



IN THE HIGH COURT OF MALAWI
REVENUE DIVISION
LILONGWE DISTRICT REGISTRY
JUDICIAL REVIEW NUMBER 4 OF 2020

BETWEEN:

AMON NKHATA

CLAIMANT

AND

THE COMMISSIONER GENERAL
OF MALAWI REVENUE AUTHORITY

RESPONDENT

CORAM: HONOURABLE JUSTICE JOSEPH CHIGONA

NKHATA, OF COUNSEL FOR THE CLAIMANT

MICHONGWE AND FRANCISCO, OF COUNSEL FOR THE RESPONDENT

FELIX KAMCHIPUTU, OFFICIAL COURT INTERPRETER

CHIGONA, J.

JUDGMENT

[1] The Claimant, Amon Nkhata, former Member of Parliament for Kasungu Central Constituency, brought the present judicial review proceedings. The application is supported by sworn statement and skeletal arguments that counsel duly adopted during the substantive hearing of the application. The Claimant is against the following decisions of the Respondent:

- (1) The decision of the Respondent in detaining the Claimant's motor vehicle without following the due process of the law and in violation of the Claimant's rights.

- (2) The disregard of the Claimant's right to be heard after detaining the vehicle and the failure to respond to the Claimant's legal practitioner's letter to the Respondent following the detention of the Claimant's motor vehicle thereby violating the Claimant's rights.
- (3) All processes leading to the said decision in (1) and (2) above.

[2] The Claimant seeks the followings reliefs:

- (1) A declaration that the Respondent's said decision which was made without hearing the Claimant violates his right to be heard under the principles of natural justice and his constitutional right to lawful and procedurally fair administrative action under Section 43 of the Constitution and therefore procedurally improper, unreasonable and unconstitutional.
- (2) A declaration that the said decision is unconstitutional as it violates the Claimant's right to own property under Section 28 of the Constitution.
- (3) A like order to Certiorari quashing the decision of the Respondent
- (4) A like order to prohibition, restraining the Respondent from further detaining the motor vehicle.
- (5) An order for leave to move for judicial review out of time against the Respondent's decision
- (6) An order of interlocutory injunction compelling the Respondent, his agents, servants or any other person action on his behalf to immediately release the Claimant's motor vehicle pending determination of the main matter
- (7) An order for costs
- (8) And other order the court may deem fit in the circumstances

[3] Suffice to mention that (5) and (6) were already dealt with.

THE CLAIMANT'S CASE

[4] The Claimant's case is outlined in the sworn statement in support of the application for judicial review. The Claimant depones that by a Notice of seizure Number 026453 dated 18th September 2019, the Respondent's officers detained and seized the Claimant's Toyota Fortuner Motor Vehicle Registration Number DZ8540, Chassis Number AHTTZZ69G90950423, and engine number IKD15211087 on the ground of non-payment of duty. The Claimant avers that in executing the said seizure notice, a copy that was given to the Claimant does not show any specific provision under the Customs and Excise Act or the Malawi Revenue Authority Act, or any other customs

related laws under which it was made. The Claimant states that since the detention of said motor vehicle, the Respondent has not responded to letters from the Claimant where he was seeking an explanation for the seizure and detention of the vehicle. The Claimant states that he purchased the motor vehicle from South Africa in February 2019 as evidenced by sales invoice marked **PMN 2**. The Claimant as a Member of Parliament then wrote the Respondent for clearance of the said motor vehicle duty free as allowed under law and that on 21st February 2019 the approval was duly granted by the Respondent as evidenced by **PMN 3**. The Claimant states that following such approval, he followed all clearance procedures and to that effect he has exhibited a copy of the certification for entry of goods duty free for privileged persons or organization, release order and police clearance certificate marked as **PMN 4(a)**, **PMN 4(b)** and **PMN 4(c)** respectively. The Claimant states that despite errors in recording of the chassis number of the motor vehicle, the vehicle detained by the Respondent is the same vehicle which was granted duty free status by the Commissioner General. The Claimant states that the Respondent was supposed to accord him a chance to rectify the errors and not to seize and detain the motor vehicle. The Claimant argues that despite letters written to the Respondent, the Respondent chose not to respond to those letters. The said letters are exhibited as **PMN 6(a)** and **PMN 6(b)**. The Claimant asserts that he has no alternative remedy against the failure of the Respondent to respond to his letter and he believes that the Respondent's decision is procedurally improper, illegal, unreasonable and unconstitutional as it was made without properly giving him an opportunity to be heard and contravenes his rights under Sections 43 and 28 of the Constitution.

