



**JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)
CIVIL CAUSE NO. 1102 OF 2020**

BETWEEN

FINANCIAL INTELLIGENCE AUTHORITY CLAIMANT

AND

NORMAN PAULOSI CHISALE DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Messrs. Chitsime and Mtonga, of Counsel, for the Claimant
Messrs. Mchizi and Taumbe, of Counsel, for the Defendant
Mr. Henry Kachingwe, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is this Court's Ruling on an inter-partes application by the Claimant for an order extending a freezing directive by the Claimant on the bank accounts of the Defendant. The application is brought under section 23(5) of the Financial Crimes Act (the Act).

The application is supported by a statement sworn by Mr. John Minofu, the Claimant's Financial Analysis Manager (the Claimant's sworn statement). The body of the Claimant's sworn statement provides as follows:

"The claimant

5. *The claimant is the principal national agency established under the Financial Crimes Act 2017 (hereafter referred to as "the FCA") responsible for preventing and combating financial crimes.*

6. *In carrying out its mandate under the FCA, the claimant is responsible for receiving, analysing and disseminating suspicious transaction reports, investigating financial crime and matters under the FCA.*
7. *Furthermore, the claimant is a competent authority as defined by the FCA to pursue proceedings with regards to civil forfeiture, seizure, detention, freezing and preservation of assets under the FCA.*

The basis of the application

8. *The defendant is a natural person who holds banking accounts at National Bank PLC and First Capital Bank PLC. The account at National Bank is account number 1519603 at its Capital City Branch while the account at First Capital Bank is account number 0004501004244.*
9. *The defendant is the sole signatory of both bank accounts held at the said banks.*
10. *The defendant is answering to several criminal charges one of which is the offence of money laundering contrary to section 42(1) of the Financial Crimes Act of 2017. The charges stem from the alleged involvement of the defendant in the illegal importation of cement using the former president of the Republic of Malawi Professor Arthur Peter Mutharika's Tax Payer Identification Number (TPIN) at Malawi Revenue Authority.*
11. *The claimant was arrested and charged together with Shafee Chunala, Peter Mukhitho, Roza Madalo Mbilizi, Lodzani Fatch and Patrick Chisasa in the illegal cement importation case, and he was released on bail.*
12. *The claimant being a central authority established to combat and prevent financial crimes works closely with other law enforcement agencies and was well aware that the defendant and his co-accused were under investigation. As such, it requested for customer information from the defendant's bankers.*
13. *On the 29th of July 2020, the defendant through his wife presented a MK30,000,000.00 cheque at First Capital Bank in order to have it cashed. The claimant got this information in the form of a suspicious transaction report and instructed First Capital Bank not to proceed with the transaction and to freeze the claimant's account in accordance with section 23(4) of the FCA. This provision empowers the defendant to carry out such action if it has reasonable grounds to believe that funds in a particular account maybe proceeds of an offence or are related to terrorist financing.*
14. *The claimant issued a freezing order in terms of the defendant's account at First Capital Bank on 29th July 2020 and the one at National Bank on the 30th of July 2020. These are supposed to be in place for a period not exceeding ninety (90) working days and can only be extended by a court for a period of not less than three (months).*
15. *According to its calculations, the claimant is still within the legally prescribed period within which it can still freeze the claimant's funds at National Bank and*

First Capital Bank. The claimant is still within the 90 working days period which will expire on the 4th of December 2020.

16. *The claimant asserts that the case against the defendant is still ongoing and new information is still being unearthed in the investigation processes. This presents the claimant with the need to have the freezing directive extended.*
17. *The Financial Crimes Act has given the claimant the mandate to freeze transactions for up to ninety working days and if there is a need to continue the freeze after the stipulated period the claimant is required to obtain a court order whereupon the affected party can make representation.*
18. *We are of the strongest opinion that the funds in the frozen accounts of the defendants will form part of the realizable property subject to confiscation under the Financial Crimes Act.*
19. *It is for the reasons in paragraphs above that the claimant submits that the freezing directive be extended up until the case is concluded.”*

