IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

BLANTYRE REGISTRY

Commercial Cause No. 157 of 2022

BETWEEN

BILDERBERG LIMITED.....1ST CLAIMANT

DR. WILLIAM BILDERBERG.....2ND CLAIMANT

AND

ECOBANK MALAWI LIMITED.....DEFENDANT

FINANCIAL INTELLIGNCE AUTHORITY.....ADDED PARTY

Coram: **Manda, J**

Tambulasi and Chimkango for the Claimant

Machika and Kataika for the Defendant

Mtonga for the Added Party

M. Kachimanga Court Clerk/Interpreter

RULING

There are two applications that were presented before us on the 18th of October, 2023. The first application was an application by the claimants in this instance for directors of Ecobank to be held

in contempt of this court for not obeying an order of injunction which was granted by this court. This application was opposed by Ecobank.

The second application(s) were filed by Ecobank and the Financial Intelligence Authority, respectively. These applications were similar in nature and sought to discharge the order of injunction which the court granted on account that the claimant had withheld material facts and had mislead the court. The claimant opposed these applications.

The brief facts of this case are that the claimant was apparently invited into the country under the auspices of the Malawi government to invest in Malawi, "his homeland". As part of this agreement, the claimant brought in the sum of USD20 Million. This sum was brought in through Ecobank.

As required by law, Ecobank reported this transaction to the FIA. after a day of the transaction being reported, (by Counsel Mtonga's admission), the FIA issued a verbal freezing order through a phone call duly obliged with the said order. The bank then also proceeded to verbally inform the claimants that there had been freezing order and that should the claimants have any queries, the claimants should take the same up with the FIA. Following this development, the claimants came to court to obtain a mandatory order of injunction.

In perusing the application, it was the preliminary view of this court that there was a triable issue and thus proceeded to grant the injunction. The premise for granting the injunction was that a freezing order cannot be granted verbally. Further, since we were informed that the claimant had been invited to invest in Malawi, it was also felt that there must good and justifiable grounds for keeping the claimants from their money. Further still, it was also our considered view that when a freezing order is being issued, the person against whom it is being issued must be duly informed about the order and the basis on which it is being issued. I believe that is what due process demands. Verbal directives are not due process. We are not in the olden times of forfeiture.

Following the granting of the order of injunction, the FIA issued yet another directive to Ecobank to freeze the claimants' accounts. This directive was written and the bank duly complied with the same. This is now the basis for the claimants asserting that the directors of the bank were in contempt of the order of the court.

What must be stated is that Court Orders take precedence and there is always that expectation that Court orders are to be obeyed. This is whether the order might have been irregularly obtained. In

the context of this instance, what we would have expected from the FIA, was for them to request for a closed hearing to inform this court about the situation. In fact, it was in view of suspicions of possible criminality this court did state that the bank had 7 days to address the court if there any issues. The implication of that order was that the mandatory order of injunction would only have taken effect after 7 days, which we believe was enough of a window for issues to be raised. If this court was informed of what was going on, obviously the mandatory injunction would not have come into effect. In any case mandatory injunctions are not supposed to take effect until all parties affected have been heard. This is in view that mandatory inunctions are obligatory. At the same time, it must also be acknowledged that facts can be misrepresented.

Under section 28(2) of the Constitution, no person shall be arbitrarily deprived of property. Further, section 29 provides that every person shall have a right to engage in economic activity. These are rights provided for under the Constitution and the same are inviolable. This is why it is pertinent for any authority to provide good grounds for taking action against a person's property. Now much as the law is silent on whether or not a person against who a freezing order has been issued should be informed, in view of the right above, I would think that it is imperative for that person to be informed. After all, if there is reasonable suspicion that there is criminal activity, a person would have the right to be informed of the charges so as to be able to mount a defence.

More importantly, and for purposes of this matter, this Court should have been informed. Like I have indicated above we should have had a closed hearing. Of course speaking of closed hearing, I must state that the hearing that we had in this instance was supposed to be a closed one. However, aspects of that hearing were on social media immediately after the hearing. Such information could only have come from counsel and we must find such antics to be very unprofessional! This is especially when the matter is pending a ruling. There can only be one intention for releasing such information and that is to try an intimidate the courts, which I believe is despicable. This is more so since this seems to be the trend nowadays!