[5] During the hearing of the application, counsel for the Claimant stressed that the actions by the Respondent are unconstitutional, illegal and improper as they breached Section 43 of the Constitution on administrative justice. Counsel stated that the fact that the Respondent did not respond to the Claimant's letters is tantamount to a breach of natural justice principles. Counsel also argues that the seizure and detention of the motor vehicle is against the Claimant's constitutional right not be arbitrarily deprived of his property. Counsel submitted that the Respondent was to accord the Claimant a right to be heard before forfeiture of his motor vehicle pursuant to Section 161 of the Customs and Excise Act.

THE RESPONDENT'S CASE

[6] The Respondent filed a sworn statement in opposition, skeletal arguments and supplementary sworn statement in opposition that counsel duly adopted. In their sworn statement in opposition by Macphellah Nyirenda, Customs Officer, the Respondent states that while on patrol duties with Interpol officers along the Liwonde-Chingeni Road, they came across the motor vehicle which is the subject matter of the present judicial review proceedings. Mr. Nyirenda avers that upon inspection of the vehicle, they noted that the chassis number and engine number on the COF disk were different from the actual chassis number and engine number on the motor vehicle. He depones that records on the COF disk shows the chassis number as AHTTZ69G9095423 and engine number as IKD15211087 as evidenced by **PMN 5**. Mr. Nyirenda avers that the actual chassis number of the motor vehicle is AHTTZ69G905042317, and engine number IKDA767136 as evidenced by the seizure notice **PMN 1** and photos taken of the motor vehicle evidenced by **MN 1(a)**, **MN 1(b)**, **MN 1(c)** and **MN 1 (d)**. Mr. Nyirenda avers that the chassis number on the COF

disc has double T and another 9 in between 0 and 5 while the actual chassis number on the motor vehicle has a single T and no 9 in between 0 and 5. He depones that even the engine numbers on the COF disc and the actual motor vehicle are completely different. Mr. Nyirenda states that upon enquiry from the one in possession of the motor vehicle as to whether they changed the engine, they were informed that such a thing did not happen. As a result, he avers that the motor vehicle was detained at Liwonde waiting for more documentation from Blantyre the following day. However, he avers that the documentation from Blantyre had other discrepancies. He states that the sales invoice indicates chassis number AHTTZZ69G9095042317 and engine number IKD1H5211087 as evidenced by PMN 2. The deponent states that the Commissioner General approved duty-free clearance of a motor vehicle bearing chassis number AHTTZZ69G9095042317 as shown by PMN 3. He avers that the certification for entry of goods duty free for privileged persons and organizations has chassis number AHTTZZ69G9095042317 as shown by PMN 4(a). That the release order indicates AHTTZZ69G9095042317 and IKD1H5211087 as chassis number and engine number respectively as evidenced by PMN 4(b). He avers that the police clearance certificate has AHTTCC69G90950423 and IKD15211087 as chassis number and engine number respectively as shown by PMN 4(c).

[7] Mr. Nyirenda depones that the difference in the chassis numbers and engine numbers on police clearance certificate and COF to the actual chassis number and engine number on the motor vehicle as well as the difference in the chassis numbers and engine numbers on the motor vehicle to the ones on sales invoice, release order and the certification for entry of goods duty free for privileged persons and the approval from the Commissioner General very suspicious and questionable.

[8] He depones that he forwarded the actual engine number and chassis number on the motor vehicle to his office for vetting in the systems and that there was no indication that the motor vehicle had gone through the clearance system. He submits that the same discovery was made by Interpol who found out that the motor vehicle was not cleared. He depones that registration at Road Traffic is based on the documents presented and not physical inspection as to verify the chassis number and the engine number. He avers that as such it cannot be proof that the motor vehicle was properly cleared. The deponent submitted that as it is, the motor vehicle in question is different motor vehicle to the one the Commissioner General approved for duty free clearance.

[9] On seizure process, the deponent submitted that the claimant was given an opportunity to be heard on the spot. He submits that the claimant was given an opportunity to furnish the officers with relevant documents. He states that allowing the claimant to go with the suspicious motor vehicle would mean inviting the claimant to change the engine number and changing or printing chassis number or disposing of the motor vehicle itself.

[10] He states that following the seizure, the claimant wrote his office on 1st October 2019 claiming his motor vehicle, which he submitted, was responded to through a letter dated 6th November 2019 marked as MN 2. To him the letter from the claimant dated 13th December 2019 was only reminding them to do what they had done already through MN2. To him, the claimant was responded to by the Commissioner General when he was advised to make certain payments.

