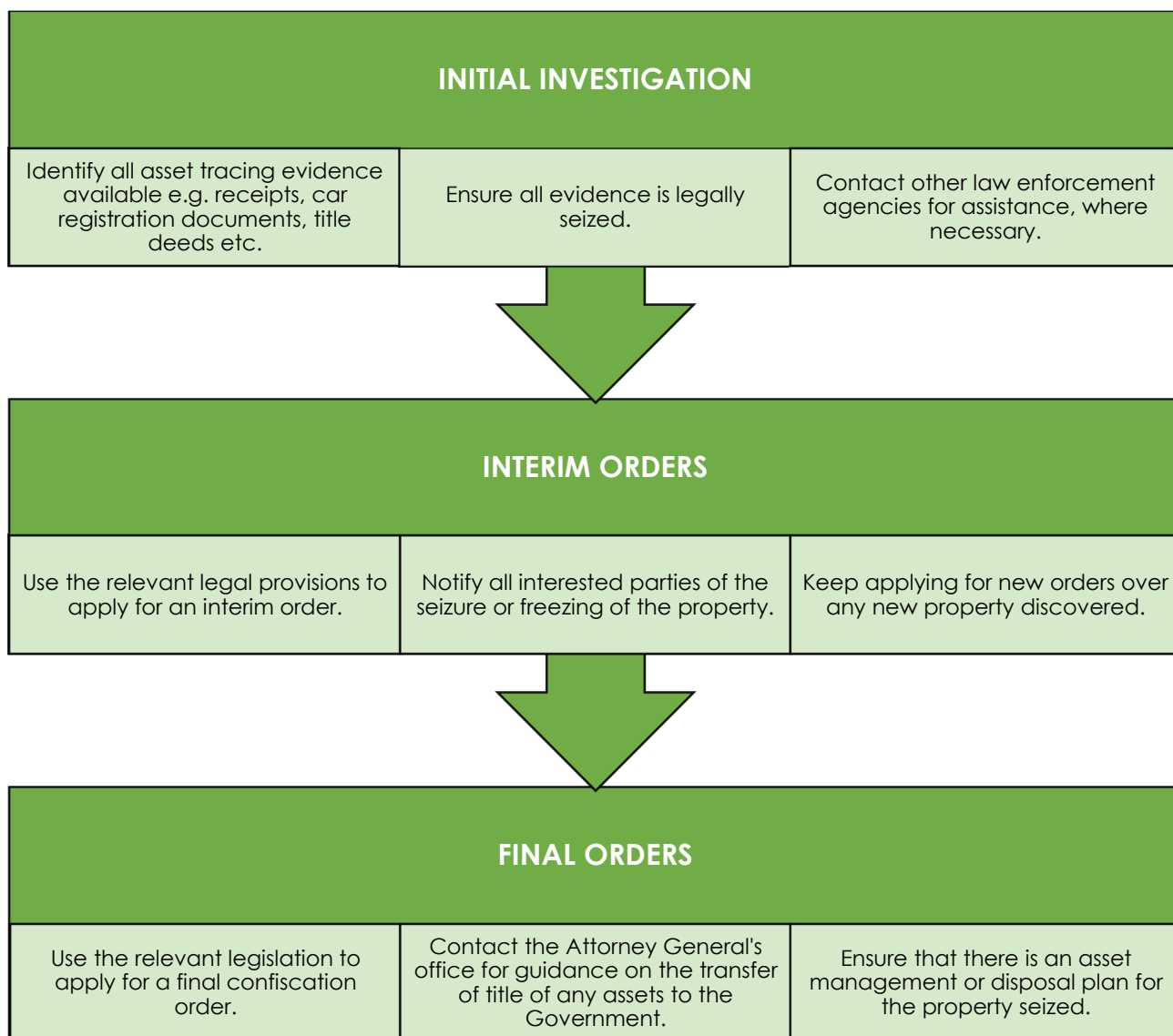
In **Republic v Hara (1997) 1 MLR 395** the Court held that failure to give an accused person the opportunity of being heard before a forfeiture order is made is wrong and a violation of a fundamental principle of law that a person may not be condemned to any penalty without first being accorded the opportunity of being heard.

