

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISCELLANEOUS CAUSE NO.154 OF 2018

- 1. SUNDUS EXCHANGE & MONEY TRANSFER**
- 2. HALEEL COMMODITIES LIMITED**
- 3. VICTORY GROUP OF COMPANIES LIMITED**
- 4. QEMAT AL NAJAH GEN TRADE LIMITED::::::::::::: APPLICANTS**
- 5. CITY LOVE GENERAL TRADING LIMITED**
- 6. HILOWE GENERAL TRADING COMPANY LIMITED**

VERSUS
FINANCIAL INTELLIGENCE AUTHORITY----- RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application under Article Section 36 of the Judicature Act as amended, Rules 3(1)(a), 5 & 6 of the Judicature (Judicial Review) Rules, 2009; Section 17A of the Anti-Terrorism (Amendment) Act, 2015 for the following reliefs;

- a. A declaration that the decision by the respondent directing the applicants' bankers to restrict or halt all withdrawals or debits from bank accounts belonging to the applicants was ultra vires, unlawful, irregular, unreasonable and made in contravention of the rules of natural justice;
- b. A declaration that the instruction by the respondent ordering the applicants' bankers to freeze all funds on or in the applicants bank accounts was ultra vires, irregular and/or unlawful, unlawful, unreasonable and made in contravention of natural justice;
- c. A declaration that the freezing of the applicants funds was deprivation of their property which is unconstitutional and unlawful;
- d. An order of Certiorari quashing the decision of the respondent ordering the applicants' bankers to halt all withdrawals and debits and to freeze all funds on the applicants' respective bank accounts;

- e. An order of Prohibition restraining the respondent from freezing the bank accounts of the applicants in contravention of the rules of natural justice and the law;
- f. An order for payment of compensation/ and/or general damages;
- g. An Order for exemplary/punitive damages be awarded to the applicants;
- h. The applicants be awarded costs of this Application.

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavit in support of the applicant of **Bashir Ali Jumale** but generally and briefly state that;

- 1) The applicants are companies incorporated in the republic of Uganda engaged in lawful business;
- 2) The 1st applicant is to the knowledge of the respondent, engaged in money transfer and money exchange business which requires constant access to bank accounts. While the rest of the applicants require regular access to their bank accounts to carry out their businesses.
- 3) The applicants operated bank accounts in Bank of Africa Uganda Limited, Stanbic Bank Uganda Limited, Ecobank Uganda Limited, KCB Bank, Diamond Trust bank Limited and Equity Bank Uganda Limited.
- 4) On or about 25th day of May 2018, the 1st respondent wrote to the abovementioned banks instructing them to freeze all the accounts belonging to the applicants.
- 5) The said orders to freeze were issued without any notice to or knowledge on the part of the applicants and they were only made aware of the orders when they sought to operate the said accounts and their bankers informed them of the freezing Order/instructions from the 1st respondent to freeze their funds.
- 6) The said freeze of the funds was purportedly done under section 17A of the Anti-Terrorism (Amendment) Act 2015 but did not fulfil the requirements of the said section.
- 7) There is /was no evidence to the satisfaction of the respondent, or at all, that any of the applicants funds were intended for the terrorism activities and the said freezing was done ultra vires and contrary to the law.
- 8) The respondent did not give the applicants any opportunity to be heard before the said freezing of their accounts, in breach of the rules of natural justice.

- 9) The respondent has acted unreasonably in freezing the said accounts without reasonable evidence, and /or in not taking reasonable and timely steps to unfreeze the said accounts which has occasioned colossal financial loss to the applicants and it is unatonable by damages.
- 10) There is no evidence that the applicants' funds are intended for terrorism activities, and the applicants have never collected or provided funds, directly or indirectly, by any means with the intention or knowledge that such funds were to be used, in full or in part, for any terrorism activities.
- 11) There is no evidence that linked the applicants or connected the applicants, their directors or shareholders to allegations that warranted the actions of the respondent.

The respondents opposed this application and the respondent filed an affidavit in reply through the Executive Director of the Respondent-Sydney Asubo.

The respondent received information on 25th April 2018 from intelligence sources that illegal Al Shabab money was being channelled through the accounts of the applicants.

The respondent further received additional information that the applicants and their associated companies were involved in international trade whose proceeds were used to fund Al Shabab activities, and this necessitated the freezing of their accounts in May 2018.

The respondent received information that in May 2018 the Anti-Terrorism police Unit in Kenya was investigating a one Farhan Hussein Haider for coordinating financial and logistical support to terrorist groups in Somalia and in Kenya, and obtained a court order freezing the accounts used for the operations.