[11] further, the deponent states that the seizure notice was clear that the seizure was a result of non-payment of duty. He avers that the claimant was not only accorded a chance to be heard but reasons were also provided. Hence, according to the deponent, the seizure was not arbitrary deprivation of property.

[12] The defendant also filed a supplementary sworn statement in opposition by Detective Inspector Dickson Sayenda of Anti Motor Vehicle Theft Unit, Blantyre Office. He submits that on 18th September 2019, Detective Sub-Inspector Phiri and Liposa together with himself and officers from Malawi Revenue Authority were on a special patrol targeting fraudulently cleared motor vehicles along the Liwonde Chingeni Road. He submits that it was during that patrol exercise that they came into contact with the motor vehicle the subject matter of the current proceedings.

[13] He avers that upon inspection of the said motor vehicle, it was discovered that the chassis number and engine number on the COF disk were different from the actual chassis number and engine number on the motor vehicle. He submits that the records on the COF disk showed motor vehicle chassis number as AHTTZZ69G9095423 and Engine Number IKD15211087 as evidenced by **PMN 5** attached to the sworn statement of Paweni Marvel Nkhata.

[14] The deponent states that the actual chassis number on the motor vehicle is AHTZZ69G9050423 and engine number IKDA767136 as verified by the seizure notice. He submits that a search in their system of motor vehicle AHTZZ69G905042317 revealed that the said motor vehicle was reported stolen by the South African Government as evidenced by the search report from Interpol Data Base marked **DS1**.

[15] Counsel for the defendant submitted during the hearing of the matter, in response to the claimant, that the claimant was not accorded a chance to be heard and that his letter was responded to. She submitted that the claimant was to appeal to the Special Referee against the decision of the Commissioner General that informed him to pay duty on the said motor vehicle. Counsel avers that there is no any breach of natural justice principles. Counsel therefore prayed for dismissal of the application.

[16] In reply to the defendant, counsel for the claimant submitted that in **MN2** there are no reasons advanced by the Commissioner General as to why the Claimant was to pay duty. Counsel told the court that they admit that there were certain discrepancies with regard to chassis numbers and engine numbers of the motor vehicle, which if accorded a chance could have been rectified. Counsel submitted that there was no any evidence that the claimant cleared another vehicle or that **PMN4** a certificate of entry of goods or release order were issued for a different car. Counsel submitted to the court that the Claimant is not disputing payment of duty but rather the decision of the Defendant.

ANALYSIS AND DETERMINATION

[17] The starting point is the Courts (High Court) (Civil Procedure) Rules, 2017. Under Order 19 rule 20 provides for grounds in which a person can apply for judicial review:

- (1) Judicial review shall cover the review of—

- (a) a law, an action or a decision of the Government or a public officer for conformity with the Constitution; or
 - (b) a decision, action or failure to act in relation to the exercise of a public function in order to determine—
 - (i) its lawfulness;
 - (ii) its procedural fairness;
 - (iii) its justification of the reasons provided, if any; or
 - (iv) bad faith, if any, where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.
- (1) A person making an application for judicial review shall have sufficient interest in the matter to which the application relates.

[18] I remind myself that judicial review, as stated in many cases, is aimed at reviewing the decision-making process and not the merits of the decision itself. It is important to remember in every case, that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected, and that it is no part of the judiciary or individual judges for that of the authority constituted by law to decide the matters in question. Thus, a decision of an inferior court or a public authority, may be quashed where the court or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable or where the decision is unreasonable in the Wednesbury sense. The function of the court is to see that lawful authority is not abused by unfair treatment¹.

[19] Reverting to the present case, after careful consideration of the evidence as adduced, I am of the considered view that the main issue for determination is whether the defendant's action arising

¹ JAMADAR-V-ATTORNEY GENERAL [2000-2001] 175, PP 179-180. See also BLANTYRE CITY ASSEMBLY-V-KAM'MWAMBA & 6 OTHERS [2008] MLR 21, P24; COUNCIL OF CIVIL SERVICE UNIONS-V-MINISTER OF CIVIL SERVICE [1985] AC 374.

from seizure of the motor vehicle breached principles of natural justice. In other words, the issue is whether the Claimant was accorded an opportunity to be heard.