## Third Party Rights

In *Letiyia Ole Maine v Republic Criminal Appeal No. 40 of 2019 (HC)*, Gikonyo, J observed that: *"Some of the due process protections before forfeiture order is made include notice-replete with essential details and information inter alia, on the time and place of forfeiture proceeding and property to be forfeited to the person who will be affected by the forfeiture to attend forfeiture hearing and determination. The trial court must conduct an inquiry or hearing for forfeiture. The person who will be affected by the forfeiture order is allowed to participate in the forfeiture proceedings and tender evidence to show cause why the property should not be forfeited. He may also appear through legal counsel or in person. The trial court then considers all relevant evidence tendered in the trial and the forfeiture proceeding in making its determination."*

## A STEP-BY-STEP GUIDE TO AN ASSET RECOVERY CASE

The figure below gives a brief outline on what a prosecutor should ensure is being done throughout an asset recovery case.



**Figure 8:** Step-by-step guide to asset recovery

## APPENDIX A: MODEL STRUCTURE OF AN ORAL FORFEITURE APPLICATION

In making an oral application, the Prosecutor must first inform the court that there will be an application for forfeiture by the State and then, once leave is granted by the Court, then the Prosecutor may be guided by the following structure of application:

<b>What crime was committed?</b>	The property was utilised in a violation of [... <i>indicate the statute that has been violated</i> e.g. section 64 of the Forestry Act.]
<b>Is there a forfeiture provision?</b>	<i>Indicate the forfeiture provision being relied on</i> e.g. Section 9 (1) of the Forestry Act permits a forestry officer to seize...
<b>What property is forfeitable?</b>	<i>Indicate on what basis the forfeiture of each item is being pursued, such as for being contraband, proceeds of crime or an instrumentality</i> e.g. 80 bags of charcoal (contraband); A Toyota Dyna truck Registration No. XXXX (instrumentality) was being used to transport the charcoal from point A to B; or a Yamaha motorcycle Registration No. XXX (proceeds of crime) was purchased using money realised from the sale of 80 bags of charcoal.
<b>What evidence makes this property forfeitable?</b>	<i>Lay out the facts of the case that support the property as contraband, proceeds or instrumentality</i> e.g. On 1st January 2023 Officer X, during a lawfully conducted search of the vehicle discovered 20 bags of charcoal concealed in the truck, with MK300,000.00. cash. The driver was arrested; and it was later discovered this was his 3rd arrest for trafficking charcoal in the same truck.
<b>Was the property seized?</b>	<i>Lay out whether the property has been seized already and how long the order should stand for</i> e.g. "the Toyota Dyna Truck was immediately seized pursuant to section 9 of the Forestry Act. The prosecution of this case is scheduled to commence in two weeks' time. We, therefore, pray that the Truck remain in the custody of the State until the close of the prosecution."



<b>What is the value of the property and where is it now?</b>	<i>Indicate the value of the property. If no valuation is available, indicate where in the process you are e.g. the Toyota Dyna was valued by Plant and Vehicle Hire and Engineering Services (PVHES) at MK5 million and is currently being kept at the Nkhotakota Forestry Offices.</i>
<b>Who are the owners or titleholders of the property?</b>	<i>Indicate the information available on the ownership of the vehicle e.g. a search of the Road Traffic Department shows that the vehicle was registered on 30th October 2022 by a particular person (mention names in full). It may be important to mention to the court at this point whether the person who registered the vehicle is a suspect in the case at hand. If not, the Prosecution would have to indicate why forfeiture should still be ordered even though the vehicle was driven by another person other than the owner.</i>
<b>Submissions or response to the forfeiture application by any interested person</b>	<i>Any person who has an interest in the property should be given an opportunity to respond to the forfeiture application.</i>

