IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

BLANTYRE REGISTRY

Commercial Cause No. 160 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**

Mumba and Ndlhovu for the Claimant

Machika for the Defendant (As an Observer)

Mtonga and Chitsime for the Added Party

M. Kachimanga Court Clerk/Interpreter

RULING

This was an application by the claimants requesting this court to lift its order suspending the operation of an Order of Mandatory Injunction which I had granted to the claimants allowing them to access funds which are held in an account maintained at the defendant bank. The mandatory injunction was granted at that time because it was just stated that there was a Freezing Order which had been "verbally" issued by the Third Party, which we found at the time to be unprocedural. It was our belief then and still our belief not that a Freezing Order needs to be a formal one.

Following the grant of the Injunction, the Third Party presented a formal Freezing Order and they also went ahead to obtain a Preservation Order. With these developments, and more importantly noting that the 2nd claimant was facing criminal charges, in particular money laundering charges, we suspended the operation of the Injunction and gave deference to the criminal courts.

Thus far we must take judicial notice of the fact that there were proceedings in the Financial Crimes Court and that currently the 2nd Claimant is facing charges in the Magistrate Court. Also of note however is the fact that the state, on its own motion, dropped the charges of money laundering against the 2nd claimant which was the predicate offence on which the freezing order was issued. A further note to be made, especially for our purposes, is that there is consensus from the claimants and the added party that the preservation order, which the added party obtained, was expiring on the 6th of February, 2024 and that the same has not been renewed on extended.

Noting the above, I did then ask the parties as to why they were before my Court seeing as I was not finding any issue here. It is at this point then that Counsel Mtonga stated that they wanted this court to make a determination as to whether there is an existing Preservation Order and we proceeded to hear arguments on this question.

According to the claimant the Preservation Order expired by effluxion of time in that the same was supposed to be valid for 90 days and that the 90 days expired on the 6th of February, 2024 and that there is no order extending the Preservation Order. It was further the claimants' argument that the expired Preservation Order could not have been extended by the fact that the added party filed a civil forfeiture proceeding on the 6th of February, 2024 since that application was only issued by the Court on the 7th of February, 2024, a day after the Preservation Order had expired. It was the claimants' submission that in terms of section 67(b) of the Financial Crimes Act, for a Preservation Order to be extended by an application for civil forfeiture, if the application is made during the subsistence of the Preservation Order. The claimants thus averred that the Preservation Order in this instance expired and is no longer in force such that there is no longer a need for this court to maintain the suspension on the Mandatory Injunction.

In response to the claimants' arguments, the added party stated that they were relying on section 67(b) of the Financial Crimes Act to deem that the Preservation Order which they obtained was still in existence. The added party then went on to concede that the Preservation Order did indeed expire on the 6th of February, 2024. However, it was their argument that they did file an

application for forfeiture on the 6th of February, 2024 but that the court only issued the same on the 7th of February, 2024 and that they did not have any control over the issuing court. The added party further averred that the did file their process within the period prescribed and that as such the Preservation Order is still in force. The added party thus asked this court to make a determination as to what constitutes an application, that is, whether an application is settled on the day it is file or on the day it is issued.

In reply, the claimants stated that the application was issued on the 7th of February, 2024 and as per section 3(1) of the Court Act, that is the date on which the application was before the court. The claimants thus reiterated that the application was made after the expiry of the Preservation Order and could not sustain the latter. It was also a further observation of the claimants that the added party had over 90 days to file the application for forfeiture for them to comply with section 67(b) of the Financial Crimes Act. The claimants thus concluded that the application for forfeiture by the added party was just a reaction to the current application. The claimants maintained their argument that the Preservation Order expired and the court should lift the order suspending the operation of the Mandatory Injunction.