[20] From the evidence adduced in this Court, the defendant's officers seized the motor vehicle after physical examination showed that the information on the COF disk is totally different from the actual chassis number and engine number of the motor vehicle. From that point, it seems to me that the one who was in possession or driving the said motor vehicle was told the reasons why the officers became suspicious of the motor vehicle. He was aware of the reasons that were being advanced by the defendant's officers. The reason, as well explained by the defendant in evidence, is that the records on the COF disc showed motor vehicle chassis number AHTTZZ69G90950423 and engine number IKD15211087 as PMN 5 shows. However, the actual chassis number is AHTZZ69G905042317 and engine number IKDA767136 as shown on the seizure notice marked as PMN1. The notice of seizure itself provides that the motor vehicle was seized in terms of Customs and Excise Act because there were reasonable grounds for suspecting that the motor vehicle was liable for forfeiture. I am of the considered view that the Claimant or the one who was in possession of the motor vehicle during its seizure knew the reason for such seizure. The notice of seizure provided the procedure to be followed by the Claimant in claiming his motor vehicle from the defendant pursuant to Section 147 of the Customs and Excise Act.

[21] The Claimant submitted that the defendant did not provide a response to his letter, PMN 6(B), dated 13th December 2019. It seems to me that the Claimant is solely basing his claim on this allegation. This letter was or is making reference to another letter that was written by the Claimant to the defendant. The defendant through counsel submitted that a response to the letter by the defendant was given to through MN 2. It is clear from the record that the Claimant wrote the defendant on 1st October 2019 asking for restoration of the motor vehicle. On 6th November, 2019, through MN2, the defendant wrote the Claimant advising him that his application or request for restoration has been approved subject to payment of a fine of MK2, 000, 000, duty K7, 780, 737, processing fee of K10, 000 and destination inspection fee of K30, 000. The Claimant was given 14 days to pay the fine.

[22] I find it interesting that the Claimant is claiming that his letter of 1st October 2019 was not responded to. In this letter, the Claimant was asking for restoration of his motor vehicle, which the defendant duly attended to through MN2 dated 6th November 2019. The letter that the Claimant

wrote on 13th December 2019 to the defendant was a follow-up on his letter dated 1st October 2019. As explained above, the defendant favourably responded to his request for restoration albeit with conditions. I do not understand what kind of response was the Claimant looking for from the defendant. As alluded to, it is my finding that the defendant duly provided a response to the claimant's letter dated 1st October 2019. In view of this, I am more than convinced that the Claimant herein was accorded an opportunity to be heard throughout the events surrounding notice of seizure. The Claimant is aware of the reasons for the notice of seizure. I am not convinced at all that the Claimant is ignorant of the reasons for the seizure. He was told what he should do to restore the motor vehicle which up to now he has not. I do not think in these circumstances there is any valid claim against the defendant. The defendant has done everything according to the dictates of the law. There is a reason for the seizure notice. In these circumstances, the seizure cannot be described as arbitrary deprivation of property. It is allowed under the Customs Laws. I therefore hold that there is no any breach of Section 43 of the Constitution and Section 28 of the Constitution.

[23] As a matter of procedure, the Claimant was to appeal against the decision of the Commissioner General to the Special Referee pursuant to Section 121 of Customs and Excise Act. It is clear from the court record that the Claimant commenced proceedings before the Special Arbitrator as evidenced by **MN 3**. However, it is clear that those proceedings did not proceed and the Claimant proceeded to file Judicial Review proceedings. Though **MN 3** is not an appeal in my considered view against the decision of the Commissioner General, the Claimant was aware that the law demands that appeals against decisions of the Commissioner General come before the Special Arbitrator under the Taxation Act and Special Referee under the Customs and Excise Act. Of course, in the present case, the correct procedure was to file an appeal before the Special Referee pursuant to Section 121 of the Customs and Excise Act and not before a Special Arbitrator as the Claimant purportedly did.

[24] The evidence of Detective Inspector Dickson Sayenda is to the effect that the motor vehicle is suspected to be a stolen motor vehicle as **DS 1** show. I am of the view that this issue will be dealt with by the responsible authorities.

[25] In conclusion, it is my finding that the defendant did not breach any principles of natural justice and that the seizure notice is in accordance with the law. In these circumstances, there is no

breach of Section 43 of the Constitution and Section 28 of the Constitution. I therefore dismiss the Claimant's application with costs.

MADE IN OPEN COURT THIS 18TH DAY OF DECEMBER 2020 AT LILONGWE DISTRICT
REGISTRY.


JOSEPH CHIGONA

JUDGE