IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION
BLANTYRE REGISTRY
COMMERCIAL CAUSE NO 136 OF 2024

BETWEEN:

MUKTESHWAR SUGAR MILLS LIMITED **CLAIMANT**

-and-

SALIMA SUGAR COMPANY LIMITED **DEFENDANT**

CORAM: **HON. JUSTICE J. ALIDE**

C. Ndalama, of Counsel for the Claimant
B. Mhango, of Counsel for the Defendant
M. Kachimanga, Court Clerk

RULING

Alide, J.

1.0 On 18 September 2024, the Claimant obtained an order of freezing injunction ("the Order") against Salima Sugar Company Limited ("SSCL"), the Defendant herein, restraining the Defendant from dealing with any money held in its bank accounts to the tune of US$2,390,296.10 (Two Million, Three Hundred and Ninety Thousand, Two Hundred and Ninety Six United States Dollars and Ten Cents), or its equivalent in Malawi Kwacha in the sum of MWK5, 258, 651, 200 (Five Billion, Two Hundred and Fifty Eight Million, Six Hundred and Fifty One Thousand Two Hundred Malawi Kwacha) at any point until the final determination of the substantive matter, or any further order of the Court. The Claimant obtained the Order without notice (*ex-parte* or in the absence of the other party).

2.0 Pursuant to the Order, the Defendant was restrained by itself or its agents or anyone acting on its behalf from removing, disposing, dissipating, transferring, transacting or diminishing any funds standing to the order of the Defendant held with the banks cited in the application.

3.0 The Order contained a few exceptions. However, I will not dwell on all of them. Among other things, the Order did not prohibit the Defendant from operating or spending reasonable sums per week in the ordinary course of its business, as well as incurring expenses and recurrent expenses, and expenses for seeking legal advice and representation. This was, however, subject to the money in the Defendant's account to be, under any circumstances, not less than the frozen amount. Further, the Order did not restrain the Defendant from dealing with, and moving, its assets in the ordinary and proper course of its business.

4.0 In response to the Order, the Defendant filed an application with notice (*inter-partes*, or in the presence of both parties) twofold; firstly, for stay of the substantive proceedings pending arbitration, and secondly, for the discharge or vacation of the Order. The application was supported by a sworn statement which was filed by the Defendant's legal counsel Mr. Crispin Ndalama. The application was also supported by skeleton arguments. A further sworn statement was by Dr. Charles Thupi, the Defendant's Company Secretary, was filed in reply to the sworn statement filed by the Claimant in opposition to the application.

5.0 It was the Defendants prayer, in brief, that the matter must be stayed pending its reference for arbitration because the contracts that governed the relationship of the parties in the matter did explicitly provide that any disputes arising out of the same be referred to arbitration.

6.0 It was the Defendant's further prayer that the Court should vacate or discharge the Order on several grounds as flows:

6.1 that the Claimant failed to disclose material facts and/or suppressed material facts in the without notice application;

6.2 that the Claimant failed to disclose that Mr. Prashant Sharma and Dr. Sachim Nikam had warrants of arrest hanging on their heads and had escaped the jurisdiction;

6.3 that the Order paralyzed the Defendant's operations as it was holding billions of moneys in the Defendant's bank accounts which had greatly suffocated the Defendant's liquidity;

6.4 there was no risk of the Defendant dissipating any funds or assets as it had several properties including land, plant and machinery, biological assets (sugar cane) as well as many other receivables from traders that could be used to settle the claim if at all the Claimant was going to be successful in the substantive matter; and

6.5 that the Claimant's undertaking to pay damages was impractical as it was a foreign registered company without any tangible assets within the jurisdiction, and while its directors were also at large.

7.0 The Claimant opposed the Defendant's application. In that regard, the Claimant filed a sworn statement in opposition to the application sworn by the Claimant's legal counsel, Mr. Burton Mhango. The Claimant also filed skeleton arguments in supports of its position.

8.0 Before the Defendant's application was heard, another application was filed in respect of the matter. This time by the Attorney General, acting for the Ministry of Finance, praying to be added as a party in the proceedings. The prayer was on the premise that the Ministry of Finance had an interest in the matter being the financier of the Green Belt Initiative Holdings Limited, one of the shareholders in the Defendant company.

9.0 When the two applications came before Justice Manda on the 14th of October 2024, the Judge issued an "Opinion" on the issues before him. In respect of the Attorney General's application, it was his position that the Attorney General (Ministry of Finance) had no standing to bring such an application in view of the fact that it was Green Belt Initiative Holdings Limited, and not the Minister of Finance, that had a shareholding in the Defendant company. In that regard it was his opinion that it should be Green Belt Initiative Holdings Limited doing so if they so wished and not otherwise. In effect, the Judge refused the Attorney Generals application.