The Defendant has filed the following sworn statement in opposition:

- “4. **THAT** on or about the 14th day of July, 2020 I was arrested by the Malawi Police Service on allegations that I was involved in the illegal importation of cement.
5. **THAT** however in or around 29th July 2020, I shockingly discovered that my accounts held at First Capital Bank (Account number 0004501001244) and National bank (Account number 15196030) had been frozen by the claimant herein in connexion to my arrest on allegations of illegal importation of Cement.
6. **THAT** from the time my accounts were frozen by the claimant herein I have been facing financial hardships as it is hard for me to sustain myself, support my family and pay my employees the same as a direct consequence of my accounts being frozen.
7. **THAT** the Claimant has brought this action to extend a freezing order effected on my bank accounts.
8. **THAT** the Claimant has stated that the freezing order stems from the fact that I am answering charges of money laundering contrary to section 42 (1) of the Financial Crimes Act of 2017. The Claimant has however not provided the court with a case number or the charge sheet indicating that I am as a matter of fact answering charges under the Financial Services Act.
9. **THAT** the Claimant has not indicated which funds in my accounts are under suspicion or investigation considering that the National Bank account has all along been the account where all my salaries and allowances have been deposited all the time, I was serving the former President as security aide. The FDH Bank account

mentioned is a business account of Zimatha Lodge of which I am sole proprietor and all proceeds from the business are deposited.

10. **THAT** *as a result of the actions of the Claimant I am going through severe economic hardships, including but not limited to:*

10.1 *Failure to school fees for my children*

10.2 *Failure to settle medical bills*

10.3 *Failure to pay my employees*

10.4 *Failure to pay utility bills*

10.5 *Failure to settle legal fees in my so many cases before the Courts*

10.6 *Failure to pay for my and my family's basic necessities like food and groceries. Attached hereto and marked "PNC 1" are various invoices to that effect.*

11. **THAT** *in the premises, I verily believe that even if the freeze is extended further, I believe I should be allowed to make reasonable withdrawals from the account to sustain my life.*

12. **THAT** *I believe that the following breakdown would be a reasonable request as far as the said withdrawals are concerned;*

12.1. *MK2, 300, 920.00 being fees for my daughter at Kamuzu Academy and payment for uniform.*

12.2. *MK4, 500, 000 being payment for G4S security for the year 2021.*

12.3. *MK10, 000, 000.00 being minimum expenses for lawyers handling my various cases.*

12.4. *MK700, 000.00 per month being daily expenses for my family.*

12.5. *MK360, 000.00 per month for my various employees.*

13. **THAT** *at the very least I ought to be presumed innocent until proven otherwise by a competent court and a blanket freeze on my accounts will cause irreparable damage to me and my family.*

14. **THAT** *considering the hardship I am going through because of the acts of the Claimant; justice requires at the minimum that I access the funds indicated in paragraph 12."*

Sections 23, 70, 107 and 108 of the Act are relevant. Section 23 deals with reporting of suspicious transactions and it states as follows:

“(1) Whenever a reporting institution suspects or has reasonable grounds to suspect or confirms, that a transaction or an attempted transaction is related to the commission of an offence under this Act, it shall as soon as possible but not later than three days after forming that suspicion and, wherever possible, before the transaction is carried out—

- (a) take reasonable measures to ascertain the purpose of the transaction, the origin and ultimate destination of the funds involved and the identity and address, of any ultimate beneficiary;*
- (b) prepare report of the transaction in accordance with subsection (2), and communicate the information contained in the report to the Authority in writing and in a manner the Director General may prescribe.*

(2) A report required under subsection (1) shall be submitted regardless of the amount involved and shall—

- (a) when applicable, contain particulars of the matters specified in subsections (1) and in sections 16(2), (3), (4), (5), (6) or 18;*
- (b) contain a statement of the grounds on which the reporting institution holds the suspicion; and*
- (c) be signed or otherwise authenticated by the reporting institution.*

(3) A reporting institution which has reported a suspicious transaction in accordance with this section shall, if requested to do so by the Authority, give such further information as it has in relation to the transaction.

