IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

MISCELLANEOUS CIVIL CAUSE NO. 89 OF 2002

BETWEEN:

THE STATE

- and -

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

- and -

EX-PARTE: Chipiloro Phiri Anganile ..... APPLICANT

CORAM: TEMBO, J.

Ngwira, of Counsel for the Applicant

Ngutwa, of Counsel for the Respondent

Mbewe (Mrs), Court Clerk

JUDGMENT

TEMBO, J:This is an application for judicial review, at the instance of Chipiliro Phiri Anganile, the applicant. In the main, by her application, the applicant is seeking a like order to cetiorari, quashing the decision of the respondent to seize the applicant's motor vehicle and a like order to prohibition, restraining the respondent from detaining that motor vehicle. Besides, the applicant is praying for an injunction, upon being granted leave to institute these proceedings. There is affidavit evidence of the parties hereto for and against the application. The Court has received written, and has also heard, legal arguments of both counsel for and against the application.

The Facts

On 28th November, 2000, Hanleck C. Phiri (the importer) imported into Malawi a motor vehicle, which was thereafter locally registered as, MN 877. Upon importation, the importer had declared a value of R40,000 for the motor vehicle and he gave 1998 as a year of make therefor. The Customs Officers rejected the declared value. Instead, they uplifted the value of that vehicle to R80,000. They had based their estimation of the value on the year of make.

Consequently, duty was assessed, based on the estimated value, at K730,245.00. The importer duly paid that duty and an official receipt dated 28 November, 2000 was issued to him. On 29th November, 2000 the vehicle was registered first, in the name of AB's Motor Dealers of Postal Address Box 5608, Limbe and finally in the name of Mr. M. A. Weeks of Private Bag 389, Blantyre 3. Thereafter, the applicant bought the motor vehicle from Loita Investment Bank. It is not clear if Mr. Weeks works for the Bank or not.

Although the Customs officers had released the motor vehicle to the importer on 28th November, 2000 upon payment of duty by him, they immediately commenced investigations into the matter in order to verify the correct value of the motor vehicle. Such investigations, in or about April 2002, showed that the correct and true value of the motor vehicle was R130,000 at the time the motor vehicle left RSA for Malawi in 2000. Consequently, the value on which the duty paid was calculated was not correct. The false declaration resulted in the revenue being prejudiced, to the extent of the amount of K638,898.74t. In order to secure recovery of that amount, the Customs Officers, through their Commissioner General, invoked the application of SS162 and 163 of the Customs and Excise Act. Thus, an offer for amicable settlement was made by the Commissioner General to the applicant on 3 May, 2002. Among other things, by his offer, the Commissioner General required the applicant to pay a sum of K35,000.00 in addition to the full duty due. The offence committed was indicated as being in respect of one unit BMW 318i Registration MN 877; value K1,564,650.00; revenue prejudiced, then to be paid by applicant was K638,898.74t. The offence committed, then sought to be settled amicably, was false declaration contrary to section 134 (b) which is punishable under S. 142 of the Customs and Excise Act.

Thereafter, the applicant not having accepted the offer or acted in compliance with its terms, the Customs Officers issued a letter to the applicant dated 6th June 2002, as follows:-

"**SEIZURE NO. 0189173 OF 30.03.02 FOR BMW 3181 REG. NO. MN 877**

Reference is made to the notification and Form C132 that were served on you on 6 May, 2002.

Since you took an undertaking and you are not complying with it, you are finally asked to honour the agreement failing which you may see your vehicle being seized immediately."

Consequent, thereupon, the applicant instituted these proceedings for judicial review.

Judical Review: The Applicable Law

For our part, the statement of the law respecting remedies by way of judicial review starts with section 108 (2) of the Constitution of the Republic of Malawi. It is thereby provided that the High Court shall have original jurisdiction to review any law, and any action or decision of the Government for conformity with this Constitution and shall have such other jurisdiction and powers as may be conferred on it by this Constitution or any other law. Besides the foregoing, it is expedient also to note section 16(2) of the Statute Law (Miscellaneous Provisions) Act which provides that in any case in which the High Court

in England is, by virtue of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom empowered to make an order of **mandamus**, prohibition or **certiorari**, the High Court shall have power to make a like order.

