IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISC. CIVIL CAUSE NO. 66 OF 1999

BETWEEN:

THE LEASING AND FINANCE
COMPANY OF MALAWI.....APPLICANT

AND

CONTROLLER OF
CUSTOMS AND EXCISE.....RESPONDENT

CORAM: HANJAHANJA, J
Mr. Kasambara of Counsel for the Appellant
Mr. Kalembera of Counsel for the Respondent
Mrs. Katunga, Official Interpreter

RULING

The Leasing and Finance Company of Malawi Limited ('The Applicant) is a money lending establishment. The applicant on application advances money on a loan to its customers who need to purchase some goods but lack money for the purchase price.

The procedure is that an agreement for sale is initially entered into. In that agreement the applicant releases a sum of money to the customer.

It is a term of the agreement that when the goods are identified the customer, upon receipt of the money, from the applicant, sells the goods to the applicant. The cash is only released when both parties have signed the agreement. The relationship then created is that of the customer as the seller and the applicant as the purchaser.

In the agreement the seller warrants that the merchandise is solely his/her/its own property, that no other party has any claim thereon by virtue of any lien pledge, landlords distress, hypothecation, bond or hire purchase agreement or by virtue of any other right or agreement whatsoever. Any breach of the warranty would entitle the applicant forthwith to declare the agreement cancelled and to claim back the purchase price with interest thereon at 55% per annum, calculated on a daily basis from the date thereof until the date of receipt of payment as well as after judgement.

After execution both parties enter into a lease agreement in which the applicant becomes the Lessor and the seller/customer the Lessee.

The lease agreement contains 13 clauses spelling out the terms and conditions agreed by the parties. I will not reproduce all the clauses for the purpose of this ruling. The lease is a lengthy document and some of the clauses may be irrelevant for the purpose of this case. I will however highlight clause 13 (a)

> *"The* lessor *shall at all times retain the ownership of the goods and the lessee shall have no interest in the goods save as provide by this agreement."*

A customer named Aziz Mohammed Issa trading as Issa's Food Products ("the Lessee") obtained a loan from the applicant under this process. He was granted a loan in the sum of K2,000,000 to purchase a Mercedenz Benz truck. He needed the truck for his transport business. The truck was used by him for international haulage.

It is the story of the Controller of Customs and Excise ("The Respondent") that on 31st August 1999, the Lessee had committed a Customs offence.

The Respondent accused the Lessee of smugglering a full load of goods in containers from Beira to Malawi by using false documents, false name of the transporter and false registration number.

Before the applicant reached his destination he met customs officials in Malawi who discovered that he had committed an offence. They seized the truck.

Subsequently the applicant received information of the seizure. A day after the seizure the applicant complained to the Respondent that the truck they had seized did not belong to the Lessee. It belonged to them. They were the owners of the truck. They made this clear in a letter they issued on 1st September, 1999 addressed to the Respondent. It says:

"Dear Sir

RE: SEIZURE OF M/BENZ TRUCK REG NO BK 7102.

We refer to the Limbamba/Lungu telephone conversation of this morning in connection with the above matter and we would like to confirm that the stated vehicle - BK 7102 - is under lease hire to Aziz Mohomed Issa t/a Issa's Food Products. He has not discharged all his obligation under the lease and therefore it remains the property of LFC.

We learned from the conversation that the vehicle was seized because it was conveying goods into the country illegally. We reiterate our contention that if at all there is a party at fault it shall be Mr. Issa and not the vehicle.

It is by this brief background that we are redemanding that the vehicle should be returned to us within 2 days; failing which we will have no option but instruct our attorney to commence legal action against your Department.

We trust you will attend this matter urgently.

Yours faithfully
THE LEASING AND FINANCE COMPANY OF MALAWI LIMITED
(signed)

Mbachazwa Lungu
CUSTOMER ACCOUNTS MANAGER

c.c. Lawson & co, P.O. Box 2074, BT Att: Mr. Tembenu"

Three weeks thereafter on 21st September, 1999 the Respondent gave their response to the applicants letter. They addressed their letter to Lawson and Company. This is what they say:

"Dear Sir

RE: SEIZURE OF M/BENZ TRUCK REG NO BK 7102

We refer to the above captioned matter and letter dated 1st September, 1999 from Leasing and Finance Company on the same.

The brief facts of the matter are such that Mahomed Issa through a lease agreement with your clients obtained the said vehicle. Contrary to the lease agreement he sold the same to Igbal Patel t/a Zaco transport.

The said vehicle was on the period from January 1999 to August, 1999 engaged in the evasion of duty by conveying full container load of goods using false names of transport operators and false registration numbers. We have evidence to that effect.

Further the said vehicle cannot be released to your client on the strength of section 161 (3) of our Customs and Excise (Cap 42:01 of the Laws of Malawi.)