## APPENDIX B: FORMS

### Sample Summons for an Application for an Interim Order



#### REPUBLIC OF MALAWI

IN THE SENIOR RESIDENT MAGISTRATE COURT SITTING AT LILONGWE

MISCELLANEOUS CRIMINAL APPLICATION NO. \_\_\_\_\_ OF 2023

**BETWEEN:**

THE DIRECTOR OF FORESTRY.....APPLICANT

-and-

CHARCOAL SELLER.....1<sup>ST</sup> RESPONDENT

TRANSPORTER.....2<sup>ND</sup> RESPONDENT

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#### EX PARTE SUMMONS FOR APPLICATION FOR SEIZURE/PRESERVATION ORDER

*Pursuant to Section ..... of the ..... Act*

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**LET THE APPLICANT** attend before the Magistrate in Chambers on the \_\_\_\_\_ day of \_\_\_\_\_ 2023 at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon on the hearing of an application by the Director of Forestry for seizure/preservation of **[LIST ALL THE PROPERTY THAT IS SUBJECT TO THE ORDER]**

**TAKE NOTICE** that the affidavit of **[INSERT NAME]** shall be read in support of the application.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 2023

\_\_\_\_\_  
MAGISTRATE

## Sample Affidavit in Support of an Interim Order



### REPUBLIC OF MALAWI

IN THE SENIOR RESIDENT MAGISTRATE COURT SITTING AT LILONGWE

MISCELLANEOUS CRIMINAL APPLICATION NO. \_\_\_\_\_ OF 2023

BETWEEN:

THE DIRECTOR OF FORESTRY .....APPLICANT

-and-

CHARCOAL SELLER .....1<sup>ST</sup> RESPONDENT

TRANSPORTER .....2<sup>ND</sup> RESPONDENT

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### AFFIDAVIT IN SUPPORT OF APPLICATION TO SEIZE PROPERTY

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I, **XXXXXXXXX**, of the Department of Forestry, P. O. Box 30048, Lilongwe **DO MAKE OATH** and **STATE** as follows:

- 1) **THAT** I am of full age and therefore duly authorised to swear this affidavit.
- 2) **THAT** the matters of fact deponed herein have come to my knowledge in the course of handling this matter and I conscientiously believe the same to be true to the best of my knowledge and belief.
- 3) **THAT** **CHARCOAL SELLER** is currently being prosecuted for forestry offences.
- 4) **THAT** in the case of **Republic v Charcoal Seller Criminal Case No. 1 of 2023 in the Principal Resident Magistrate Court sitting at Lilongwe** the Respondent was charged with Offences relating to forest reserves and protected forest areas contrary to section 64 (1) of the Forestry Act in respect of the felling and collection of trees in a forest reserve.
- 5) **THAT** further, the Respondent has been charged with the offence of Money Laundering contrary to section 42 of the Financial Crimes Act.
- 6) **THAT** on 1<sup>st</sup> January 2023, the 1<sup>st</sup> Respondent was arrested, with the 2<sup>nd</sup> Respondent, in a Toyota Dyna 5 Tonne Truck Registration No. XXXX, with the sum of MK300, 000.00 cash in a plastic bag under the front seat under other items and 20 bags of charcoal.

**TOYOTA DYNA No. XXXX**

- 7) **THAT TRANSPORTER**, the 2<sup>nd</sup> Respondent, is the registered owner of the vehicle in issue.
- 8) **THAT** a search of the Road Traffic Department's system demonstrated that:
- i) The vehicle was cleared by Malawi Revenue Authority on 10<sup>th</sup> October 2022;
  - ii) The vehicle was cleared by Interpol on 20<sup>th</sup> October 2022; and
  - iii) The vehicle was registered by Road Traffic Department on 30<sup>th</sup> October 2022. I attach and exhibit hereto a copy of the printout from the Department of Road Traffic marked as '**XX 1**'.
- 9) **THAT** the 2<sup>nd</sup> Respondent has no known legitimate source of income and investigations into how the vehicle was purchased are ongoing.
- 10) **THAT** the 2<sup>nd</sup> Respondent has been arrested on 2 prior occasions for transporting charcoal. I attach and exhibit hereto a copy of the judgments in question marked as '**XX2**' and '**XX 3**'.
- 11) **THAT** the 2<sup>nd</sup> Respondent has already been cautioned in respect of the possession of the 20 bags of charcoal.
- 12) **THAT** the State will seek to recover all proceeds of crime and any tainted property; and this vehicle, if not determined to be tainted property, may be used as realisable property to recover the proceeds of the offence.