In terms of law, section 67(b) of the Financial Crimes Act states as follows:

> *A preservation order shall expire ninety days after the date on which notice of the making of the order is published in the Gazette or two newspapers of widest circulation in Malawi, unless—*
>
> > *(b) there is an application for a forfeiture order pending before the court in respect of the property subject to the preservation order;*

Section 3(1) of the Courts Act reads as follows:

> *All summonses, warrants, orders, rules, notices and mandatory processes whatsoever, whether civil or criminal, shall—*
>
> *(a) if issued or made by the High Court, be signed by the Registrar;*

The above two sections the words shall which implies that they are mandatory in nature. Consequently, in the first instance, a preservation order expires after 90 days. However, as an exception, the preservation order will not expire where there is an application for forfeiture **pending** before the court [Emphasis mine].

Simply defined a pending application would be one awaiting a determination of the court or an action by the court. Much as issuing an application can be deemed to be an action, I do not think that we can say that there was a pending application for forfeiture before the court on the 6th of February, 2024. The application for forfeiture was issued on the 7th February, 2024, which was after the Preservation Order had expired. On this basis then, the Preservation Order could not be deemed to have been extended by the forfeiture application.

A further observation to be made is that, it would indeed seem that the application for forfeiture was made as a reaction to the claimants' application before this court. This of course will beg the question as to why the added party waited till the 90th day to apply for forfeiture? That is of course not for this court to answer, apart from stating that the state having dropped money laundering charges, there would be no predicate offence on which to base an application for civil forfeiture under the Financial Crimes Act (see ***Williams v The Supervisory Authority (Antigua and Barbuda)*** [2020] UKPC 15). In this regard, section 74(1) of the Financial Crimes Act actually makes it mandatory that a court can only make an order of forfeiture is it is satisfied that the property concerned (a) has been used or is intended for use in the commission of an offence under the **Act;** or (b) constitutes proceeds of crime. To this end there must be an affidavit in support of the application for forfeiture from an investigator providing the basis for the application. This was not apparently done as the claimants were just served with one page of the application and nothing else. The other pages of the application were actually furnished when the hearing was underway, which I believe was prejudicial to the claimants.

It is the intention of a civil forfeiture application to make sure that criminals do not benefit from their crimes and this requires a demonstration that a person who is subject to a forfeiture claim has committed a crime and that the targeted property constitutes proceeds of that crime (see ***Criminal Assets Bureau -v- Murphy & anor*** [2018] IESC 12). In sum, civil forfeiture regime is intended to provide:

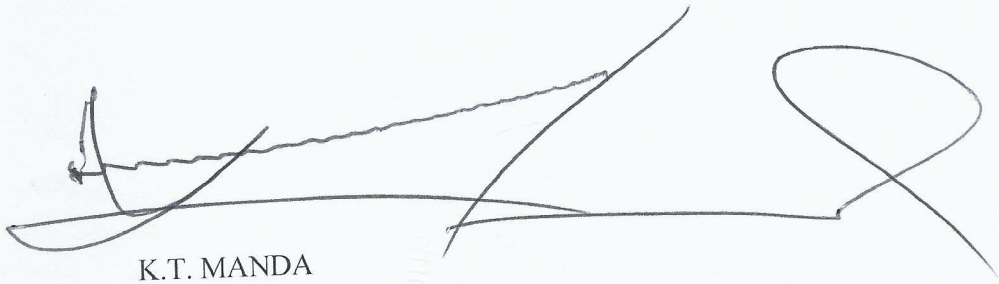
- reparative measure – taking away from individuals that which was never legitimately owned by them; and
- a preventative measure – taking assets which are intended for use in committing crime.

Finally, civil forfeiture is not to be adopted as a "soft option" in place of criminal proceedings, especially where the criminal charges have been dropped and thus there are no allegations of offences being committed under the Financial Crimes Act. (see generally ***Serious Organised Crime Agency v Perry & Ors*** [2009] EWHC 1960).

In conclusion, the preservation order having expired by effluxion of time, there is no legal basis for the defendant to keep denying the claimant access to their accounts. In fact, I must state that there was no point of these proceedings. However, since the matter came before and there was a hearing, I must make a pronouncement. My pronouncement is that the claimants be given access to their accounts with immediate effect as there is nothing legally preventing them from doing so. The defendant is thus ordered to unfreeze the accounts

Each party will bear their own costs.

Made in Chambers this.....15th .....day of.....February.....2024



K.T. MANDA

JUDGE