Subsequently, the respondent duly notified the director of Public Prosecutions in accordance with the provisions of Section 17A of the Anti-Terrorism (Amendment) Act, 2017.

The applicants are being investigated by the Criminal Investigations Directorate of Uganda Police Force.

The respondent contended that they were under no legal obligation to notify the applicants under the law and there mandate is to provide information to the Director of Public Prosecution.

The respondent contended that the application is premature since the office of the Directorate of Public Prosecutions is yet to exercise its mandate under the law.

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and consider in the determination of this application.

Two issues were framed by this court for determination;

1. *Whether the respondent acted unfairly and in breach of rules of natural justice in freezing the applicants' bank accounts without according them a hearing.*
2. *What remedies are available to the applicant?*

The applicants were represented by *Mr Kyagaba Isaac* whereas the respondent was represented by *Ms Brenda Mahoro*.

In Uganda, the principles governing Judicial Review are well settled. Judicial review is not concerned with the decision in issue but with the decision making process through which the decision was made. It is rather concerned with the courts' supervisory jurisdiction to check and control the exercise of power by those in Public offices or person/bodies exercising quasi-judicial functions by the granting of Prerogative orders as the case may fall.

It is pertinent to note that the orders sought under Judicial Review do not determine private rights. The said orders are discretionary in nature and court is at liberty to grant them depending on the circumstances of the case where there has been violation of the principles of natural Justice. The purpose is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected to. *See; John Jet Tumwebaze Vs Makerere University Council & 2 Others Misc Cause No. 353 of 2005, DOTT Services Ltd Vs Attorney General Misc Cause No.125 of 2009, Balondemu David Vs The Law Development Centre Misc Cause No.61 of 2016.*

For one to succeed under Judicial Review it is trite law that he must prove that the decision made was tainted either by; illegality, irrationality or procedural impropriety.

The court is not concerned with the actual decision and its consequences, but whether the public authority, in arriving at the decision offended any of the principles upon which the court would grant a review of the decision made.

The respondent as a public body is subject to judicial review to test the legality of its decisions if they affect the public.

ISSUE ONE

1. *Whether the respondent acted unfairly and in breach of rules of natural justice in freezing the applicants' bank accounts without according them a hearing.*

The applicant's counsel submitted that the use of the word may in the section 17A of the Anti-Terrorism (Amendment) Act 2015 denotes exercise of discretion which must be exercised legally and in accordance with the rules of natural justice.

According to counsel the Act imposed an obligation on the respondent that before it exercises the discretionary power given under the Act it must have satisfactory evidence and must give the person whose property is to be frozen, an opportunity to be heard.

It was the applicants' submission that the only way that the respondent could have been satisfied that the applicants' funds were intended for terrorism activities- by carrying out investigation, obtaining satisfactory evidence and then inviting the applicants for a hearing/inquiry. At the hearing/inquiry, the evidence that points towards the culpability of the applicants would have been shown to them and pursuant to the deliberations, section 17A(1) of the Act would be invoked.

The respondent submitted that after freezing the accounts of the applicants, they notified the Director of Public Prosecution and the applicant will have an opportunity to seek redress after the Director of public Prosecutions has taken further action.

The respondent submits that the steps taken were in accordance with section 17A of the Anti-Terrorism (Amendment) Act to allow the Director of Public Prosecutions. The applicants who are thus aggrieved by the respondent's acts have an opportunity to be heard at a later stage when the Director of Public Prosecutions takes further action.

The respondent contended that the applicants have not articulated the specific law that has allegedly been contravened. They contended that before freezing the bank accounts where satisfied that the funds are intended for terrorism activities.

She further submitted that they received information indicating that one of the signatories to various accounts of some of the applicants was implicated in organising and collaborating terrorists' activities in Kenya and Somalia. The same signatory to the bank accounts of the applicants was also a shareholder in some of the applicants associated and affiliated companies. The respondent diligently and cautiously analysed all information that it received in order to satisfy itself that funds of the applicants were intended for terrorism activities before exercising its discretion to freeze the accounts.

In resolving this issue it is important to appreciate the provision under which the bank accounts were frozen.

Section 17A of the Anti-Terrorism (Amendment) Act provides;

(1) The Financial Intelligence Authority may, cause the freezing or seizing of funds or property where it is satisfied that the funds are or the property is intended for terrorism activities.