**CASH SUM OF MK300,000**

- 13) **THAT** the 2<sup>nd</sup> Respondent has been interviewed on several occasions as to the source and destination of the cash in the vehicle but is yet to provide a credible response.
- 14) **THAT** the sole source of known income of the 1<sup>st</sup> Respondent is subsistence farming on a plot of 3 acres.
- 15) **THAT** it is my considered view that the MK300, 000.00 represents proceeds of the sale of charcoal, and is the link to the money laundering charge.
- 16) **THAT** the State intends to recover the proceeds of the crimes herein and it would be contrary to the interests of justice to return the already seized sum to the accused when we will be seeking to recover the same later.
- 17) **THAT** I am informed that there is a Confiscation Fund where the money may be put in the interim, pending the determination of asset recovery proceedings in this matter.
- 18) **THAT** in accordance with section 113 of the Financial Crimes Act, the Respondent may, upon deposing an affidavit, be granted a sum from said sum as a living allowance and therefore, will not be significantly prejudiced by the effect of a preservation order.



**WHEREFORE** I humbly pray to this Honourable Court for an order preserving the Toyota Dyna Registration No. XXXX and the cash sum of MK300, 000.

Sworn by the said **XXXXXXXXXXXXXXXXXX** .....

At .....

(Deponent)

On this ..... day of ..... 2023

**Before Me:**

\_\_\_\_\_

COMMISSIONER FOR OATHS

## Sample Draft Order



### REPUBLIC OF MALAWI

IN THE SENIOR RESIDENT MAGISTRATE COURT SITTING AT LILONGWE

MISCELLANEOUS CRIMINAL APPLICATION NO. \_\_\_\_\_ OF 2023

BETWEEN:

THE DIRECTOR OF FORESTRY .....APPLICANT

-and-

CHARCOAL SELLER .....1<sup>ST</sup> RESPONDENT

TRANSPORTER .....2<sup>ND</sup> RESPONDENT

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#### ORDER TO PRESERVE TAINTED PROPERTY

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Whereas the Director of Forestry having reasonable grounds to believe that **CHARCOAL SELLER** and **TRANSPORTER** have committed a serious offence and that they have tainted property that they have the power, directly or indirectly, to dispose of or deal with as if it were their own, and has laid that information on oath before this Court and has applied for the issue of a preservation order.

**IT IS HEREBY ORDERED** that:

- 1) The Department of Forestry take possession of the Toyota Dyna Registration No. XXXX and;
- 2) Toyota Dyna Registration No. XXXX be sold and the money thereof be deposited into the Confiscation Fund pending final determination of the asset recovery proceedings herein;
- 3) The Department of Forestry facilitate the depositing of the sum of MK 300,000.00 into the Confiscation Fund pending final determination of the asset recovery proceedings herein; and
- 4) **CHARCOAL SELLER** and **TRANSPORTER** may not directly or indirectly dispose of any property that they own or hold an interest in until the final determination of the asset recovery proceedings herein.

Given under my hand this \_\_\_\_\_ day of \_\_\_\_\_ 2023.

## Sample Affidavit in Support of a Final Order



### REPUBLIC OF MALAWI

IN THE SENIOR RESIDENT MAGISTRATE COURT SITTING AT LILONGWE

MISCELLANEOUS CRIMINAL APPLICATION NO. \_\_\_\_\_ OF 2023

BETWEEN:

THE DIRECTOR OF FORESTRY .....APPLICANT

-and-

CHARCOAL SELLER .....1<sup>ST</sup> RESPONDENT

TRANSPORTER .....2<sup>ND</sup> RESPONDENT

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### AFFIDAVIT IN SUPPORT OF APPLICATION TO CONFISCATE PROPERTY

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I, **XXXXXXXX**, of the Department of Forestry, P. O. Box 30048, Lilongwe **DO MAKE OATH** and **STATE** as follows:

