

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 1394 OF 1997**

**BETWEEN:**

**MALAWI SAVINGS BANK ..... PLAINTIFF**

- and -

**BONNY BRIGHTON KALOMBOLA ..... DEFENDANT**

**CORAM: TEMBO, J.**

Kazoka, of Counsel for the Plaintiff

Mbendera, of Counsel for the Defendant

Mdala, Court Clerk

**RULING**

**TEMBO, J.:** This is an application of the defendant by which the defendant is seeking an order of the Court to make provision for living expenses to be covered by money enjoined by a mareva injunction from being paid to the defendant. There is an affidavit in support of, and in opposition to, the application. The Court has heard legal arguments of counsel. Besides, the Court has also read the judgment/ruling of Chimasula Phiri, J. dated 19<sup>th</sup> January, 1999 to which this application relates.

In his ruling, Chimasula Phiri, J. at page 9 had ordered as follows:

“Therefore, I order a variation to clause 2 of the order of 1<sup>st</sup> July, 1997 to read as follows:

That nothing in this Mareva injunction order shall prevent the payment by the defendant of his ordinary and usual living expenses at the monthly rate of K15,000 or such sums as the court may further order and direct: Provided further that sums may be withdrawn from the frozen accounts mutually agreed with the plaintiff's legal practitioners in writing or by order of the Court.

This varied order shall take effect from 1<sup>st</sup> July, 1997 and all arrears up to end of December, 1998 totalling K270,000.00 should be paid to the defendant. Hereafter the said K15,000.00 should be paid monthly in arrears towards the end of the month.”.

The foregoing is the order to which the instant application of the defendant relates. It is evident from the affidavit of Mr. Mbendera that the plaintiff has not complied with that order in that by 17<sup>th</sup> October, 2001, when Mbendera swore that affidavit, an amount of K495,000 had not yet been paid to the defendant, representing arrears of living expenses allowances for a period, then, of 2 years 9 months at K15,000 per month. During the hearing of the instant application, a clear impression was given that, that amount has not yet been paid to date. It is the prayer of Mr. Mbendera, for the defendant, that an order of the Court be made requiring the plaintiff to pay up the amount that should currently be payable to the defendant since the order of Chimasula, J., that is the amount of the entire period since then to now at the rate of K15,000 per month. It is the further prayer of the defendant that the Court should adjust the amount allowed for living expenses per month in order to take into account the general rise in living expenses and the added burden which the defendant has assumed respecting his care and maintenance of two orphans, now under his charge.

By his two affidavits, and legal arguments, Mr Kazoka for the plaintiff strongly objects to the instant application. In the main, Mr. Kazoka submits that the defendant is in breach of the Mareva injunction which requires that the defendant makes disclosure of his assets; that the defendant has not made disclosure as required of him so to do. Besides, Mr. Kazoka's further submission hinges on speculation that the defendant might have by now dissipated the various assets; then and now, subject to the Mareva injunction order under consideration. Being mere speculation, the Court would attach no weight to counsel's submission in that regard.

As to the argument respecting the defendant's duty to disclose the assets, Mr. Mbendera says that the defendant had done all that he could in the circumstances. Be that as it may, the view of the Court is that, in considering and determining the instant application, particular attention ought to be given to the express terms of the order of the Mareva injunction in question. Yes, the original order as it was reviewed or amended by the order of Chimasula Phiri, J, referred to above.

The Court fully adopts the views expressed by Chimasula Phiri, J., in the ruling he made relative thereto; in particular those appearing on pages 1 through to 9. Among other things I am in complete agreement with the view of Chimasula Phiri, J., at page 5, where the Judge said:-

“I am of the view that the order creates a legal and enforceable right for the defendant’s ordinary and usual living expenses. Therefore, I do not think that the defendant’s non compliance with the other conditions affects the defendant’s right to ordinary and usual living expenses. Even if I was wrong on the legal position about this right on whether it is a legal right or equitable right, in the present case the order for ordinary and usual living expenses for the defendant is clear and unconditional. If the plaintiff wished to make it conditional, the order would have expressly said so .... As I have already said, the order was obtained on ex-parte basis and the plaintiff carefully drew the draft order and no where had the right to ordinary and usual living expenses for the defendant been made subject to any conditions.”.

By his affidavits, and legal arguments, Mr. Kazoka is inviting the Court not to accede to the prayers of the defendant in the instant application on the ground that the defendant has not complied with the duty respecting the disclosure of assets which are subject to the Mareva Injunction in question. This argument cannot be allowed to stand in that the order in question did not, expressly or by necessary implication, prescribe disclosure of assets on the apart of the defendant as a condition precedent to the defendant’s enjoyment of allowances for his ordinary and usual living expenses.

In the circumstances, the Court would grant the application of the defendant as follows: the monthly rate prescribed in clause 2 should be replaced with a new rate of K20,000 per month. This takes into account the fact that the applicant had earned a salary in the region of K25,000 per month at the time he was dismissed. This rate will have effect from the date of this ruling. It is further ordered that the defendant should be allowed to have the amount of all the arrears of monthly allowances not yet paid to the defendant to date, at the rate of K15,000 per month, to be so paid to the defendant out of the assets subject to the mareva injunction, including those indicated in paragraphs 3, 5 and 6 of Mbendera’s affidavit dated 17<sup>th</sup> October, 2001. It is ordered.

Costs are for the defendant.

**MADE** in Chambers this 27<sup>th</sup> day of June, 2002, at Blantyre.

A. K. Tembo

**JUDGE**