

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISCELLANEOUS CIVIL CAUSE NO. 40 OF 2002**

BETWEEN:

THE STATE

-and-

**THE COMMISSIONER GENERAL OF THE
MALAWI REVENUE AUTHORITY.....RESPONDENT**

Ex-parte, PLASTICO INDUSTRIES LTD.....APPLICANT

CORAM: HON. JUSTICE A.C. CHIPETA

Applicant/Counsel - Absent

Mpango, of Counsel for the Respondent

Mzungu (Miss), Official Interpreter

RULING

On 22nd March, 2002 the Hon. Justice Mkandawire granted to the Applicant, Plastico Industries Limited, on an application made ex-parte, leave to apply for Judicial Review of certain decision of the Respondent, Malawi Revenue Authority, under O 53 rule 3 of the Rules of Supreme Court. At the same time the Applicant was also granted an Order of Stay against the process of distress carried out by the Respondent against the Applicant's properties. Now, under Order 32 rule 6 of the Rules of Supreme Court, Malawi Revenue Authority has applied to court for a vacation of the Order of Stay obtained by Plastico

Industries Limited. The application is supported by the affidavit of learned Counsel for Malawi Revenue Authority, Mr Dominic Stephen Mpango.

When the summons was called for hearing I ended up hearing Mr Mpango in the absence of the other party or its Counsel. This is because it was abundantly clear then that service of the material summons had been duly effected some two weeks earlier. In fact the

summons was called an hour after its due time and by then there was no word to explain the absence of Plastico Industries Limited and/or its lawyers.

From the way the summons to vacate is drawn the impression one gets is that in this application Malawi Revenue Authority is only targetting the Order of Stay against its distraint process. Despite absence of direct reference to the Judicial Review proceedings permitted by the leave granted herein, in the argument of the summons, it becomes noticeable that the attack launched goes beyond the Order of Stay and actually extends to the intended Judicial Review. In a way it appears that this could not have been avoided as the Stay herein has its foundation in the proposed Judicial Review and could not have been secured independently of such proceedings. On the other hand, however, the intended Judicial Review proceedings are not themselves dependent on the Order of Stay and may well proceed whether the Stay herein is retained or discharged.

With reference to the facts on the file Mr Mpango, in arguing his client's case, pointed out that disgruntled with an assessment of tax in the sum of K21,306,560.20 made on it, Plastico Industries Limited, asked for a review of the assessment. The decision of the Commissioner General of the Malawi Revenue Authority on that request, he said, was that the original assessment should stand and in this regard he referred to his exhibit "DSM1," which is a letter dated 30th August, 2001 indicating that in terms of the law the assessed tax was collectable and that a final notice would shortly follow.

Mr Mpango next observed that Plastico Industries Limited could have but that it did not in fact appeal against this decision to the special Arbitrator in terms of S. 98 of the Taxation Act and then argued that its failure to do so is fatal and that the court cannot extend the time within which such appeal can now be lodged. In this regard Mr Mpango cited the decision of Hon. Justice Mead in *Press (Holdings) Limited -vs- Commissioner of Taxes (1978-80)* 9 MLR 62 as authority on the point. Mr Mpango thus contended that in, to date, not appealing against this decision of the Commissioner General not to revise the initial assessment in terms of Part III of the eighth schedule of the Taxation Act, the Applicant sat on its rights and that it cannot now succeed to gain extension of time within which to appeal to the special Arbitrator. It is on this basis, he said, that the Respondent was bringing in this application to the court to vacate the Order staying the distraint so that enforcement may proceed under S. 107(3)(a) of the Taxation Act.

In the light of the arguments brought up in this application I have had a look at both the provisions of the Taxation Act as cited and at the case authority relied upon. Although I must observe that a judicial review is a separate and distinct process from an appeals procedure, I must acknowledge that the significance of the case authority cited is not lost on that pretext alone. The authority in question well serves to expose what alternative remedial measures were available to Plastico Industries Limited in this matter and is also helpful for determining how well that company utilized or ill-utilized them.

Bearing all this in mind I have revisited the ex-parte application that was laid before the court, which application is the one that led to the Stay Order now under challenge. It is my observation that nowhere in this application did the letter marked "DSM1," which

was a direct response to Plastico Industries Limited's very first query of tax assessment, feature. The impression created by the application was as if the respondent never really took a position on the query lodged with it and that as negotiations followed and continued Plastico Industries Limited, was, totally from the blues, early this year just puzzled with a Final Notice and then Distraint action. Indeed there is no sign that beyond efforts at negotiation any formal appeal steps were taken either against the decision to retain the tax assessment (which was revealed) or against the Final Notice. Further, even if the negotiations were somehow construed as some kind of appeal to the Commissioner General, there is no indication that at any point Plastico Industries Limited took steps to avail itself of the appeal process to the Special Arbitrator in terms of the Rules of Procedure in the 8th Schedule to the Act, let alone any other appeal process.

I note that the language used in Sections 97 and 98 and that the procedure for appeals laid down in the eighth schedule are quite plain and precise. The steps and stages a party aggrieved with an assessment of tax or a decision thereon is expected to undertake in order to overturn the same are clearly laid down and are quite elaborate. In sequence they graduate from the Commissioner, to the special Arbitrator, and then finally to the High Court. In this case Plastico Industries Limited, it is now clear, did not follow these steps and so, until it is otherwise determined at the judicial review that might follow, the position is that the tax liability herein is legally enforceable as assessed.

I would not by this ruling wish in any way to pretend to foretell the outcome of the Judicial Review proceedings yet to come. As matters stand, however, it is clear that the Applicant did not timeously avail itself of all the procedural processes the Taxation Act made available to it in challenging the assessment herein. It is also clear that due to this neglect or omission on its part the tax liability assessed herein is now legally enforceable. It has thus exercised my mind whether it is indeed appropriate that there should be a stay on legal enforcement of tax just because a party which failed to fully utilize appeal provisions now seeks to have the decisions he should have appealed upon otherwise judicially revised.

The letter exhibit "DSM1" which the Applicant did not disclose in its application makes it clear that the Respondent did not in this matter leave the Applicant in limbo on its query and thereby deprive it of the opportunity to take advantage of the appellate procedure. The Applicant therefore only has itself to blame for neglecting a legally available alternative solution to its crisis. Be this as it may, however, after taking into account the import of Press (Holdings) Limited -vs- Commissioner of Taxes (above-cited), although not directly an authority on the subject of Stay Orders, I am of the mind that if "DSM1" had been disclosed by Plastico Industries Limited in its ex-parte application, in the light of Sections 97 and 98 as well as S. 107(3) of the Taxation Act, the need to stay distraint action herein would not have arisen. Thus whereas the leave for Judicial Review still stands I direct that the Order of Stay against the distraint action of the Respondent be and it is hereby vacated. Should it turn out that the Applicant's judicial review proceedings are successful, I am confident that the Respondent should be in a position to effect necessary refunds. The Respondent's summons to vacate Stay Order thus succeeds with costs.

Made in Chambers the 30th day of April, 2002 at Blantyre.

A.C. Chipeta

JUDGE