(4) After receipt of a suspicious transaction report required under subsection (1) or whenever the Authority has reasonable grounds to suspect that funds in a particular customer account maintained at any reporting institution may be proceeds of an offence or related to terrorism financing, the Authority may direct the reporting institution in writing or by telephone to be followed up in writing within one working day, not to proceed with the carrying out of that transaction or any other transaction immediately and where appropriate, freeze any funds or reverse any transaction in respect of the funds affected by that transaction or proposed transaction for a period not exceeding ninety working days in order to allow the Authority—

- (a) to make necessary inquiries concerning the transaction; and*
- (b) if deemed appropriate, to inform and advise a competent authority.*

(5) The Court may, upon the application of the Authority, order the extension of the direction under subsection (4), for a period of not less than three months:

Provided that a party affected or likely to be affected by the order, may apply on notice to all parties concerned to be heard on the matter.

(6) *A person who contravenes this section shall be liable ...*" - Emphasis by underlining supplied

Section 70 of the Act makes provision regarding living expenses of a person holding an interest in property subject to a preservation order and it is couched in the following terms:

"(1) A preservation order may make a provision as the Court deems fit for reasonable living expenses of a person holding an interest in property subject to a preservation order and his immediate family.

(2) A Court shall not make provisions for any expenses under subsection (1) unless it is satisfied that—

(a) the person cannot meet the expenses concerned out of his property which is not subject to the preservation order; and

(b) the person has disclosed under oath all his interest in the property and has submitted to that Court an affidavit.

(3) Upon conviction, the Court may order refund of the expenses referred to in subsections (1) and (2) and the refund may be recovered as a civil debt against the person."

Section 107 of the Act governs the making of applications for preservation and restraining orders and it states as follows:

"(1) A competent authority may apply to the court for a preservation order against any realizable property held by the defendant or specified realizable property held by a person other than the defendant.

(2) An application for a restraining order shall be made, without informing the other party, in writing and be accompanied by an affidavit stating—

(a) where the defendant has been convicted of an offence under this Act, the offence for which he was convicted, the date of the conviction, the Court before which the conviction was obtained and whether an appeal has been lodged against the conviction;

(b) where the defendant has not been convicted of an offence under this Act, the serious offence for which he is charged or about to be charged and grounds for believing that the defendant committed the offence;

(c) a description of the property in respect of which the restraining order is sought;

(d) the name and address of the person who is believed to be in possession of the property;

- (e) *the grounds for the belief that the property is tainted property in relation to the offence;*
- (f) *the grounds for the belief that the defendant derived a benefit, directly or indirectly, for the commission of the offence;*
- (g) *where the application seeks a restraining order against the property of a person other than the defendant, the grounds for the belief that the property is tainted property in relation to the offence and is subject to the effective control of the defendant;*
- (h) *the grounds for the belief that a confiscation order or a pecuniary penalty order may be or is likely to be made in respect of the property.”*

Section 108 of the Act provides as follows as regards the conditions to be considered in granting preservation orders under the Act:

“(1) Subject to this section, where the competent authority applies to the court for a preservation order under section 107 against property and the court is satisfied that—

- (a) *the defendant has been convicted of an offence under this act or has been charged or is about to be charged with an offence under this act;*
- (b) *where the defendant has not been convicted of an offence under this act, there are reasonable grounds for believing that the defendant has committed an offence under this act;*
- (c) *there is reasonable cause to believe that the property is tainted property in relation to an offence or that the defendant derived a benefit directly or indirectly from the commission of the offence;*
- (d) *where the application seeks a restraining order against property of a person other than the defendant, there are reasonable grounds for believing that the property is tainted property in relation to an offence and that the property is subject to the effective control of the defendant; and*
- (e) *there are reasonable grounds for believing that a confiscation order or a pecuniary penalty order is likely to be made under this act in respect of the property, the court may make an order in accordance with subsection (2).*

(2) An order made pursuant to subsection (1) may—

- (a) *prohibit the defendant or any person from disposing of, or otherwise dealing with, the property or a part thereof or interest therein as is specified in the order, except in a manner specified in the order; and*

