



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS CIVIL CAUSE NUMBER 33 OF 2016

BETWEEN:

S. NKHOMA AND 208 OTHERS

1st PLAINTIFF

N. KATENGEDZA AND 10 OTHERS

2nd PLAINTIFF

L. NAISON AND 7 OTHERS

3rd PLAINTIFF

AND

ELECTRICITY SUPPLY CORPORATION OF MALAWI

LIMITED

DEFENDANT

Coram: JUSTICE M.A. TEMBO,

Mzembe, Counsel for the Plaintiffs
Roka, Counsel for the Defendant
Chanonga, Official Court Interpreter

ORDER

This is this Court's order on the plaintiffs' application for continuation of an order of Mareva injunction that the plaintiffs obtained ex parte in this matter.

The plaintiffs obtained a Mareva injunction, ex parte, before my brother Judge on 24th May 2016 by which the defendant was ordered not to remove from Malawi or



in any way dispose of or deal with or diminish the value of any of its assets which are in Malawi whether in its own name or not and whether solely or jointly owned. The assets covered by the order were listed.

The case of the plaintiffs is that they have claims against the defendant wherein the value claimed is in excess of K1, 000, 000, 000.00. While those cases subsist, the defendant announced that it would unbundle and break up into two entities to carry on the business of the defendant, namely, an electricity generating company and an electricity transmission company. The plaintiffs asserted that they wrote the defendant inquiring as to who would satisfy their claims should they be successful. The plaintiffs indicated that they got no reply by the time they came to obtain the ex-parte order from this Court.

The plaintiff submitted that there are five conditions that have to be met before a Mareva injunction is granted as outlined in the case of *SBSK Plantations v Dynasty Rangers* [2002] 1 MLJ 326. The plaintiff submitted that they met the said conditions as follows.

The plaintiffs asserted that they had demonstrated that they have good and arguable claims against the defendant. Further, that the defendant has assets within the jurisdiction.

Further, that the balance tilts in favour of continuing the Mareva injunction as the unbundling and splitting of the defendant will only dilute the defendant's assets and it will be hard for the plaintiffs to know as to which entity to proceed against. The plaintiffs indicated that some of the plaintiffs will be under the new generating company that will be borne out of the unbundling of the defendant.

The plaintiffs asserted that they also demonstrated that the defendant showed lack of probity and that there is a real risk of dissipation of its assets.

The plaintiffs also asserted that they did not delay in applying for the injunction herein and made full disclosure of material facts without any suppression of the same. For the foregoing reasons the plaintiffs sought the continuation of the injunction.

On its part, the defendant submitted that had the plaintiffs inquired from the defendant on the unbundling process the plaintiffs would not have been in this Court.

The defendant further contended that on applications for Mareva injunction the order will only be granted when there is a genuine risk of dissipation of assets of the defendant.

The defendant argued that the plaintiffs fears that the defendant's assets will be dissipated due to the defendant's unbundling process into an electricity generating company and an electricity transmission company are unfounded.

The defendant submitted that, by its letter in response to the plaintiffs' query on the impact of the unbundling process, it clarified that the defendant will continue to exist and trade as it is doing now except that only the electricity generating function will no longer be part of the defendant. Further, that the defendant will not be dissolved and will be responsible for the plaintiffs' claims should the plaintiffs succeed on the said claims.

The defendant also observed that some of the plaintiffs are the defendant's own employees and should have known about the impact of the unbundling of the defendant in view of the many sensitization meetings the defendant held for its employees concerning the defendant's unbundling process. The defendant therefore charged that the plaintiffs suppressed material facts by not disclosing their knowledge.

The defendant then stated that the defendant had three functions namely generation, transmission and distribution of electricity. It pointed out that the whole essence of unbundling the defendant is to improve the generation capacity by creating competition against the defendant. The defendant stated that there will be other companies that will also be generating electricity but the defendant will be the single buyer of all electricity generated.

The defendant disputed how the plaintiffs came up with an estimate of their claims at K1, 000, 0000, 000.00 when the same are not assessed by the Court.

The defendant insisted that after the unbundling process there will be no dissipation of the defendant's assets.

The defendant also asked this Court to take judicial notice of the legislative framework for the unbundling of the defendant which aims at achieving good for the nation.

The plaintiffs responded that they got the response from the defendant on the impact of the unbundling process late and in any event after they had already obtained the order ex parte herein. Further, that the defendant had not proved that at the meetings whose notices were produced in evidence on this application the subject of discussion was the unbundling process of the defendant.

