IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1591 OF 1998

BETWEEN:

WILSON MULAUZI ..... PLAINTIFF

AND

THE CONTROLLER OF CUSTOMS AND EXCISE .....DEFENDANT

CORAM : CHIMASULA PHIRI, J.

Kaphale of counsel for the plaintiff

Mpango - Deputy Controller of Customs & Excise, for the defendant

Selemani, Court Clerk

RULING

This is an application for an interlocutory injunction of a mandatory nature requiring the defendant to deliver the vehicle it seized from the plaintiff. The plaintiff contends that the seizure was wrongful. The defendant has on the other hand argued that the seizure was rightful on the basis that no duty was paid on the vehicle and that the burden to prove payment of duty is on the plaintiff and has not been discharged.

The facts are not very much in dispute. The plaintiff is the owner of a motor vehicle Nissan sentra registration number CP 422. The plaintiff acquired the vehicle from Mach General dealers on or about 20th April 1995. At the time of purchasing the vehicle, the plaintiff was to be the third owner of the vehicle and this is clearly indicated in the registration book. From the blue book entries, it is clear that the vehicle was first registered in Malawi on 2nd February 1994 as belonging to Mr. Mthimunye of Private bag 1, Kanengo Lilongwe. Ownership was transferred and registered in the name of Mach general dealers on 19th October 1994. Early this year on 20th February 1998 the defendant seized the vehicle from the plaintiff apparently on the ground of none payment of duty. A Notice of Seizure of that date is exhibited. The notice quotes the provisions of Section 147 which sets out time limits within which a claim for restitution ought to be lodged and also the limitation time for instituting proceedings for recovery of the seized goods. The defendant informed the plaintiff that in lieu of taking proceedings against the

plaintiff K70,752.75 was demanded as duty and penalty. On 26th March 1998 the plaintiff queried the request that he should pay duty and penalty on the basis that he was third owner and such responsibility would lie with the 1st owner. The plaintiff contended that the Road Traffic Commission does not register a vehicle unless it has a Customs duty clearance certificate. Therefore there was no reason for the plaintiff to suspect that duty had not been paid. The plaintiff contended that government was negligent in registering the vehicle in the first instance. The plaintiff offered to pay duty of K29,135.40 by instalments and requested for the release of the vehicle. On 22nd May 1998 the plaintiff's solicitors sent a notice of civil suit to the Attorney General and this has also been exhibited. The plaintiff has commenced civil action against the defendant in this civil cause number 1591 of 1998. The writ was issued on 26th May, 1998 and the filing fee of K60.00 was paid on General Receipt number 087212 dated 26th May 1998 although the official rubber stamp was backdated to 20th May 1998 whether by design or inadvertence, I will comment on this aspect in my ruling.

The defendant as already indicated does not dispute the facts concerning the seizure and purported reasons therefor. However, the defendant has argued that the defendant is not estopped by the practice of registering a vehicle only where there is a customs duty clearance certificate from seizing the plaintiff's vehicle. Further, the vehicle registration book is not a document issued by the Department of Customs and Excise and it is not proof of payment of proper customs duty. The defendant has argued that the burden to prove payment of duty is on the plaintiff in terms of section 156 (b) (ii) of the Customs and excise Act. Furthermore, the belief by plaintiff as to the payment of proper duties on the motor vehicle as inferred from the registration book is immaterial under Section 156(a) of the Customs and excise Act.

The plaintiff had also argued that the seizure was wrongful and was time barred. The limitation period in contemplation being 2 years. The defendant has argued that fraud is a material element in this matter. Section 155(1) of the Act extends the period to five years hence still within a time limit. The plaintiff has further argued that he was not personally fraudulent and had no reasonable opportunity in the circumstances to discover the earlier fraud, if any and cannot be brought within the ambit of Section 155(1). The defendant has argued that he fraud in question is not attached to the personalities **per se** but to be imputed in connection to the seized goods. The defendant has indicated willingness to release the seized goods on payment of appropriate customs duty and penalty. Finally the defendant exhibited a computer printout from the Traffic Commission dated 28th May 1998 indicating no information on Customs clearance certificate for motor vehicle registration number CP 422.