- (b) *at the request of the competent authority, where the court is satisfied that the circumstances so require—*

 - (i) *direct such person as the court may appoint to take custody of the property or such part thereof as is specified in the order and to manage or otherwise deal with all or any part of the property in accordance with the directives of the court; and*
 - (ii) *requiring any person having possession of the property to give possession thereof to the person appointed under sub-paragraph (i) to take custody and control of the property.*
- (3) *An order under subsection (2) may be made subject to such conditions as the court thinks fit, and without limiting the generality of this subsection, may make provision for meeting out of the property or a specified part of the property, any or all of the following—*

 - (a) *the reasonable living expenses of the person, including the reasonable living expenses of the dependents of the person, if any, and reasonable business expenses;*
 - (b) *the reasonable expenses of the person in defending the criminal charge and any proceedings under this Division; and*
 - (c) *any specified debt incurred by the person in good faith.*
- (4) *In determining whether there are reasonable grounds for believing that property is subject to the effective control of the defendant the court may have regard to the matters referred to in section 66.*
- (5) *Where the other person appointed under subsection (2) (b) (i) is given a direction in relation to any property, he may apply to the court for directions or any question respecting the management or preservation of the property under his or her control.*
- (6) *An application under subsection (1) shall be served on all persons interested in the application or any of them as the court thinks expedient and all persons shall have the right to appear at the hearing and be heard.*
- (7) *Where the application is made under subsection (1) on the basis that a person is about to be charged, any order made by the court shall lapse if the person is not charged—*

 - (a) *where the offence is an offence against the laws of Malawi, within three months; and*
 - (b) *where the offence is an offence against the laws of a foreign State, within twelve months.”*

It is the case of the Defendant that the application by the Claimant has to be dismissed on two grounds. Firstly, it is contended that the Claimant has failed under section 23 of the Act to show cause why an extension should be granted by failing to indicate why the 90 days were not enough to make enquiries regarding the suspicious transaction of K30, 000, 000.00. Secondly, the Defendant argues that the Claimant is essentially applying for a preservation order and having made it under section 23, it is misconceived and as a result the Claimant has failed to show how conditions in section 108 of the Act have been met to warrant the granting of the relief sought. It might not be out of place to quote the Defendant's skeleton arguments in full:

“3.1 Section 23 (4) of the Financial Crimes Act, 2017 which has been used by the Claimant reads as follows;

“...” text as set out above

- 3.2. The Claimant seems to suggest that it is applying for the extension because the frozen funds will be part of the realisable property and the freezing directive should serve the purpose of preserving the funds in question from being dissipated. Such an order can be given by this Court under sections 107 and 108 of the same Financial Crimes Act, 2017.*
- 3.3. Section 108 of the Financial Crimes Act, 2017 provides as follows ... text as set out above]*
- 3.4. Paragraph 13 of the Sworn Statement in support of the Claimant's application indicates that the freezing directives were issued in respect of a transaction involving the Defendant's wife who presented a MK30, 000, 000.00 cheque at First Capital Bank in order to have it cashed and that it was that transaction that was reported as suspicious.*
- 3.5. If indeed the MK30, 000, 000.00 transaction was the basis of the freezing directive, then the purpose of such directives should fall under the reasons under section 21 of Financial Crimes Act. The Claimant has not shown anywhere how far the enquiries have gone nor have they indicated if they intend to report the said transaction to a competent authority. Furthermore, the Claimant has not shown in any way why it needs an extension.*
- 3.6. Paragraph 18 of the said Sworn Statement indicates that the extension is sought because **“we (the Claimant) are of the strongest opinion that the frozen accounts of the defendant will form part of the realizable property subject to confiscation under the Financial Crimes Act.”***
- 3.7. Paragraph 19 indicates that the Claimant wants the freezing directives to be extended until the case is concluded.*