Applications to the Court for remedies by way of judicial review are regulated by Ord. 53 of the Rules of the Supreme Court (R.S.C.). Thus, as per rr1, 2 and 3 of Ord. 53 an application for an order of **mandamus**, prohibition or **certiorari** shall be made by way of an application for judicial review in accordance with the provisions of this Order. An application for a declaration or an injunction may be made by way of an application for judicial review, and on such an application the court may grant the declaration or injunction claimed if it considers that, having regard to -

(1)the nature of the matter in respect of which relief may be granted by way of an order of mandamus, prohibition or **certiorari**;

(2)the nature of persons and bodies against whom relief may be granted by way of such an order; and

(3)all the circumstances of the case,

it would be just and convenient for the declaration or injunction to be granted on an application for judicial review. No application for judicial review shall be made unless the leave of the court has been obtained.

In the case of **Council of Civil Service Unions and Others -v- Minister for the CivilService** (1985) A. C. 374, 408, 410, 414, in particular passages in the speeches of Lord Diplock and Lord Roskill are very instructive on the matter under consideration. In the words of Lord Diplock -

“Judicial review, now regulated by R.S.C., Ord. 53, provides means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (body of persons) whom I will call the “decision maker” or else a refusal by him to make a decision.

To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect that other person (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or (b) by depriving him of some benefit or advantage which either he had in the past been permitted by the decision-

maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some grounds for withdrawing it on which he has been given an opportunity to comment; or he has received assurance from the decision-maker which will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn...

For a decision to be susceptible to judicial review the decision-maker must be empowered by public law to make the decisions that, if validity made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers, which have one or other of the consequences mentioned in the preceding paragraph.

One can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety" ... By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (**Associated Provincial Picture House Ltd -v- Wednesbury Corporation** (1948) 1 K.B. 223. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer or else there would be something very wrong with our judicial system. I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

In the words of Lord Roskill -

"Historically the use of the old prerogative writs of **certiorari**, prohibition and **mandamus** was designed to establish control by the Court of King's Bench over inferior courts or tribunals. But the use of those writs, and of their successors, the corresponding prerogative orders, has become far more extensive. They have come to be used for the purpose of controlling what would otherwise be unfettered executive action whether of central or local government. Your Lordships are not concerned in this case with that branch of judicial review which is concerned with the control of inferior courts or

tribunals. But your Lordships are vitally concerned with that branch of judicial review which is concerned with the control of executive action. This branch of public or administrative law has evolved, as with much of our law, on a case by case basis and no doubt hereafter that process will continue. Thus far this evolution has established that executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review upon what are called, in lawyers' shorthand, Wednesbury principles (**Associated Provincial Picture Houses Ltd -v- Wednesbury Corporation** (1948) 1 K. B. 223. The third is where it has acted contrary to what are often called "principles of natural justice". As to this last, the use of this phrase is no doubt hallowed by time and much judicial repetition, but it is a phrase often widely misunderstood and therefore as often misused. That phrase perhaps might now be allowed to find a permanent resting-place and be better replaced by speaking of a duty to act fairly ... My noble and learned friend, Lord Diplock, in his speech has devised a new nomenclature for each of these grounds, calling them respectively "illegality", "irrationality" and "procedural impropriety" - words which, if I may respectfully say so, have the great advantage of making clear the differences between each ground.".

Let me only add the observation that the duty to act fairly or to do so in accordance with the rules of natural justice has been enshrined in section 43 of the Constitution of the Republic of Malawi, which makes provision on administrative justice.

It is expedient to note at this stage that what the Customs officers seek to recover from the applicant, the underpaid duty, is a matter which is expressly regulated by S.91 of the Customs and Excise Act, as follows:

"When any amount of duty has been underpaid ... the person who should have paid such duty ... shall pay such amount ... on demand being made by the proper officer.".

In the view of the Court a proper reading and understanding of S.91 entails the following: that if any amount of duty is underpaid, the importer who ought to have paid it in the first instance ought to be called upon so to do. That section, therefore, would not, and it does not, affect the position of third parties who, subsequent upon underpayment of duty, are innocent buyers of those goods without notice of the duty underpayment. The use of the legislative expression "shall" in S. 91clearly signifies the making of a mandatory provision in that regard.

Consideration and Determination of Issues Raised

To begin with, and regard being had to the evidence, the Court accepts the view that this is a proper matter for judicial review and that the applicant has **locus standi**. The applicant is the owner of the motor vehicle subject to underpayment of duty. She is not the importer who made the undervaluation or so declared. She bought the car after the car had changed hands several fold, thus she says that she bought it from the Bank. The blue book clearly shows who the first two owners were: thus AB's Motor Dealers and Mr. Weeks, in that order. The respondent are the ones who are asserting the affirmative that the applicant is not owner. It is, therefore, incumbent upon them to prove their assertion on a balance of probabilities. The view of the Court is that the respondent have not succeeded in doing so, hence the finding of the Court that the applicant is the 4th owner of the BMW motor vehicle in question. If she bought it from the Bank, it makes sense, in that there were two other earlier owners of the same as specified above: AB's Motor Dealers and Mr. Weeks. Before resting on that point, it suffices for the Court merely to state and note that the Malawi Revenue Authority and its servants or employees are a public entity whose decisions, if complained against, are amenable to judicial review by this Court.