We trust the forgoing is in order.

Yours faithfully
(signed)
S.A. Kalembera
PRINCIPAL ASSISTANT CONTROLLER (LEGAL)

So far up to this point there is no dispute on the facts between the applicant and the respondent.

Now comes the divergence. Mr. Kasambara criticised the decision to seize the vehicle . On behalf of the applicant he moves the court for an order of certiorari to quash the decision to seize and forfeit the truck. He attacks the Respondent for not observing the rules of natural justice. The decision was, therefore, unfairly made.

His argument is that neither the applicant nor the lessee nor Igbal Patel were given an opportunity to be heard before the forfeiture was enforced.

In reply Mr Kalembera forcibly maintains that there was no infringement of the principles of nature justice. He denies there ever was any forfeiture invoked. What happened was that only a seizure order was made pending an order for forfeiture.

He observed that the letters exchanged between the parties on 1st September and 21st September were proof enough that the Respondent was given an opportunity to be heard. Mr Kasambara dismissed this argument as without merit. He re enforces his argument by pointing out that by referring to section 161 in that letter the Respondent had already made a decision on a forfeiture.

He submitted that the section deals with innocent owners to be heard before forfeiture. The Respondent, according to Mr Kasambara, proceeded to apply the powers of forfeiture without giving the applicant as owner of the truck an opportunity to be heard contrary to section 161 (1) (a) and (b). The section says:

> "Notwithstanding the provisions of sections 159 (1) and 160, where a conveyance is liable to forfeiture under section 145 (2) such a conveyance shall not be forfeited -
>
> (a) unless and until the owner of the conveyance (if he can with reasonable diligence be found) has been given an opportunity of being heard; and
>
> (b) if the said owner satisfied the court the offence in respect of which the conveyance was rendered liable to forfeiture was committed without his knowledge or consent and that he was unable to prevent it.

Such being the facts now I turn to the law.

It is my very considered opinion that the exchange of letters in September, 1999 did not constitute "an opportunity to be heard." It cannot be. There was no meeting convened for a thorough investigation of the matter. There were no questions and cross questions at all.

It seems to me that the Respondent at or soon after seizing the vehicle knew that the applicant retained the ownership in the vehicle and therefore the the owner . This I say so because in the Respondents letter they mentioned that the Lessee breached his lease agreement with the applicant when he sold the truck to the Igbal Patel. They could only say this, in my view, because they saw and read the lease agreement between the applicant and the lessee. They must have read clause 13 (a) "the lessor shall at all times retain the ownership of the goods and the lessee shall have no interest in the goods save as is provided in this agreement."

Doubtless, it was incumbent upon the Respondent to organise or convene a meeting between them and the applicant to ask the applicant to show cause why the vehicle should not be forfeited following the custom offence committed. That the Respondent did not do.

In ***Tarmohomed v Reginam*** Vol 3 ALR Malawi series page 388, EMEJULU, J., said

> "The rules of natural justice demand that the owner of a vehicle which is about to be forfeited for some offence

> committed with the vehicle should be given an opportunity to show cause why the court shall not order forfeiture of the vehicle."

It seems to me from the facts available this vehicle was not only seized under section 146 (1)

> "Any officer or police may seize any goods or conveyance which he reasonably suspects may be liable to forfeiture,"

But the vehicle had been forfeited under section 145 (2).

> "Any conveyance which has been used without lawful authority for importation, landing, removal, conveyance, exportation or carriage, coastwise or in transit of goods liable to be forfeiture shall be liable to forfeiture."

Ridge v Baldivca 1964 A C 40 stands for the proposition that an administrative body may in a proper case be bound to give a person who is affected by their decision an opportunity of making representations. It all depends, the case further states, on whether he has some right of expectations of which it would not be fair to deprive him of his property without hearing what he has to say.

The facts before me show that the appellants have such a right or interest, some legitimate expectations to which it would be unfair to deprive it of the truck without being given an opportunity to be heard. As said earlier, I do not for a moment consider the exchange of the two

letters by the parties as a process where an opportunity to be heard was given. LORD PARKER in the *Ridge v Baldwin* case held that even where one was acting in an administrative capacity the administrative body was under a duty to act fairly.

I hold that the Respondent in applying the powers in the Customs and Excise Act acted unfairly in enforcing the forfeiture of the truck. This use of statutory power to deprive a person of his liberty or property without him being given an opportunity to be heard and making his representations on his own is indeed against the principles of natural justice. There was no investigation in order to give him an opportunity to concede or deny the allegations made against him.

Consequently, I quash the order for forfeiture. The truck must be restored and delivered back to no one else but to the applicant within the next 48 hours from today's date.

Costs to the applicant.

Made in Chambers this day of 11th February, 2000at Blantyre.

W M HANJAHANJA
JUDGE