- 1) **THAT** I am of full age and therefore duly authorised to swear this affidavit.
- 2) **THAT** the matters of fact deposed herein have come to my knowledge in the course of handling this matter and I conscientiously believe the same to be true to the best of my knowledge and belief.
- 3) **THAT** **CHARCOAL SELLER** is currently a convict, serving sentences at Maula prison in relation to convictions relating to forestry offences.
- 4) **THAT** in the case of Republic v Charcoal Seller and Transporter Criminal Case No. 1 of 2022 in the Principal Resident Magistrate Court sitting at Lilongwe the Respondent was convicted of Offences relating to forest reserves and protected forest areas contrary to section 64 (1) of the Forestry Act in respect of the felling and collection of trees in a forest reserve.
- 5) **THAT** the 1<sup>st</sup> Respondent is currently serving a sentence of 4 years in respect of that offence. I attach and exhibit hereto a copy of the said judgment and sentence marked as "XX 1" and 'XX 2', respectively.
- 6) **THAT** on 1<sup>st</sup> January 2023, the 1<sup>st</sup> Respondent was arrested, with the 2<sup>nd</sup> Respondent, in a Toyota Dyna 5 Tonne Truck Registration No. XXXX, with the

sum of MK300, 000.00 cash in a plastic bag under the front seat under other items and 20 bags of charcoal.

### **TOYOTA DYNA No. XXXX**

- 7) **THAT TRANSPORTER**, the 2<sup>nd</sup> Respondent, is the registered owner of the vehicle in issue.
- 8) **THAT** a search of the Road Traffic Department's system demonstrated that:
  - i) The vehicle was cleared by Malawi Revenue Authority on 10<sup>th</sup> October 2022;
  - ii) The vehicle was cleared by Interpol on 20<sup>th</sup> October 2022; and
  - iii) The vehicle was registered by Road Traffic Department on 30<sup>th</sup> October 2022. I attach and exhibit hereto a copy of the printout from the Department of Road Traffic marked as 'XX 3'.
- 9) **THAT** the 2<sup>nd</sup> Respondent has no known legitimate source of income; although his Facebook has many pictures with him posing next to charcoal bags and cut trees. I attach and exhibit hereto said photos marked as "XX4" to "XX20".
- 10) **THAT** investigations have demonstrated that the 2<sup>nd</sup> Respondent's wife has no job and no other known source of income.
- 11) **THAT** despite no clear source of income the 2<sup>nd</sup> Respondent's daughter goes to Mount Sinai, where the school fees per term is MK500, 000.00. I attach and exhibit hereto a copy of the invoice for her term fees and a copy of the cheque drawn by the 2<sup>nd</sup> Respondent marked as "XX 21" and "XX 22".
- 12) **THAT** the 2<sup>nd</sup> Respondent has been arrested on 2 prior occasions for transporting charcoal. I attach and exhibit hereto a copy of the judgments in question marked as 'XX23' and 'XX24'.
- 13) **THAT** the 2<sup>nd</sup> Respondent has also been convicted in respect of the possession of the 20 bags of charcoal.
- 14) **THAT** the State seeks to recover all proceeds of crime and any tainted property and this vehicle appears on a balance of probabilities, to be the proceeds of crime.

### **CASH SUM OF MK300,000**

- 15) **THAT** the 2<sup>nd</sup> Respondent has been interviewed on several occasions as to the source and destination of the cash in the vehicle, but is yet to provide a credible response.
- 16) **THAT** the sole source of known income of the 1<sup>st</sup> Respondent is subsistence farming on a plot of 3 acres, which he shares with 2 brothers.
- 17) **THAT** it is my considered view that the MK300, 000.00 represents proceeds of the sale of charcoal.



**WHEREFORE** I humbly pray to this Honourable Court for an order forfeiting the Toyota Dyna Registration No. XXXX and the cash sum of MK300, 000 to the State.

Sworn by the said **XXXXXXXXXXXXXXXXX** .....

At ..... (Deponent)

On this ..... day of ..... 2023

**Before Me:**

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**COMMISSIONER FOR OATHS**

The development of this Guide was led by Lilongwe Wildlife Trust through Modern Cooking for Healthy Forests in Malawi, an Activity co-funded by the United States Agency for International Development and the United Kingdom Foreign, Commonwealth and Development Office.