However, regard being had to the evidence, it cannot be said that the respondent's decision in question ought to be vitiated on grounds of irrationality or procedural impropriety. The evidence clearly shows that the respondent officers have been in constant touch with the applicant and that the applicant has not been denied any chance to be heard on the matter. In that regard, it is expedient to note that when the motor vehicle had been seized it was released to the applicant subsequently on account of such process of affording the applicant a chance to be heard. It is true, regard being had to the evidence, that there was an offence committed by the importer who made a false declaration as to the value of the motor vehicle upon its importation. The measures, therefore, taken by the respondent to secure recovery of the underpaid duty were not unreasonable **per se**. Given that to be the position, the applicants's prayer for an order of the Court to vitiate the decision of the respondent on the ground of irrationality or procedural impropriety cannot be sustained. The applicant's prayer in that respect is dismissed accordingly.

Be that as it may, the position of the Court is otherwise when it comes to the consideration and determination of the prayer of the applicant, therefor, on the ground of illegality, thus **ultra vires** or error of law. The seizure of the applicant's motor vehicle, at the instance of the respondent, is expressly for the purpose of obtaining further payment of duty respecting the underpaid duty by the importer. The fact that the respondent would wish to recover the underpaid duty is not an issue, given the fact that there was a declaration by and of the importer in which the value of the motor vehicle was grossly undervalued: thus R40,000, which was uplifted to R80,000 by the respondent's officers, instead of R130,000. The resulting loss in revenue was about K.7 million. However, although such is the position, the question for the determination of the Court is: from whom ought the respondent to recover the underpaid duty in the circumstances? On their part, the respondent elected to proceed against the applicant, hence the seizure notice

issued to her and the offer for the settlement of the matter pursuant to SS 162 and 163 of the Customs and Excise Act, then made to the applicant by the respondent's Commissioner General. Was the action of the respondent one which was or is justified in law? Regard being had to S. 91, of the Customs and Excise Act, the Court does not give an affirmative response to that question. The ground of illegality or**ultra vires** entails that the decision maker must understand correctly the law which regulates his or her decision making power and that he or she must give effect to it. Illegality, therefore, involves want or excess of jurisdiction. S. 91 enjoins the respondent to require that the duty underpaid be paid by the person who should have paid such duty, thus in the instant case, the importer.

It is quite clear, given the evidence, that the applicant was not and is not the importer in question. The respondent have the particulars of the importer and it is not even suggested that the respondent have had trouble or any difficulty in tracing or knowing the whereabouts of the importer. Besides, there is no suggestion or proof of the fact that the applicant had any knowledge of the underpayment of duty in question or had been somehow guilty of causing it, at the time the applicant acquired the motor vehicle in question. It is abundantly clear that by the time the applicant had acquired ownership of the motor vehicle, the declaration in which the undervaluation was given or made had long been made by the importer, duty payable based thereupon had been paid by the importer and the motor vehicle had been released to him and was duly registered as MN 877 by the Road Traffic Commissioner, without any caution as to the underpayment or undervaluation of duty being flagged or howsoever being raised. Given those circumstances, the applicant can only be characterised as an innocent buyer of the motor vehicle in question without any notice of the undervaluation and underpayment of duty in that regard. In the circumstances the decision and action of the respondent in requiring duty to be paid by her, in respect of the underpaid duty by the importer, must be and is faulted on the ground of illegality or **ultra vires**. Consequently, the applicant's prayer succeeds in that regard and it is so ordered. For avoidance of doubt, this decision shall operate so as to merely prohibit the respondent from further seeking to recover the underpaid duty from the applicant and to prohibit any further seizure and detention of her motor vehicle, in that regard. The respondent would be perfectly entitled to take a further action for that purpose against the importer of the motor vehicle, thus acting in compliance with S. 91 of the Customs and Excise Act.

On costs, the Court accepts the submission of Mr. Ngutwa, respecting the prayer, that the Court should make no order as to costs pursuant to S. 154 (2) of the Customs and Excise Act. Given the circumstances of the instant case, this is an appropriate case in regard to which no order as to costs ought to be made. Thus, the effect of it is that each party ought to pay own costs. It is so ordered.

MADE in Chambers this Wednesday, 12th day of March, 2003, at Blantyre.

A. K. Tembo

JUDGE