I will start with the jurisdiction of this court. Section 147(4) provides that the claimant may, within three months of the date of seizure, or of the giving of any required notice of seizure, whichever is later, institute proceedings for the recovery of such goods ..... giving notice in writing to the Controller of the institution of such proceedings. The seizure was on 20th February 1998 and the three months lapsed on 19th May 1998 or even 20th May

1998 for argument's sake. The proceedings commenced on 26th May 1998. This was after the time limit set out in section 147(4) of the Act and repeated in the Notice of Seizure. The official rubber stamp date on the writ showing 20th May 1998 can be proved wrong. Firstly the statement of claim is dated 22nd May 1998. Secondly the endorsement clearly shows 26th May 1998. Lastly it is clear that the summons for the interlocutory injunction order were taken out after the issuance of the writ in that the affidavit was sworn on 25th May, 1998 and the filing fee was paid on 26th May 1998 on General Receipt number 87225, i.e. a receipt having a serial number after the one issued for filing fee of the writ. I am showing all these details because one of the issues to be considered in granting or refusing an interlocutory injunction is whether or not the facts or circumstances raise a triable issue. Can there be a triable issue in a statute barred case? Theoretically, it can exist but practically such issue would be **per incuriam**. No **ratio decidendi** would come from such consideration, i.e. it would not be of any consequence. In the present case, whether or not the plaintiff was a**bona fide** purchaser for value without notice would only be eluded too in **per incuriam** because the claim is obviously statute barred in terms of Section 147(4) of the Act.

Assuming I am wrong and that the matter is not statute barred, I will consider if there is a triable issue. The issue to be considered is whether or not the seizure by the defendant is wrongful. Section 134 of the Act makes it an offence except in accordance with customs laws, for any person to buy, receive, harbour, offer for sale, deal in or have in his possession any goods subject to customs control. The facts of this case clearly show that no appropriate duty was paid for this vehicle. However, section 160(b) of the Act deals with proceedings for recovery of goods under Section 147(4) particularly where the claimant has satisfied the Court, the remedy is not outright release of the goods but subject to payment of duty and such other conditions as may be imposed. Therefore, if in any event the plaintiff would be required to pay duty, then why should the court restore the goods to the owner where it is clear that no duty was paid by the earlier owners thereof? The balance of convenience would favour the non-release, it has to be on payment of duty as earlier on communicated to the plaintiff. Should the plaintiff succeed to the extent that duty is not payable by himself, the defendant would be in a position to refund duty so levied. I am mindful that the merits of the case are not to be decided on mere affidavits but here are facts which are very much not is dispute and equally are the provisions of the law. However, I need mention, that in terms of section 161(2), there is quite high probability that the plaintiff would qualify as a person who would satisfy the court that offence in respect of which the goods were rendered liable to forfeiture was committed without the plaintiff's knowledge or content and that the goods were acquired by the plaintiff after the Commission of the said offence and that they were acquired for their true value and without knowledge that they were liable to forfeiture. Nonetheless, this Section does not exempt the plaintiff from paying appropriate duty. He is only exempt from forfeiture. It still comes down to the same point of his liability to pay customs duty now that he knows that duty was not paid.

Interlocutory injunction being a discretionary remedy, I would refuse to grant it in this case. The **status quo** would actually serve the parties interests better than otherwise

dealing with the seized goods. The Court would only urge the parties to engage into speedy trial so that the goods do not deteriorate as a result of prolonged non-use. I notice that the plaintiff's earlier stand offering to pay fair duty by instalments was positive and could have engaged the parties on an amicable out of court agreement. I am equally of the view that the Minister's powers to waive penalty on duty are far and wide. Such powers could assist innocent victims in the class of the plaintiff. Each party pays its own costs.

DATED THIS 8th day of June, 1998 in Chambers at Blantyre.

CHIMASULA PHIRI

JUDGE