10.0 In respect of the Defendant's application for stay of the proceedings, the Judge after discussing the issue at length stated as follows at the end of his Opinion:

> *"Having made the above observations, and of course considering the recent events it is my considered view that there is need for an interrogation of some of these issues specifically whether this matter should go for arbitration and whether this is a matter that would require a full trial, which trial will examine the operations and the goings-on at the defendant company with the regards the bit that has been apparently admitted.*
>
> *However, with considerable thought, I do not think that I should be the one to make such further inquiries in this matter. I thus proceed to recuse myself from these proceedings."*

The Judge did not make any pronouncement on the Defendant's application to discharged or vacate the Order. It was at this point that the matter was referred to my Court.

11.0 I resolved to proceed accordingly and set the application for hearing. However, before the matter came up, the Defendant filed yet another application without notice for vacation or variation of the Order. This was, apparently, in view of some new developments that had occurred in respect of the Defendant's position since the granting of the Order. It was the Defendant's view that despite the fact that the previous application was still not yet heard and determined by the Court, the new application was filed in order to address the emerging developments.

12.0 The emerging developments were twofold; firstly that the Defendant had been served with a final notice of Notice of Intention to Distrain by the Malawi Revenue Authority as a result of the Defendant's failure to fulfill its statutory tax obligations accumulating to MK6,127,655,737.51 (Six Billion, One Hundred and Twenty Seven Million, Six Hundred and Fifty Five Thousand Seven Hundred and Thirty Seven Malawi Kwacha and Fifty One Tambala); and secondly, the Defendant had been served with a letter of demand from Lingadzi Farmers and Marketing Cooperative for the sum of MK727,500,000 (Seven Hundred and Twenty Seven Million Five Hundred Thousand Malawi Kwacha only).

13.0 It was the Defendant's view that they needed a quick relief as regards the two issues because they were failing to meet those obligations because their bank accounts had been frozen by the Order. This new application was supported by a sworn statement of Dr. Charles Thupi and also skeleton argument filed by legal counsel in support thereof.

14.0 Upon my consideration of this new without notice application, I ordered that the application be combined and heard together with the first application since I had already set it down for hearing. I so decided because I did not see any urgency in the matter bearing in mind that the Defendant's default in terms of its statutory obligations on the taxes had started way long before the Order was issued by the Court. Further, the letter of demand from Lingadzi Farmers and Marketing Cooperative was simply a letter of demand. It was not a judgment or an enforcement order. It was my view that the Defendant was just trying to be dramatic. I also ordered that the new without notice application must proceed with notice and consequently must be served on the Claimant.

15.0 Following the order, the Claimant filed two sworn statements; one in opposition to the new application, and the other one in reply to the sworn statement by Dr. Thupi in reply to the Claimant's statement in opposition to the earlier application.

16.0 Further, a without notice application to add a party and/or an order for leave to commence a derivative action was filed by the Attorney General on behalf of Green Belt Initiative Holdings Limited. And having considered the same I ordered that the application do come before the Court with notice and that it

should be served on the Claimant accordingly. I further ordered that the application be heard on the same day I was hearing the Defendant's application. The Claimant then filed a sworn statement in opposition to the application to add of Green Belt Initiative Holdings Limited as party as well as skeleton arguments accordingly.

17.0 On the day of hearing of the applications, I heard the Defendant's application first, and the followed the same with the Attorney General's application.

18.0 At the end of the hearing of the Defendant's application i.e. the combined application to stay proceedings pending arbitration and to discharge or vacate freezing injunction; and the application for vacation or variation of the freezing injunction, the Defendant abandoned the first limb of the application i.e. to stay proceedings pending arbitration observing that it was in the best interest of the parties to see that the matter is concluded with speed. Therefore, the Defendant felt that referring the matter for arbitration may take too long to resolve the issue as the Claimant and the Defendant would have to enter into discussions on how to effectively conduct the arbitration in the event that the Court ruled in favour of it. This was having regard to the fact that the parties had not indicated the finer details of arbitration in the contracts. It was also the Defendant's further worry that arbitration may require the parties to have access to foreign exchange in order to prosecute the matter and recognizing the challenges of sourcing the same. The Defendant the resolved to submit itself to the jurisdiction of the Court. Accordingly, that first part of the application fell off. I will not belabour discussing this issue in this ruling.

19.0 On the second part of the application, it was the Defendant's submission that the Order ought to be discharged, vacated or varied on the grounds that I have summed up as follows:

19.1 That Order was wrongly granted because the Claimant failed to disclose material facts and/or suppressed material facts including but not limited to the fact that there was a forensic audit at the Defendant's company whose finding were detrimental the Claimant's position. Further, that the Claimant failed to disclose that Messrs. Prashant Sharma and Sachim Nikam had warrant of arrests hanging on their heads and were facing criminal prosecution as a result of some of the findings of the forensic audit. Some of the findings upon which the two had been charged and were facing prosecution was directly related to the issue of the contracts which are the subject of the present matter. The Claimant also submitted that the two had since escaped the jurisdiction.

