IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

MISCELLANEOUS CIVIL CAUSE NO. 169 OF 2020

PROFESSOR ARTHUR PETER MUTHARIKA ..... APPLICANT

AND

THE DIRECTOR OF
THE ANT-CORRUPTION BUREAU ..... RESPONDENT

Coram: **HON. JUSTICE R. MBVUNDULA**
S. Tembenu SC, & W. Banda, Counsel for the Applicant
V. Chiwala, Counsel for the Respondent
Chimang'anga, Official Interpreter

RULING

The applicant is the immediate past President of the Republic of Malawi. The applicant brought the present application through a filing made on 25th November 2020 seeking this court's order to reverse a Restriction Notice (the RN) issued by the respondent on 6th August 2020, pursuant to section 23 (5) of the Corrupt Practices Act (the CPA). The RN instructed the Chief Executive Officer of Standard Bank that unless with the written consent of the respondent, the bank should not allow or facilitate the withdrawal of any amount of money by any person including the account holder(s) of one account, held by the applicant, and

another, held jointly by the applicant and the former first lady, Getrude Mutharika. The RN is exhibited to the applicant's sworn statement in support of the application, sworn on 23rd November 2020, and marked "APM 1".

The applicant informs the court that he was subsequently questioned by the Malawi Police in connection with allegations that his Tax Payer Identification Number (TPIN) was used to import huge quantities of cement into the country. He further informs the court that he is personally aware that other persons were arraigned by the police in connection with the allegation. He further states that at the meeting with the police he made a request that the police should compile all information relating to the instances when his TPIN was used and avail the same to his legal team and, further, that he informed the Office of the President and Cabinet about this when that office requested for an interview with him in connection with the issue.

The applicant states further that on 27th October 2020 he wrote to the respondent through his legal practitioners requesting the respondent, as they were considering to unfreeze the bank accounts, that they should give written consent for him to withdraw K30 000 000.00 in order for him to pay an amount he owed a certain contractor who had done works at his Mapanga property, pay for his daily upkeep, pay his workers as well as buy other supplies. A copy of the letter is exhibited and marked "APM-2". There has been no response to that request, so the court is informed.

The applicant further states that the respondent has not yet charged him with any offence and laments that despite all that, more than three months after the issuance of the RN, the respondent has not unfrozen the accounts, and that as a result he is adversely affected because he is unable to satisfy his daily living expenses. The applicant believes that the continued freezing of the accounts is unjustified and should not be allowed to continue, and therefore asks this court to reverse the RN dated 6th August 2020.

For the respondent is a sworn statement made by Flattery Nkhata, the respondent's Principal Investigating Officer, who states that early in August 2020 the respondent received a complaint alleging misuse and abuse of Presidential privileges, which led to the institution of investigations the preliminary results of

which indicated overwhelmingly that the applicant's bank accounts, especially the two aforementioned, were closely connected to the alleged abuse, which led to issuance of the RN aimed at maintaining evidence which would be necessary at trial and to avoid dissipation of the money, which would render asset recovery nugatory in the event that the state successfully prosecuted the applicant.

Mr Nkhata states that the RN issued against the applicant was in relation to his TPIN, and not cement only, which is being investigated by other law enforcement agencies. He states that the investigations in relation to the applicant's TPIN have led to revelations of so many complex and unlawful transactions connected thereto and the said bank accounts necessitating elongation of the time within which to investigate the matter than anticipated, and as the investigations are likely to take more time, there is need to renew the RN for a further three months. In the circumstances it is his belief that reversing the RN as requested by the applicant would be tantamount to allowing the applicant to use the tainted money. He further states that the RN will not only be necessary for investigation but also for trial and asset recovery, hence prays that the application to reverse the RN be dismissed and that the court should renew the same for a further three months.

Both parties filed skeleton arguments and orally addressed this court on the matter.

Counsel Tembenu told the court that the major thrust in the applicant's application is that the RN should be reversed so that propriety should prevail in the sense that an RN that was obtained on 6th August and valid for three months had outlived its validity according to section 23 of the CPA because that section is clear that the RN shall last for three months. Counsel Tembenu then stated that looking at the matter from that angle one might tempted to take the position that the application herein was superfluous, but that looking at the individual involved and the gravity of the allegations being levelled against him it was felt necessary to ask this court to make a clear pronouncement that any RN obtained against the applicant or any other person cannot last for more than three months unless renewed by an order of the court.

It is correct that the validity period of a restriction notice issued under section 23 of the CPA is three months. It may be renewed after expiry or cancelled within the three months. Section 23 (3) is in the following terms:

> "(3) A notice issued under subsection (1) shall have effect from the time of service and shall continue in force for a period of three months or until cancelled by the Director, whichever is earlier, but may upon expiry be renewed for further periods of three months on application to a magistrate showing cause why the notice should be renewed.

The evidence before this court is that the RN under discussion herein was issued on 6th August 2020. It means therefore that unless cancelled it was to continue in force until 5th November 2020.

In the course of the hearing of this application it transpired that the RN was renewed, not immediately it expired but about a month later, on 7th December 2020. The process by which it was renewed raised controversy, which controversy, in my view, ought to be brought before the magistrate court which granted its renewal, as the decision to grant it is neither on appeal to this court nor subject of this application. I therefore refrain from resolving that controversy.

The court record will show that on the date the present application was filed in this court on 25th November 2020, the RN sought to be reversed in the present application had in fact expired per the provisions of section 23 (3) of the CPA. In my finding, therefore, this application, seeking to reverse the RN which was non-existent on the day the application was filed, is superfluous. Indeed as earlier on mentioned, counsel for the applicant did expressly acknowledge that a restriction notice that was obtained on 6th August and valid for three months had outlived its validity according to section 23 of the CPA because that statutory provision is clear that a restriction notice shall last for three months unless renewed. But, according to counsel for the applicant, the applicant felt it necessary to ask this court to make a clear pronouncement that any restriction notice obtained against the applicant or any other person cannot last for more than three months unless renewed by an order of a court. On his part the respondent expressly acknowledges this legal position, through the sworn statement of Mr Nkhata as well as the submissions of counsel. It is my view that the need for the court to re-state that which is absolutely clear and not in controversy does not arise. The prayer is moot.

In the same connection the applicant blames the respondent for failing to "unfreeze" the RN after the expiry of the three months. He states that more than three months after the issuance of the RN, the respondent has not unfrozen the accounts, as a result of which he is adversely affected because he is unable to satisfy his daily living expenses. Nowhere in the CPA, however, is the respondent required to "unfreeze" a restriction notice that has expired. As already stated, there was none in existence to unfreeze at the time of the filing of the present application. Section 23 (3) is clear that the respondent may cancel an existing restriction notice or renew an expired one. The import of this, as regards an expired restriction notice, is that matters revert to the position before the issuance of the restriction notice. Consequently the person against whom the restriction notice was issued is free to access his bank accounts without seeking the respondent's or anyone else's permission, including that of the bank to which the notice was issued. In the present case, therefore, the applicant was, as of 25th November 2020 (the date when he filed the within application to reverse the RN), at liberty to access his bank accounts herein without the aid of the court, unless he was restrained from doing so (which is not alleged) as there was no restriction notice in existence.

The applicant's present application is therefore without basis or merit and on that score alone is dismissed with costs.

Made in chambers at Blantyre this 22nd day of January 2021.

R Mbvundula
JUDGE