Coming now to the question of whether the directors of Ecobank were in contempt of court? By their own admission, Ecobank did say that they did not obey the court order so they were in contempt. However, it was their argument that they had no choice since they were served with a freezing order by the FIA. The bank further stated that if they did not comply with the FIA order, they would have been fined. Of course, there being a court Order, the expectation would be that

the banks lawyers would have pointed out the same to the FIA. This they did not do and as such, they did not do what the court order stated. To that extent the directors of the bank could be deemed to have been in contempt of court.

However, for one to be guilty of contempt of court, there must be the element of willfulness. The bank directors, having been served with a second FIA freezing order, and considering the consequences of disobeying the order, did say that they felt compelled to obey that order. This I am inclined to believe. Yes, perhaps the bank's lawyers would have done better, but incompetence does not amount to willfulness. All in all, I must find that without clear willfulness to disobey the court order, the charge of contempt has not been established.

Now coming to the applications for discharging the injunction, it is noted that both the bank and the FIA have made almost similar arguments. The basis for both applications are that the claimant had mislead the court by not disclosing a material fact. The material fact in question was apparently the fact that the claimants had actually been informed that there was a freezing order that the FIA had issued and that this was before the claimant came to this court to obtain an injunction. it was the banks assertion that upon being served with the order of injunction, they did comply the order until they were served with a second freezing order. According to the bank, been served with the second freezing order, they had no option but to comply. It was thus the banks argument that if the claimants had any issues they should take them up with the FIA. On this basis they applied that the injunction should be set aside and that the matter should proceed for mediation.

On the matter proceeding for mediation, we have been informed that the claimants have commenced an action in the Financial Crimes Court on similar facts. This assertion was not disputed. It was further asserted that there has been an operation during which the second claimant has been arrested and that the arrest relates to the USD20 Million transaction. Basing on these two assertions this court can then obviously not proceed with these proceedings as we have to give deference to the criminal processes. On that note then this matter cannot proceed until the criminal proceedings are concluded. More so considering that the burden of proof in a criminal proceeding is beyond all reasonable doubt and a finding of fact in a criminal proceeding will take precedence.

A further point to be made in this instance is the issue which was raised by the FIA in this instance, which relates to section 26 of the Financial Crimes Act which protects persons who report suspicious transactions from civil, criminal, administrative or disciplinary proceedings. This then

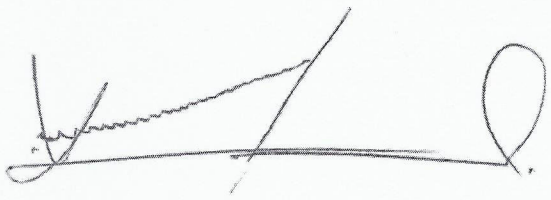
raises the question as to what the bank would be liable for in these proceedings? According to the law, if the officers of the bank acted in good faith, then they cannot be held liable for complying with the directions given by the FIA pursuant to the Financial Crimes Act. This is regardless of whether or not the criminal activity occurred or not. The only rider I see is that the officers need to act in good faith. So where it is established that the officers did not act in good faith, then they could be held liable.

In the present instance, the claimants did not raise the issue that the officers of the bank acted in bad faith. The only suggestion that was there was that there did not seem to be a formal order to freeze the claimants accounts. Depending on that, that is why this court did opine that the bank cannot act without a formal clear order issued under the Financial Crimes Act. However, with there being evidence of the freezing orders from the FIA, the claimants will have to establish bad faith on the part of the officers of the bank. On this I do not want to speculate as to what the claimants would want to do.

Suffice it to say that perhaps then I would agree with the bank that the claimants ought to take issue with the FIA, which they apparently have by filing a law suit in the Financial Crimes Court. Then there is also the fact that there are likely going to be criminal proceedings against the second claimant. With all this, I do not see the current role of this court at the moment in as far as the issues surrounding the claimants are concerned. As stated the criminal process will have to take precedence and come to a conclusion. In view of these developments, I will suspend the operation of the Mandatory Order of Injunction till the conclusion of the criminal proceedings.

Each party will near their own costs for these applications

Made in Chambers this.....26.....day of.....October.....2023



K.T. MANDA

JUDGE