The plaintiffs then submitted that a look at the documents submitted by the defendant shows that the liabilities of the defendant will be borne and loaded on the defendant and the new electricity generating company will go with a clean slate and some assets from the defendant. The plaintiffs submitted that, in the circumstances, the defendant will be heavily burdened and will be unable to pay anything if the plaintiffs succeed.

The plaintiffs submitted that the K1, 000, 000, 000.00 value attached to their claims is their own preliminary estimate of the value of their claims.

The plaintiff did not dispute that the unbundling process is aimed at the good of the nation.

The plaintiffs consequently insisted that the Mareva injunction herein continue until their claims against the defendant are determined.

This Court has had regard to the case of *Mareva Compania Naviera SA v. International Bulk Carriers SA* [1980] 1 All E.R. 213n; [1975] 2 Lloyd's Rep. 509, CA, where it was held, distinguishing *Lister & Co. v. Stubbs* (1890) 45 Ch.D. 1, CA, that the Court has jurisdiction to grant an interlocutory injunction to restrain a defendant from dealing with his assets for the purpose of preventing him from removing them from the jurisdiction to defeat any later judgment against him

What must be noted here is that the purpose of a Mareva injunction is to prevent a defendant from dealing with assets with a view to defeating a later judgment against the said defendant.

In the scheme of things in the present case, the unbundling process is not aimed at defeating any judgment that may be obtained against the defendant. The unbundling process is legislatively driven to improve the electricity generating capacity in this jurisdiction.

For that reason, this Court takes the view that the injunction herein was granted on the wrong legal premise and ought not to have been granted. The foregoing is apparent when one considers that the defendant will continue to trade in electricity as a single buyer of electricity generated by the electricity generating companies. One wonders how someone can imagine that such an entity will dissipate its assets with a view to defeating any judgment that may be obtained by the plaintiffs.

This Court has also found that in the premises, where the unbundling process is aimed at improving electricity generation, it cannot be said that the defendant lacks probity.

This Court finds persuasive authority in *Ketchum International Plc v Group Relations Ltd* [1997] 1 W.L.R. 4 to the effect that the mere fact that the defendant's actual or feared conduct would risk impairing the claimant's ability to enforce a judgment does not in every case mean that a Mareva injunction should be made. What is vital is that the defendant's conduct in question must itself be unjustifiable.

This Court does not find the defendant's unbundling process to be unjustifiable. The plaintiffs have not at all suggested that the defendant's conduct in the unbundling process is unjustifiable. On the contrary, the plaintiffs agree that the unbundling process is for the good of this jurisdiction.

This Court also finds that since the unbundling process is aimed at improving electricity generation that the defendant will buy there is also no real risk of dissipation of the defendant's assets that may prevent the plaintiffs from recovering from the defendant if they are successful.

Consequently, on the authority of *Investment and Development Bank of Malawi v Gredean Africa (Pvt) Limited* [1993] 16(2) MLR 531 and on further persuasive authority in the cases of *SBSK Plantations v Dynasty Rangers* [2002] 1 MLJ 326 and *Mareva Compania Naviera SA v. International Bulk Carriers SA* [1980] 1 All E.R. 213n, this Court finds that there is no ground for continuing the Mareva injunction in this matter considering that the defendant will continue trading in electricity and there is no real risk that the unbundling process of the defendant will dissipate the defendant's assets resulting in failure of the plaintiffs to recover from the defendant if they are successful.

This Court has reflected on the submissions by the defendant that the plaintiffs suppressed material facts by not disclosing that they knew about what the unbundling process herein was all about. This Court has concluded that it is fair for the defendant to make that submission. The defendant appears to have indeed called meetings to appraise its members of staff, some of which are the plaintiffs in this matter, about the defendant's unbundling process. The plaintiffs must therefore have been informed as to what the unbundling process is really about.

The coming of the plaintiffs to this Court to seek a Mareva injunction in such circumstances is therefore an abuse of the court process on the part of the plaintiffs who are the defendant's employees. Their action must have been based on rumour mongering rather than fact and this always has undesirable consequences such as the unnecessary incurring of costs.

Although the plaintiffs satisfied some of the conditions for the granting of the Mareva injunction, namely, having a good and arguable claim and making the application without delay, they failed to satisfy the other important conditions as discussed above and, in the foregoing premises, the injunction obtained ex parte in this matter is dissolved with costs to the defendant.

Made in chambers at Blantyre this 29th September 2016.



M.A. Tembo
JUDGE