19.2 The Order paralyzed the operations of the Defendant as billions of moneys were frozen in the bank accounts. This greatly suffocated the

liquidity of the Defendant. As a result, the Defendant was failing and had failed to honour several statutory and contractual obligations with various parties making the grant of the Order on the balance of convenience very inconvenient and not in the interests of justice.

19.3 The Claimant had demonstrated that there was no real risk of the Defendant dissipating any funds or assets as it had several properties including land, plant and machinery, biological assets (sugar cane) as well as many other receivables from traders that could be used to settle the claim if at all the Claimant would be successful in the substantive matter. The Defendant also submitted that the assertions made by the Claimant to the effect that the Defendant ran the risk of dissipating the funds were simply conjecture and without factual basis.

19.4 That the Claimant's undertaking to pay damages was impractical as it was a foreign registered company without any tangible assets within the jurisdiction. The fact that the Claimants directors had fled Malawi made matters worse.

20.0 In a nutshell, the Defendant largely interrogated the manner in which the contracts for the manpower supply were procured from the Claimant bearing in mind the issues of corporate governance, conflict of interest, and fiduciary breaches that had arisen in respect of the Defendant's directors. The Defendant argued that these issues were not disclosed by the Claimant in its application. In that regard, the Defendant argued that the Claimant had not made a full and frank disclosure of all the material facts in so many fronts in the application.

21.0 It was the Defendant's submission that being an equitable relief that the Claimant were seeking, they should have made a full and honest disclosure of all the relevant issues, but they did not. It was therefore the Defendant's view that the Claimant had acted in bad faith and did not have clean hands on the matter.

22.0 In response to the Defendant's application, the Claimant stood its ground and called on the Court to dismiss the Claimants application and sustain the Order. The Claimant argued that it had demonstrated in full all the required ingredients for the granting of a freezing order under Order 10 Rule 11 of the Courts (High Court) (Civil Procedure) Rules, 2017. I have summed up the Claimant's arguments as follows:

22.1 That it had a good and arguable case against the Defendant by reason of the following:

22.1.1 The Claimant was on different occasions contracted by the defendant for provisional manpower services as exhibited in the various agreements in the application.

22.1.2 The Defendant defaulted on the payment of the sums as per the various agreement accumulating to the outstanding total sum of US$2, 390, 296.00.

22.1.3 The Defendant formally acknowledged the debt through a letter written to the Claimant.

22.1.4 The Defendant has been dealing with its assets including the funds in a manner that will likely cause the Defendant company fail to satisfy the judgment likely to be made. In this regard the Claimant argued that the Defendant had apparently been dissipating huge sums of money from its accounts in such manner that the funds will not be available. The Claimant highlighted some payments the Defendant had made to some institutions and claimed that these payments were made in the name of corporate social responsibility, yet they were made in breach in breach of corporate governance principles. It was the Claimant's argument that the Defendant had generally displayed of lack of proper oversight and accountability mechanisms over the management of its funds.

22.1.5 The Defendant had failed to show any evidence to the effect that they had failed to pay for their essential services such as salaries, electricity and water bills. The Claimant submitted that it had reasons to believe that the Defendant was using different means of collecting and making payment for services rather than through the banks in order to avoid the Order. In a nutshell the Claimant states that the Defendant's operations have not been paralyzed by reason of the Order.

22.1.6 On the undertaking to pay damages the Defendant if it was found that Order was erroneously obtained, the Claimant argued that its undertaking was practical as it had over MWK5, 258, 651, 200 (Five Billion, Two Hundred and Fifty-Eight Million Six Hundred and Fifty-One Thousand Two Hundred Malawi Kwacha) held by the Defendant. The Claimant argued that the undertaking can be enforced anywhere even abroad, and it did not need their physical presence in Malawi.

22.2 That the judgment will involve the Defendant's assets in form of the money which is being dissipated by the Defendant.

22.3 That looking at how the Defendant was using the money, the Claimant had satisfied the requirement that the Defendant's account needs to be restrained to secure the Claimant's interests.

22.4 That the Claimant did not suppress any material facts and stated that the fact that a Forensic Audit had been conducted at the Defendant's company, and that the report had been released had always been a matter of public knowledge and was in the public domain. The Claimant argued that with such matters in the public domain the Court takes judicial notice of the same. The Claimant further argued that, that notwithstanding, it was not material fact that would affect the Court's decision whether to issue a freezing injunction or not since the debt was already admitted by the Defendant. The Claimant further argued that in any event the report only presented opinion of the authors and was in no way conclusive evidence of any illegality. The Claimant further argued that the fact that warrants of arrest had been issued against the Defendants directors including Messrs. Prashant Sharma and Sachim Nikam was not a material fact to be disclosed in the application because the information was already in the public domain. The Claimant argued further that in any case the fact that they were warrants of arrest against the Directors was not a material fact as they did not have any effect on the Defendant company in as far as the outstanding sums were concerned. The Claimant further played down the importance of the forensic audit by submitting that it was being heavily contested for having been inaccurate. The Claimant argued that the forensic audit was not independent and was done without integrity in accordance with International Auditing Standards (ISA) 2000.

22.5 The Claimant argued that the Defendant had failed to give any evidence that the Order had paralyzed the Defendant's operations. It was argued that it was not true that the Defendant had billions of moneys in its bank accounts. The Claimant stated that at the time of obtaining the Order six out of the seven banks that had been served with the Order did not any account with Defendant. Only one bank had the sum of US$61,100.18 (Sixty-One Thousand One Hundred United States Dollars and Eighteen Cents) and MK28,381,715.09 (Twenty-Eight Million Three Hundred and Eighty-One Thousand Seven Hundred and Fifteen Malawi Kwacha and Nine Tambala) only. The Claimant argued that if indeed the Defendant money in excess of MK 2, 000,000,000 (Two Billion Malawi Kwacha) then such monies were never held in any banks affected by the Order or that

the banks have presented false statements in their responses filed with the Court.

23.0 Having heard both parties, the issue before the Court now is to determine whether or not the Freezing Order of Injunction granted by this Court without notice on 18 September 2024 be sustained or discharged, vacated, or varied.

24.0 I will start by briefly looking at the law governing the application and obtaining of freezing injunctions in this Court. The starting point is Order 10 Rule 11 of the Courts' (High Court) (Civil Procedure) Rules, 2017 (CPR 2017) which provides as follows:

> *"The Court may, on application, make an order (the freezing injunction) restraining a person from removing assets from Malawi or dealing with assets in or outside Malawi."*

25.0 Order 10 Rule 12(2)(b) of the CPR 2017 provides situations in which the Court may make an order for freezing injunctions. It provides as follows:

> *"The Court may make the order only where –*
> *(b) the Court is satisfied that –*
> *(i) the applicant has a good and arguable case;*
> *(ii) a judgement or order in the matter, or its enforcement, is likely to involve the assets; and*
> *(iii) the assets are likely to be removed from Malawi, or dealing with them should be restrained."*

26.0 As clearly stated in the CPR 2017 above, the first consideration that the Court must examine before issuing a freezing order is whether an applicant has a good and arguable case. What is a good and arguable case? A good and arguable case is a claim or a defence that has a reasonable prospect of success based on the law and facts of the case. In *Ninemia Maritime Corp v. Trave Schiffahrtsgesellschaft GmbH ("Niedersachsen")* [1983]2 Lloyd's Rep.600, Justice Mustill (as he then was) explained, at paragraph 605, that a good and arguable case was *"one which was more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50% chance of success."*

27.0 The second consideration that the Court must examine is whether, in the event that a judgement or order is entered in favour of the applicant in the matter, or indeed its enforcement, it is likely to involve the assets to be frozen.

28.0 The final consideration is that the Court need to be satisfied that the assets are likely to be removed from Malawi, or dealing with them should be restrained.

29.0 Before I get into discussion as to whether the above elements were satisfied by the Claimant or not, I must also highlight that a freezing injunction is an equitable relief. This means that the Court has power to decide whether to grant it or not based on fairness and justice.

30.0 I must also state that the primary purpose of a freezing injunction is to make sure that the Defendant does not dissipate or dispose of the assets that could be used for settlement of the potential judgement or the judgement. In *Fourie v. Le Roux* [2007] UKHL 1, the House of Lords emphasized that that purpose of freezing injunction is not to provide security for the claim but to prevent the dissipation of the assets. In that regard, the Court must fully satisfy itself as to whether there is a real risk of the assets being dissipated before issuing the injunction. Where a Court is satisfied that there is indeed real danger of dissipation of the assets if left in hands of the Defendant such that a prospective judgement or a judgement will be wholly or partly unsatisfied, the Court may issue a freezing order.

31.0 In *Polly Peck International plc v. Nadir (No.2)* [1992] 4 All ER 769, the Court of Appeal emphasized that the Court must also consider the extent and the nature of the assets to be frozen as well as the proportionality of the order and its impact on the defendant. In that regard, the Court must ensure that it considers if the freezing injunction is proportionate to the position of the Defendant and that it must not unfairly prejudice or punish the Defendant. Further, it should not unnecessarily be too broad to secure the interest of the Claimant. In *Cretanor Maritime Co. Ltd v. Irish Marine Management Ltd* [1978]1 WLR 966, the Court highlighted that freezing orders are not cast in stone and can be adjusted to reflect fairness and practicality.

32.0 It must also be emphasised that parties seeking a freezing injunction are required to act with utmost good faith and make a full and frank disclosure of all the material facts pertaining to their application. Full and frank disclosure of material facts is at the centre of all applications for any equitable relief. This ensures that the Court exercises its discretion fairly and justly. It prevents applicants from taking advantage of or misleading the Court into issuing orders based on false, incomplete, or misleading information while ensuring that the integrity of the judicial process is maintained. It also ensures that the principles of equity are strengthened and upheld.

33.0 Further, any party coming before the Court seeking an equitable relief must not come before the Courts with dirty hands. The maxim goes: he who comes to equity must come with clean hands. This means that a party that has come to

Court to seek an equitable relief must have acted fairly, honestly and in good faith in a matter related to their claim. Where a party has engaged in an improper or unethical conduct, they may be denied an equitable relief even if their legal rights have been breached. This ensures that equitable reliefs are only granted to those who had acted with integrity and fairness. It reflects the long-standing principle that equity is a system of conscience and justice and that those who seek it must do so free from any wrongdoing related to the claim.

34.0 Let me hasten to indicate that the Defendant has not yet filed a Defence in this matter save the Response Form with an indication that it intends to contest the matter. This is because upon the Defendant's application I extended the period within which the Defendant is to file the said defence because of the pending application on the record to stay the matter pending reference to arbitration. The Defendant was essentially complying with section 6(1) of the Arbitration Act. As it stands therefore, all we have on record is the sworn statement filed on behalf of the Defendant which, for the purposes of the application, suffices.

35.0 Looking at the arguments from both parties, I will first start and determine on whether the Claimant has a good and arguable case in this matter. In that regard I have had a view of the pleadings filed by the Claimant, as well as the sworn statements filed in support of the application. It is not really in dispute that the Claimant and the Defendant entered into a series of contracts in which the Claimant was supposed to supply manpower services for the operation and maintenance support the Defendant at its sugar manufacturing factory. It is also not in dispute that pursuant to the said contracts the Claimants supplied manpower services for the operation and maintenance support to the Defendant's sugar factory including engineers, supervisors, mill operators, fitters, welders and electricians who were technically qualified and experienced to operate and manage the factory.

36.0 Following this series of contracts, several invoices were issued by the Claimant to the Defendant to the tune of US$4,388,256 (Four Million Three Hundred and Eighty-Eight Thousand Two Hundred and Fifty United States Dollars). Out of this amount, the Defendant paid the Claimant only the sum of US$1,997,959.90 (One Million Nine Hundred and Ninety-Seven Thousand Nine Hundred and Fifty-Nine United States Dollars and Ninety Cents), leaving the balance of US$2,390,296.10 (Two Million, Three Hundred and Ninety Thousand, Two Hundred and Ninety-Six United States Dollars and Ten Cents) which remains unpaid. This is the subject of the current claim as pleaded in its Statement of Case in the substantive matter, and as spelt out in the sworn statement that was filed in support of the application.

37.0 All seemed good for the Claimant as far as the determination of whether they have a good and arguable case is concerned. However, what seemed to be a good and arguable case in this matter has been heavily compromised and undone by the Claimant's own application.

38.0 The Claimant's application was for an equitable relief meaning that the Court has power to decide whether to grant it or not based on fairness and justice, and that, the Claimant had to be within the boundaries of the rules of equity. Accordingly, it was expected that the Claimant would act with utmost good faith, which includes making a full and frank disclosure of all the material facts pertaining to their application, and to have its hands clean. In my view, the Claimant has entirely failed in this regard, and I will be examining the same accordingly.

39.0 Firstly, I will look at how the issue of the interconnected relationships between the various players in this matter were subtly concealed by the Claimant. In my view this is especially important because it has a bearing on this application. The manner in which the Claimant crafted paragraphs 7, 8, 9 and 10 of the sworn statement in support of their initial application clearly demonstrates that the Claimant understood the importance of explaining the same as regards the application.

40.0 Under paragraph 7 of the sworn statement filed on behalf of Claimant in support of the application it is deponed as follows:

> "***THAT*** *the Defendant is a joint venture company incorporated pursuant to a Joint Venture Agreement between AUM Sugar & Allied Limited, a private limited liability company registered under the Companies Act, (Cap 46:03) of the Laws of Malawi, and Green Belt Initiative Holdings Limited (GBI Holdings Ltd) a private limited liability company wholly owned by the Government of Malawi and registered under the Companies Act (Cap 46:03) of the Laws of Malawi. I exhibit hereto the said Shareholding Agreement between AUM Sugar & Allied Limited and Green Belt Initiative Holdings Limited marked as exhibit "MK 1".*

41.0 In essence, the Claimant is highlighting that the Defendant was created as a joint venture company and had two shareholders namely; AUM Sugar & Allied Limited, and the Green Belt Initiative Holdings Limited. The Claimant then proceeds under paragraph 8 to state as follows:

> "***THAT*** *the majority shareholder of AUM Sugar & Allied Limited is Ulka Industries Limited and that the majority shareholder of Ulka Industries Limited is Mr. Sachin Nikam who is also the majority shareholder of the Claimant."*

42.0 The Claimant is further offering a clarification under the above paragraph 8 that the majority shareholder of AUM Sugar &Allied Limited is Ulka Industries Limited in which Mr. Sachin Nikam held the majority of shares. The paragraph further proceeds and states that the said Mr. Sachin Nikam was also the majority shareholder of Mukteshwar Sugar Mills Limited, the Claimant herein.

43.0 Having deponed as noted above, the Claimant then quickly proceeds under paragraph 9 to state as follows:

> "***THAT*** *apart from the common shareholding by Mr. Sachin Nikam in Ulka Industries Limited as the majority shareholder in AUM Sugar & Allied Limited and the claimant herein, there are no common directors between AUM Sugar & Allied Limited and the claimant."*

44.0 In this regard, the Claimant is basically stating that apart from Mr. Sachin Nikam holding shares in in Ulka Industries Limited, which in turn holds shares in AUM Sugar & Allied Limited and Mukteshwar Sugar Mills Limited, the Claimant herein, there were no common directors between AUM Sugar & Allied Limited and Mukteshwar Sugar Mills Limited, the Claimant.

45.0 The Claimant then concludes on this relationship under paragraph 10 which reads as follows:

> "*THAT the Claimant is a separate legal entity with legal capacity to sue and to be sued in its own name."*

46.0 The Claimant explanation above can be stated in summary that there is a close connection between Mukteshwar Sugar Mills Limited, the Defendant herein, Ulka Limited, AUM Sugar & Allied Limited and Salima Sugar Company Limited. The common factor in all this is Mr. Sachin Nikam. Mr. Sachin Nikam is the majority for Ulka Industries Limited, which has majority shareholding in Mukteshwar Sugar Mills Limited, the Claimant herein, and also majority shareholding in AUM Sugar & Allied Limited. AUM Sugar & Allied Limited is in turn the majority shareholder in Salima Sugar Company Limited, the Defendant herein. This is how the Claimant has explained the interconnection between the various companies in this matter. In its view, this explanation had been offered in order to show that there were no common directors between AUM Sugar & Allied Limited and Mukteshwar Sugar Mills Limited, the Claimant herein.

47.0 On the other hand, the Defendant has provided a further clarification on this interconnection between these companies under paragraphs 5 and 6 of the sworn statement of Dr. Charles Thupi filed in reply to the sworn statement by Mr. Burton Mhango in opposition to the application to Stay Proceedings Pending

Arbitration and Discharge or Vacating the Freezing order, as well as his sworn statement in support of the Vacation and/ Variation of the Freezing Order.

48.0 Under paragraph 5 he states as follows:

> *"THAT the claimant is a company incorporated in India, while the defendant is a company incorporated in Malawi. At all material times in so far as the claims are concerned, the defendant was a joint venture company between Aum Sugar & Allied Ltd, and Greenbelt Holdings Limited (which held the interest of the Government of Malawi), in which the former was the majority shareholder of the company. Aum Sugar & Allied Limited also had/has two shareholders being Ulka industries and MDE Farms."*

49.0 The Defendant herein confirms that the Defendant was a joint venture company and had two shareholders; namely AUM Sugar & Allied Limited as majority shareholder, and Green Belt Initiative Holdings Limited. It further clarifies that AUM Sugar & Allied Limited had two shareholders namely; Ulka Industries Limited and MDE Farms.

50.0 Under paragraph 6 Dr. Thupi proceeds and states as follows:

> *"The shareholders of Ulka industries were Dr. Sachim Nikam and Mr. Prashant Shama; while the shareholders of MDE Farms were Mr. Shiriesesh Betgiri and Mr. Bruhat Betgiri. These four being Dr. Sachin Nikam, Mr. Prashant Shama, Mr. Shiriesesh Betgiri and Mr. Bruhat Betgiri were all Directors in the Defendant, while Ulka Industries (Dr. Sachin Nikam and Mr. Prashant Shama) remained a shareholder (owner) of the Claimant, Mukteshwar Sugar Mills Ltd in India."*

51.0 What is coming out now is that Ulka Industries had two shareholders, Mr. Prashant Sharma, and Mr. Sachin Nikam. Mr. Prashant Sharma's name as shareholder of Ulka Industries Limited is coming out for the first time. The Claimant conveniently omitted to disclose it and only mentioned Mr. Sachin Nikam as a majority shareholder. The full position however is that Mr. Sachin Nikam and Mr. Prashant Sharma were shareholders of Ulka Industries Limited, and Ulka Industries Limited were the shareholders of Mukteshwar Sugar Mills Limited, the Claimant herein. The Defendant then explains that both Mr. Sachin Nikam and Mr. Prashant Sharma were directors in Salima Sugar Company Limited, the Defendant herein.

52.0 Under paragraph 14 of Dr. Thupi's sworn statement he further depones further as follows:

"*The defendants assert that the Order ought to be vacated because of the following reasons:*

(a)The Claimants failed to disclose material facts and/or suppressed material facts including but not limited to the fact that a Forensic Audit at the Defendant made specific findings that the agreements between Mukteshwar and Salima Sugar ***"was based on deception and the fraud to benefit the directors of Salima Sugar who were also directors of Mukteshwar and the arrangements we are made to enrich themselves"*** *(*my own emphasis*); and that there were overpayments made to the said Claimant of almost MWK1,656,221,918.00 (One Billion, Six Hundred, Two Hundred and Twenty One Thousand, Nine Hundred and Eighteen Kwacha; as the Defendant was made to pay for services that it was never supposed to pay. I hereby exhibit a USB DISK containing an electronic copy of the Forensic Audit and mark as CT3.*

52.0 It is clear from the above reference that the Forensic Audit findings at the Defendant company also established that the Directors of Salima Sugar Company Limited, the Defendant herein, were also Directors of Mukteshwar Sugar Mills Limited, the Claimant herein. This is buttressed by paragraph 5.5.8.2 of the Forensic Audit, on the second and third paragraphs which reads as follows:

"The contract for 2016 crushing season was signed by Mr. Prashant Sharma as a Director of Mukteshwar with Chairman Shirieesh Betgiri for SSCL. Mr. Prashant Sharma signed contracts for 2017, 2018 and 2019 crushing seasons with Mr. Bruhat S Betgiri as SSCL director while contracts for 2020 and 2021 crushing seasons were signed by Mr. Bruhat S Betgiri signing as Chairman of SSCL.

Note that Mr. Prashant Sharma, the Director of Mukteshwar Sugar Mills Limited is also now a shareholder of AUM SAL from January 2023 and director of SSCL from April 2023. Mukteshwar Sugar Mills Limited, Ulka Industry Limited, AUM SAL and SSCL perceived majority shareholders and directors were all related. However, the Mukteshwar contractual matters has never been taken to any board meeting for approval and all concerned directors have never declared interest."

53.0 Looking at the sworn statement of Dr. Chares Thupi on behalf of the Defendant, the extent of the full relationship of these companies have come out bare. Among others, it is clear that Mr. Sachin Nikam and Prashant Sharma are shareholders of Ulka Industries Limited which holds majority shareholding in AUM Sugar and & Allied Limited, and AUM Sugar Allied Limited held majority shares in Salima Sugar Company Limited, the Defendant, at the material time.

Further, it is clear that Mr. Sachin Nikam and Prashant Sharma were both Directors of Salima Sugar Company Limited, the Defendant. To make matters worse, Mr. Prashant Sharma was also a director of the Mukteshwar Sugar Mills Limited, the Claimant. In effect all these entities were connected and as observed by the Forensic Audit Report that "*Mukteshwar Sugar Mills Limited, Ulka Industry Limited, AUM SAL and SSCL perceived majority shareholders and directors were all related*.

54.0 I looked at this relationship, shook my head and mused how the Claimant felt that this information was not material, or necessary to the Court for a fair disposal of the application. Instead, the Claimant went on and dwelt on the fact that there were no common directors between AUM Sugar & Allied Limited and the Claimant. Why did the Claimant not disclose that there were common directors between the Claimant and the Defendant? As concluded by the Forensic Audit, I also agree that all these companies, shareholders and directors were all related. No wonder they were at peace concluding the contracts subject of this claim without even seeking any board approval and without declaring any interest. Surely, this relationship smacks a semblance of a criminal enterprise. I am not surprised that two directors are on the run.

55.0 In my view the Claimant should have fully and frankly disclosed this relationship instead of skirting around arguing that there was no relationship between the parties. It is very clear that ultimately, Mr. Sachin Nikam and Prashant Sharma stood to directly or indirectly benefit from the transaction between the Claimant and the Defendant, who had common directors, through dividends or otherwise. The fact that Mr. Sachin Nikam and Prashant Sharma went all way round and created multiple corporate legal persons quite aware that, ultimately, they were going to be the beneficiaries, was a red flag of some sinister undertaking. Being related parties, I do not find any reason to isolate any of them out of this equation. Their hands, including the Claimant's hands, were all dirty and have no reason to come to Court and seek the aid of equity.

56.0 Secondly, on the Claimant's failure to disclose the issue of the Forensic Audit and the report, I found the Claimant's justification that they did note disclose the same because the matter was public knowledge to be very difficult to appreciate. As much as the issue of the Forensic Audit was in the public domain, it was still the duty of the Claimant to disclose the same to the Court and to disclose that a Forensic Audit Report had since been released.

57.0 In my view, the Claimant deliberately chose to skip this fact because the Court would have automatically loved to see the report and/or raise questions on what the findings were. On the report, specifically, I choose to differ with the Claimant

that the same was a matter of public knowledge. While the fact that it had been released may have been in public domain, I do not think that its contents were. The report was prepared and then released to the Defendant's Directors and Shareholders, and not to the general public. With that in mind, the Claimant, had a duty to disclose its finding as far as it related to the issues in the claim. In my view, the Claimant once again deliberately chose to deliberately not disclose the contents because of adverse findings related to the Claimant's and the Defendant's directors and the claim itself. One of such findings is highlighted under paragraph 14 of the Dr. Thupi's sworn statement which states as follows:

> *"……..that the agreements between Mukteshwar and Salima Sugar* ***"was based on deception and the fraud to benefit the directors of Salima Sugar who were also directors of Mukteshwar and the arrangements we are made to enrich themselves"*** *(*my own emphasis*); and that there were overpayments made to the said Claimant of almost MWK1,656,221,918.00 (One Billion, Six Hundred, Two Hundred and Twenty One Thousand, Nine Hundred and Eighteen Kwacha; as the Defendant was made to pay for services that it was never supposed to pay."*

58.0 In addition to the foregoing, I noted several findings in the report which directly affected the two main beneficiaries of this whole dishonourable scheme, Mr. Sachin Nikam and Mr. Prashant Sharma. Bearing in mind that the two were the key persons in everything that was happening between the Claimant and the Defendant, and also as ultimate beneficiaries in this matter, I fail to appreciate why the Claimant failed to fully disclose the issues surrounding the report.

59.0 Thirdly, it is very clear that the Claimant failed to disclose that Mr. Prashant Sharma and Mr. Sachim Nikam had warrant of arrests hanging on their heads and were facing criminal prosecution as a result of some of the findings of the forensic audit. Paragraph 14(b) in the sworn statement of Dr. Thupi in which he states as follows:

> *"I repeat Paragraph 14(a), and state that the Claimant did not disclose that Mr. Prashant Shama and Dr. Sachim Nikam have Warrant of arrests hanging on their heads and escaped the jurisdiction. The Warrants are in relation to offences of making false documents, uttering false documents, forgery, conspiracy to defraud, cheating and money laundering which are related in part to the claims in the within proceedings."*

60.0 The Claimant's argument to the effect that the issuance of the warrants of arrest against the Defendants directors including Mr. Prashant Sharma and Mr. Sachim

Nikam was not a material, and that they did not disclose it because the information was already in the public domain was simply another lame excuse. In my view, it is a material fact that had to be highlighted in the report to enable the Court to appreciate what could have happened to deserve the two key directors having warrants of arrest on their heads, let alone escaping the jurisdiction. To me this is key information and should have been disclosed by the Claimant at the time it made its application.

61.0 Having considered the application, it is my finding that, in addition to its hands being dirty, the Claimant deliberately suppressed a substantial amount of material information at the time that it filed its application. Otherwise, if the Claimant did the same, the application was going to raise an alarm, and the Court was surely going to look at it differently. With this in mind, I do not think that the Court exercised its discretion fairly and justly in this matter when it granted the Order in view of the half truths and inadequate information that was presented before it by the Claimant. I do not think that my brother Judge, Justice Manda, was going to issue the Order had the Claimant fully and frankly disclosed all the issues before him. Sadly, such kind of non-disclosure affects the integrity of judicial process and has grave consequences. I feel short of going back to relive the issues that arose after the Order was granted but I am not.

62.0 Having found that the Claimant suppressed information in its application, I will not belabour to determine the other issues that were raised in the application except one. I would also like weigh in and buttress the point that freezing injunctions must always be proportionate to the position of the Defendant and must not unfairly prejudice the Defendant. As mentioned in *Polly Peck International plc v. Nadir (No.2)* above, the Court must always consider the extent and the nature of the assets to be frozen as well as the proportionality of the order and its impact on the Defendant. Being an equitable relief it must always have a semblance of fairness and practicality.

63.0 In the present case it is clear that the Defendant is a very new company trying to stand on its feet. It is in evidence that it has just started making profits. It is run on taxpayers' money and employs a lot of Malawians. It is evident that it has several contractual and statutory obligations to take care of, and to meet the same it must keep its operations going. It is also clear that the Defendant is going through a lot of financial problems. Some of these problems have clearly been contributed by the conduct of Mr. Sachin Nikam and Mr. Prashant Sharma. Surely, it would be folly for this Court to let the Defendant company go under in the present circumstances. However, it is also true that the Defendant has several properties including land, plant and machinery, as well as many other

receivables that it may have recourse to liquidate the claim. In my view I do not think that freezing the Defendant's bank account was the best recourse in the circumstances.

64.0 Having found that the Claimant suppressed material information at the time they made the *ex parte* application before this Court, I hereby order that the order of freezing injunction granted by this Court on 18 September 2024 be and is hereby vacated forthwith.

65.0 I further order that, in view of the Defendant having dropped its application to stay the proceedings pending arbitration, the substantive matter do proceed in this Court accordingly. In that regard, it is ordered that the Defendant do file and serve the Claimant its defence within 14 days from the date hereof.

66.0 I also order that the Claimant be condemned to costs of this application.

Delivered at Blantyre this 7th day of February 2025

Jabbar Alide

JUDGE