- (2) Where the Financial Intelligence Authority causes the freezing or seizing of funds or property under subsection (1), the Financial Intelligence Authority shall, immediately inform the Director of Public Prosecutions in any case not later than forty eight hours after the time of freezing or seizing.***
- (3) After receipt of the information under subsection (2), the Director of Public Prosecutions shall apply to court for an order freezing or seizing such funds or property and the court shall make a determination expeditiously.***

It is true that discretionary power conferred upon legal authorities is not absolute, even within its apparent boundaries, but is subject to general legal limitations. Therefore discretion must be exercised in the manner intended by the empowering Act or legislation. The limitations to the exercise discretion are usually expressed in different ways, i.e discretion must be exercised reasonably and in good faith, or that relevant considerations only must be taken into account, that there must not be any malversation of any kind or that the decision must not be arbitrary or capricious.

In the case of ***R v Commission for Racial Equality ex p Hillingdon LBC [1982] QB 276*** Griffiths LJ has said;

“Now it goes without saying that Parliament can never be taken to have intended to give any statutory body a power to act in bad faith or a power to abuse its powers. When the court says it will intervene if the particular body acted in bad faith it is but another way of saying that the power was not being exercised within the scope of the statutory authority given by Parliament. Of course it is often a difficult matter to determine the precise extent of the power given by the statute particularly where it is a discretionary power and it is with this consideration that the courts have been much occupied in the many decisions that have developed our administrative law since the last war.”

It can therefore be deduced from the above decision that where Parliament confers power upon some Minister or other authority to be used in discretion, it is obvious that the discretion ought to be that of the designated authority and not the court. Whether the discretion is exercised prudently or imprudently, the authority’s word is to be law and the remedy is to be political only.

On the other hand, Parliament cannot be supposed to have intended that the power should be open to serious abuse. It must have assumed that the designated authority would act properly and responsibly, with a view to doing what was best in the public interest and most consistent with the policy of the statute. It is from this presumption that the courts take their warrant to impose legal bounds on even the most extensive discretion.

In the case of ***Sharp v Wakefield [1891] AC 173*** court observed that;

“ ‘discretion’ means when it is said that something is to be done within the discretion of the authorities that something is to be done according the rules of reason and justice, not according

to private opinion: Rookes case; according to the law and humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.”

The respondent has shown court that before the exercise of its discretion to freeze the applicants’ bank accounts it was satisfied with the available evidence that the said funds could indeed be used for terrorism activities.

The bank accounts were frozen on the basis of a one ***Farhan Hussein Haider*** who is being investigated by Anti-Terrorism Police Unit in Kenya for coordinating financial and logistical support to terrorist groups in Somalia and Kenya. None of the applicants has made any specific denial of the said person except that they contend he was removed from the directorship or shareholding of some of the applicants.

The respondent armed with such information was duty bound to take immediate action by freezing the bank accounts and nay none action would have resulted in removal or withdrawal of the said funds.

The second consideration is whether the applicants were entitled to be heard before freezing their bank accounts.

The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with and so forth. See ***Administrative Law 10th Edition by Wade & Forsyth page 420***

In the case of ***Lloyd vs Mc Mahon [1987] AC 627 at 702*** Lord Bridge in the House of Lords noted;

“ My Lords, the so called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred an any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure attainment of fairness.” See also ***R (West) vs Parole Board [2005] 1 WLR 350.***

The purpose of the freezing of the applicants’ bank accounts was to enable the further investigations in the activities of the applicants and that stage they would be accorded a right to be heard.

In the case of **Opio Belmos Ogwang vs Attorney General and Inspectorate of Government High Court Miscellaneous Cause 158 of 2015** Justice Nyanzi Yasin citing the case of *Mafabi Richard vs Attorney General Constitutional Petition No. 14 of 2014* their Lordships observed that:-

“....investigation is purely preliminary...where an act or proposal is only a first step in a sequence of measures which may culminate in a decision detrimental to a person’s interests, the courts will generally decline to accede to that persons submission that he is entitled to be heard in opposition to this initial act; particularly if he is entitled to be heard at a later stage”

The nature of the work and mandate of the respondent is to detect financial crimes including money laundering and financing of terrorism, requires swift and expeditious detection of crimes which may affect the public at large. In such circumstances it may not be possible to offer a hearing at such an early stage in the investigation of such crimes.

Accordingly this issue fails and it is resolved in the negative

ISSUE TWO

What remedies are available to the applicant?

The applicants have failed to prove to court that the respondent acted unfairly when they froze the bank accounts without according them a hearing.

The applicants are not entitled to the remedies sought. This application fails and dismissed with costs.

SSEKAANA MUSA
JUDGE
27th /08/2018