IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NUMBER 432 OF 2019

IN THE MATTER OF THE FINANCIAL CRIMES ACT

IN THE MATTER OF APPLICATION FOR A PRESERVATION ORDER

BETWEEN

THE FINANCIAL INTELLIGENCE AUTHORITY----------APPLICANT

AND

LUCY RACHAEL SUKALI

Trading as IDEAL STATIONERY----------1ST RESPONDENT

CHARLES EZRA MCHAKULU----------2ND RESPONDENT

CORAM: THE HONOURABLE JUSTICE M.C.C. MKANDAWIRE

Mtonga/Chitsime, Counsel for the Applicant

Katundu, Counsel for the Respondents

Kumwenda, Court Interpreter

RULING

Background

1. On the 11th of June 2019 the Applicant Financial Intelligence Authority filed an ex-parte application for a preservation order pursuant to section 65 of the

Financial Crimes Act. This section provides that a competent authority may apply to the court for an order prohibiting any person, subject to the conditions and exceptions specified in the order, from dealing in any manner with any realizable or tainted property.

2. After going through the sworn statement by John Minofu in support of the application, together with the skeleton arguments that was attached, pursuant to section 65(2) of the Financial Crimes Act, I ordered for a preservation order to be immediately in force. The preservation order related to the following property:

i) The balance of Mk120, 917, 295.60 in Account No. 1004030113 at National Bank of Malawi Victoria Avenue Branch.

ii) Residential Property at Plot No. Area 6/137.

iii) Residential Property at Plot No. Area 12/460.

The court further ordered that the property should be brought under the control of the Director General of the Financial Intelligence Authority (who is the administrator of the confiscation fund on behalf of the Minister in terms of section 130(2) of the Financial Crimes Act).

3. On 17th September 2019 the Applicant filed a summons for a forfeiture order pursuant to section 72 of the Financial Crimes Act. Section 72(1) provides that if a preservation order is in force, a competent authority may apply to the court for an order forfeiting to government or any of the property that is subject to the preservation order.

4. On 23rd September 2019 the 2nd Respondent Charles Ezra Mchakulu appointed Messrs Kita & Co and White and Cross as joint legal practitioners. On the same day, Kita & Co filed ex-parte application for leave to apply for setting aside of a preservation order out of time. I accordingly granted them the leave on 24th September 2019.

5. On 27th September 2019 the 2nd Respondent's counsel filed an inter-parte application for setting aside of a preservation order. The matter was set down to come for hearing on the 7th of October 2019. When we met on this day, both parties requested the court to give them more time so that they both prepare

responses and a reply. I then directed that the matter should come for hearing on 24th October 2019. The application for forfeiture was therefore pended.

6. After carefully going through all the submissions by both parties, on the 13th of November 2019, I delivered a ruling dismissing the 2nd Respondents application. I ordered that the preservation order that I had given on 12th June 2019 was still in force.

The Basis of the Application

7. The application for a forfeiture order was supported by a sworn statement made by Mr John Minofu who is employed by the Applicant as Financial Analysis Manager.

8. On the 11th of September 2020, the 2nd Respondent's counsel filed a response.

9. When the matter came for hearing on the 16th of September 2020, the Applicant informed the court that they were making an oral application pursuant to Order 12 of the Courts (High Court) (Civil Procedure) Rules 2017 withdrawing their application in relation to the residential properties and that they would be proceeding with only the cash of Mk120,917,295.60 that was at the National Bank, Account No. 1004030113 Victoria Avenue Branch.

10. Counsel for the Respondents said that in response to the application, they had focused on the residential properties and that on the cash at the bank, they had conceded and had nothing to say. Counsel said that he left everything in the hands of the court.

11. Having withdrawn the application on the residential properties, I shall therefore only dwell on the money at the bank. The sworn statement of John Minofu is very simple to understand.

The Applicant's Case

12. The 1st Respondent is a duly registered business that holds an Account Number 1004030113 at National Bank of Malawi Victoria Avenue Branch.

13. The 2nd Respondent is listed as an administrator of the 1st Respondent in the account opening forms and works as the Manager-Banking Operations at Reserve Bank of Malawi.

14. The Respondents have since the preservation order been arrested and charged with other accomplices for the offences of theft, fraud and money laundering as per the charge sheet marked EX JM 1.

15. The Applicant on 20th May 2019 upon receipt and analysis of a suspicious transaction report, directed National Bank of Malawi to freeze funds amounting to Mk120, 917, 295.60 in the 1st Respondent's account mentioned in paragraph 12 above.

16. Investigations and analysis of the said account shows that from July, 2017 to April 2019 the 1st Respondent's account mentioned in paragraph 12 above received from the Reserve Bank of Malawi described as inward telex payment RFB total amount of Mk355,706,125.52.

17. Although the 1st Respondent is a duly registered business created for the business of stationery, there were no legitimate businesses conducted with the Reserve Bank of Malawi to warrant the payments received during the stated period in paragraph 16 above nor were there any other business transactions with any other known businesses.

18. The Applicant's investigations and analysis has concluded that the 1st Respondent business is a front created by the 2nd Respondent to facilitate the theft and laundering of funds from the Reserve Bank of Malawi as the bank could not trace any supporting documents justifying the payments.

19. The Applicant therefore prays to this court to make an order that the money Mk120, 917, 295.60 in Account Number 1004030113 should be forfeited to the Malawi government for being proceeds of crime.

The Respondents' Case

20. As already stated, the Respondents have said nothing on the money in issue. The Respondents' response is completely silent when it comes to this money. The Respondents have said something on the money that the 1st Respondent received from the transport business. But with regards to the money that came from the Reserve Bank of Malawi, there is total blackout.

21. Counsel for the Respondents had summed it up all and he was very honest that they had conceded on this money.

22. It would therefore be naive for the court to be so jurisprudential on such an issue where the Respondents are tongue tied.

Analysis

23. I have taken note of the fact that the forfeiture application under section 72 of the Financial Crimes Act has to comply with several steps as prescribed therein. In this case, the competent authority who is the Applicant applied to the court for the order of forfeiture. The relevant notice which is 14 days was given. The said notice was properly served as per the requirement of the law. The Respondents who had given notice under section 66(3) appeared during the hearing of the application. They opposed the making of a forfeiture order but only with regards to the residential property. After the withdrawal by the Applicant only cash at the bank was the subject of the forfeiture application.

24. Unfortunately, the Respondents could not say anything on the cash that came from the Reserve Bank of Malawi to the 1st Respondent bank account. This was indeed strange for the Respondent to say even a single statement as to how this massive cash had found itself in their Bank Account.

Conclusion

25. This court is satisfied on a balance of probabilities that the cash of Mk120, 917, 295.60 constitutes proceeds of crime. I therefore make an order of forfeiture pursuant to section 74(1) (b) of the Financial Crimes Act.

26. I further order that pursuant to section 128 as read with section 129 of the Financial Crimes Act, the forfeited fund in this civil matter should be put in the Confiscation Fund. Costs to the Applicant.

MADE THIS 24th DAY OF SEPTEMBER 2020 AT LILONGWE

M.C.C. MKANDAWIRE

JUDGE