- 3.9. *The totality of paragraphs 18 and 19 shows that what the Claimant is actually applying for before this Court is not just an extension of the freezing directives but rather a preservation order. In that case the said application is misconceived as it ought to be made under sections 107 and 108 of the Financial Crimes Act which clearly indicates the conditions the Claimant has to fulfil in order to be granted.*
- 3.10. *In the present circumstances the Claimant has at no point indicated the reasons for believing that the funds in the Defendants are proceeds of an offence under the Financial Crimes Act nor have they even attempted to explain how the Defendant benefitted from the said offence.*
- 3.11. *In the event that a confiscation order is granted, or the extension is granted, the Defendant would like to invoke the spirit of section 108 of the Financial Crimes Act ...*
- 3.12. *In the case of Caitrin & Ors (pseudonyms) (No 2), Re Freezing Injunction: Application to discharge or vary [2010] NIFam 4 (25 February, 2010), the court stated that one needs to bring evidence before court that there is a need of some assistance towards certain expenses in order to have a freezing order discharged or varied.*
- 3.13. *The Defendant has presented evidence before this Court of reasonable expenses before that he has to meet and is seeking the Court indulgence to make provision from out of the frozen accounts to meet the said expenses as contained in paragraph 9 of the Defendant's Sworn Statement in opposition to the application."*

I have considered the submissions by the Defendant and I find them to lack merit. One important point to bear in mind is that the provisions of section 23 of the Act come into play in relation to reporting stage before the matter escalates to an advanced stage of prosecution or trial. At this stage, the power to issue freezing directives is vested in the Claimant. The Claimant has clearly outlined the basis of its application: see paragraphs 8 to 17 of the Claimant's sworn statement. I thus fail to understand why the Defendant seeks to link the freezing directive to his answering charges of money laundering contrary to section 42 (1) of the Financial Crimes Act of 2017. It is clear that this fact is stated in the Claimant's sworn statement as background information and not as the basis of the freezing directive.

I also wish to add that the powers of the Claimant under section 23(4) of the Act are not limited in the manner being suggested by the Defendant. The enquiries by the Claimant need not be confined to a particular transaction: they can be as broad and comprehensive as the circumstances of the case demand. In this regard, the words "*the Authority may direct the reporting institution ... not to proceed with the carrying out of that transaction or any other transaction immediately and where appropriate, freeze any funds or reverse any transaction in respect of the funds affected by that transaction or proposed transaction*" in section 23(4) of the Act are instructive.

In view of the foregoing, I am satisfied that the Claimant has established a good case for it to be allowed more time to make necessary inquiries concerning the matter herein and for it to inform and advise competent authorities, if deemed appropriate. To my mind, a further period of four months would be adequate for this purpose. In the premises, the freezing directive issued by the Claimant on the bank accounts of the Defendant is extended for four months from the date of this Ruling. It is so ordered.

I now move to the prayer by the Defendant that, in the event that the Court grants the extension, the Court should make provisions that the reasonable expenses of the Defendant be met from the frozen accounts. The prayer is said to be made “*in the spirit of section 108 of the Financial Crimes Act*”: see paragraph 3.11 of the Defendant’s skeleton arguments.

There are two main reasons why this prayer has to be refused. Firstly, living expenses are the subject of sections 70, 71 and 108 of the Act. These provision relate to circumstances where a person holds an interest in property subject to a preservation order. No preservation order has been granted in the present matter. If the framers of the Act had intended that living expenses be provided for in respect of a freezing directive made under section 23 of the Act, this would have been done with clarity and directness as provided for in respect of preservation orders.

Secondly, section 70 of the Act is crystal clear that a Court shall not make provisions for any reasonable living expenses unless it is satisfied that the person cannot meet the expenses concerned out of his or her property which is not subject to the preservation order. The Defendant has made no attempt whatsoever to disclose the property that he owns. As such, the Defendant has not met the conditions set by the Act for the Defendant’s expenses to be paid out of the frozen accounts.

All in all, the application by the Claimant to extend the validity of the freezing directive is granted and the prayer by the Defendant that certain of his expenses be met from the frozen accounts is refused.

Pronounced in Chambers this 6th day of January 2021 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE