IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL APPEAL NUMBER 83 OF 2005

BETWEEN:

THE MALAWI REVENUE AUTHORITY……...…..APPELLANT

- AND -

AZAM TRANSWAYS……..……RESPONDENT

CORAM: THE HONOURABLE MR JUSTICE J S MANYUNGWA

Mr Ngutwa, of Counsel, for the Appellant

Mr Changwamnjira/Mr Mpaka, of Counsel, for the Respondent

Mrs V Nkhoma – Official Court Interpreter

J U D G E M E N T

Manyungwa, J

INTRODUCTION:

This is the respondent's summons for damages made pursuant to section 153 of the Customs and Exercises Act, herein after referred to as the 'Act' on the grounds that the appellant's Commissioner General conducted himself with malice and not in good faith towards the respondent when the appellant seized the respondent's trucks. The application is supported by an affidavit of Mr Munir Tarmohomed. There is an affidavit in opposition sworn by Mr Henry

Ngutwa, Counsel for the appellant herein. The respondents also filed their skeleton arguments with the court. The brief facts are that the respondents, who are a trucking company had their four (4) trucks and trailers impounded by the appellant sometime in June, 2005. The respondent argued in the lower court that the seizure by the appellant of the trucks was unlawful as the respondent had not committed any offence under the Act. On 24th October, 2005, the learned Chief Resident Magistrate ordered that the trucks herein referred also to as conveyances which were hitherto being detained by the appellant be released to the respondent. Not being satisfied with the learned magistrate's Order, the appellant appealed against that order in this court, and after hearing arguments from both parties on appeal, the High Court, on 13th day of March, 2006 dismissed the appellant's appeal. It is in the light of this background that the present application came to me on 26th March, 2006 on which the ruling of this court was reserved. I now proceed to pronounce my ruling.

THE EVIDENCE:

It is deponed by Mr Munir Tarmahomed that he is the Operations Manager for Azam Transways responsible for all Malawi Operations. It is stated on behalf of the respondent that on 20th June 2005 Truck Number PE 661 – BL 3961 arrived at Mwanza Boarder where the appellant's officers issued a Dentention Notice B 013223 asking for cleared documents. The deponent avers that three other trucks namely PE 660, PE 663 and PE 657 were detained in a similar manner. The said trucks were impounded because the appellant was demanding that the respondent had to give MRA clearance documents for the goods the respondent carried in 2004. The respondent is a trucking company that carries on international transport business for a reward and operates amongst other destinations Malawi and South Africa. On divers dates between the months of January and May, 2004 the respondent's trucks carried various goods for importers in Malawi through the Mwanza Boarder. Sometime in June, 2005, the appellant seized the respondent's four (4) trucks on the ground that the respondent's trucks did not deliver the goods to Malawi Freight Limited. The respondent exhibited copies of the Detention notices namely MT1 (a) and (b). The respondent further contended that they provided the information as much as they could gather to the appellant as is appearing on paragraph 2 of Mr Munir Mahomed's affidavit showing ***inter alia***, the truck and trailer numbers, importers name, Authority to Proceed Number(s) and dates, description of goods and alleged revenue involved which in all totaled to

MK9, 356,676.92. The respondent therefore contended that despite providing the names of the importers, and despite providing aquitted ATP's to the appellant which clearly showed where the goods had gone, the appellant still detained the respondent's above named four trucks.

It is further stated that when the respondent failed to reason with the appellant and after exhausting all avenues, the respondent finally sought legal assistance and the lower court under Civil Cause Number 2033 of 2005 ruled that the appellant had to release three of the four trucks back to the respondent whilst the appellant held on to one truck pending the conclusion of the matter. The respondent further avers that following this order, all the trucks were released except one, for a period of just one week and then the trucks were re – impounded and remained detained for a total period or 9.42 months. The respondent therefore contended that the appellant did not act with care and further did not act in good faith and therefore maliciously went on holding the 4 trucks and four trailers over a period of almost 9½ months. It is further stated that at the time the respondent made all efforts to have the trucks and trailers released and had explained to the appellant that they were only transporters and not importers or exporters. Moreover, the respondent had proved to the appellant that they had followed all laid-down procedures from point of entry to point of off-loading but that instead of the appellant punishing the importers, they punished the respondent who are mere transporters. The respondent therefore contends that the appellant's conduct was very unreasonable in holding on to all the 4 trucks and 4 trailers for 9.42 months without assessing the effects of their action on the respondent and that if this behaviour is left unchecked innocent companies will collapse in view of this unacceptable behaviour. As a result, the respondent argues that since then its company is suffering since the respondent's plea to the appellant to hold on to 1 truck and 1 trailer, while investigations were going on fell on deaf ears. Further, the respondents state that the lower court's order that the trucks had to be released except one truck, was only effective for 1 week, after which the trucks were further re – impounded, and yet this was after the respondents had made a similar proposal that only one truck be kept by the appellant. This proposal was made in view of the fact that one truck and one trailer is worth over MK9 million which in the respondent's view was enough to satisfy the fine. The respondent therefore argued that from the lower courts ruling, the appellant should have known at least that they did not have a very good case against the respondent and they should have therefore cared to release the trucks back to the respondent, and that if anything

hold on to only one truck and one trailer, so as to enable the respondent continue with its business operations but that this notwithstanding the appellant still held on to all four trucks and their trailers. The respondent therefore argues that the appellant's conduct herein has caused the respondent loss of income for a period of 9.42 months, and the respondent therefore prays that the court should award them damages for loss of business as the said action by the appellant's was done in bad faith. The respondent therefore argues that the appellant's conduct is malicious and not made in good faith in view of the following observations:-

First of all, one truck and trailer would have been sufficient for the alleged fine which had been assessed at MK9 million, and that a proper officer acting in good faith would have caused a valuation of all the trucks and only have kept only those that were enough to pay for the debt. The decision therefore to keep all the 4 trucks and 4 trailers valued at MK36 million, for a possible fine of MK9 million is acting in bad faith and clearly malicious. Secondly, impounding trucks for a transporter who is not the importer of the goods and who had complied with all the requirements then i.e. obtaining and delivering a completed ATP and impounding the trucks when the said trucks were coming from South Africa, on a different trip is ***mala fides***. Thirdly, the respondents argued that when a truck passes through Mwanza Boarder an Authority to Proceed (ATP) is issued, and that one can not pass through the boarder without one being issued. In each particular case, the respondent's drivers were given an ATP form, which had an address of the importer, who was also the consignee and the bonded warehouse which is also a clearing agent for the appellant. Once goods are delivered at a bond, the ATP's were being sent to the appellant's Blantyre (Dry) Port, and the acquitted ATP's which are received from Clearing Agents were surrendered at the Boarder. The respondent avers that all his trucks complied with this procedure, and exhibited the copies of the said ATP's marked as exhibits MT 2 (a) (b) (c) and (d).

The respondent therefore contends that a responsible customs officer should have gone to the consignees as provided on ATP or the Customs Bonded Warehouse, which is also the appellant's Clearing Agent, where the goods were cleared and thereafter off-loaded instead of impounding and detaining 4 trucks and 4 trailers that had carried and off-loaded the suspected goods one year after the suspected transactions, and the respondent contends that such a decision to leave the

consignee out is clearly ***mala fides***. Further, the respondent contends that even Mr Chikudzu in his affidavit, who is the Senior Customs Officer demonstrates that he agrees that the ATP's showed different consignees with Malawi Freight Limited bond and that all the returned ATP's had Malawi Freight Limited's stamps therefore demonstrating due receipt of goods and yet this clearing Agent was never prosecuted whilst the respondent's four (4) trucks and trailers were seized.

The respondent therefore contends that a reasonable customs officer acting in good faith should have taken issue with the consignees and clearing Agent, who received the goods and not the respondent, a mere transporter. The respondent argued that the net profit as particularized in his affidavit per trip is ZAR 16, 746.00, and that a truck on average makes three round trips between Malawi and South Africa. The respondent prayed for damages for the 4 trucks, 3 trips per month for the period of 9.42 months at a net profit of ZAR 16,746 totaling to ZAR 1, 892967.84.

The appellant vehemently opposes the application and in an affidavit in opposition sworn by Mr Ngutwa, it was argued on behalf of the appellant that under section 35 of Act, a transporter has the duty to account for the imported goods and that if he fails to do so he faces the same liability as the importer. Further, it is argued on behalf of the appellant that under section 92 of the Act, the respondent can while the goods are under its control, hold any goods for an importer on any person liable to pay duty on previously imported goods as a lien for the duty was not paid by the said importer or other person. Further the appellant argued that section 153 of the Act does not give any party a right to commence proceedings against the respondent, and as such the respondent's summons herein are ill-founded, vexations and frivolous. Further, the appellant argued that the respondent's summons raises issues that ought to have been litigated upon before and in therefore a clear abuse of the Court under Order 18 r 19 of the Rules of the Supreme Court. It is further contended on behalf of the appellant that this matter was previously adjudicated upon and a court of competent jurisdiction came up with a final order. That the issues raised in the summons ought to have been previously raised by the respondent, therefore the matter herein is caught by the principle of ***res-judicata*** and that the respondents are estopped from making this claim. Further, the appellant argued that even if the summons herein be said to be regular and that the application herein is founded in law, the appellant would not be liable to

pay damages by virtue of section 154(2) of the Act. The respondent therefore denies that their action to detain the respondents' vehicles under the Act was malicious and not in good faith.

ISSUES FOR DETERMINATION:

The main issue for determination by this court is whether in seizing or detaining the respondent's trucks and trailers, the appellant acted maliciously and in bad faith ***mala-fides*** towards the respondents. If so, whether damages are payable.

THE LAW:

The starting point is section 153 of the Act which is in the following terms:-

> Section 153 "Except as otherwise specifically provided in the customs laws, no claim shall lie against the Government, the Department, the controller, (Director General), nor any officer for anything done in good faith under the powers conferred by the customs laws.

Admittedly, section 153 of the Act grants general immunity to the Government, the Department of Customs and Excise now called Malawi Revenue Authority, the Controller now called the Director General or any officer for anything done in good faith. Clearly, this means in as far as the actions of the appellant are done in good faith under the powers conferred on them, then no claim would lie. the lie. However, the wording of the section clearly suggests that this would only be so where the act is done in bad faith. In my most humble opinion, the section conversely means, where one is able to show or prove that the appellant's actions were done in bad faith, or were ***mala-fides*** then a claim in damages would lie against the Government, the Department, the Director General or any officer as the case may be. According to Mozleys & Whitleys Law Dictionary, Eleventh Edition, the word "good faith" is defined as:-

> "[A]thing is deemed to be done in good faith where it is, in fact done honestly whether it is done negligently or not."

This then means that the appellant would generally have immunity as long as its actions are reasonable and done in good faith. Where however, the appellant's actions are in bad faith, them damages would be claimable, notwithstanding that section 154 of the Act states no damages can be claimed.

Section 154 of the Act provides as follows:-

S154(1) "Where under the provisions of the customs laws any proceedings may be brought by or against the Controller, then the Controller may sue or be sued by the name of the Controller of Customs and Exercise and may for all purposes be described by that name.

(2) Where any proceedings are brought against the Controller under Customs and judgment is given against Controller then, if the court before which such proceedings are heard is satisfied that there were reasonable grounds for the action giving rist to the institution of the proceedings, anything seized or the value thereof, but shall not otherwise be entitled to any damages and no costs shall be awarded to either party.

Provided that this subsection shall not apply to any action brought in accordance with sections 20 and 174.

(3) Except as provided in subsection (2), where any proceedings are brought by or against the Controller, costs may be awarded to or against the Controller.

(4) Where under the provisions of the Customs laws any proceedings are brought by or against the Controller and

(a) any sums or costs are recovered by the Controller, such sums or costs shall be credited to the revenue

(b) any damages or costs are ordered to be paid by the Controller, such damages or costs shall be paid out of monies appropriated."

It must be understood that the damages being referred to here are the ones that would be awarded where a matter falls under the provisions of Sections 20 and 174 of the Act. The claim here is under section 153.

Although, it was argued strongly in my view, by Counsel for the appellant that section 154 of the Act as quoted above, that no damages would be payable, the section in my opinion should be understood is on a supposition that the appellant acted on good faith. Then damages would not be claimed unless the claim under section 154 the claim is brought in accordance with section 20 or 174 dealing with a claim for damages for damage to premises or goods or property and negligence on the part of officers of the appellant respectively. Where however the appellant acts in bad faith, then under section 153 a person who suffers as a result of the appellant's acting in bad faith can file a claim for damages. As can be seen from the provisions of section 153, the immunity given to the appellant is only general, covers situations where the appellant acted in good faith, and that where this is lacking then an action may lie. Good Faith in my opinion, in the instant case demanded that the appellant had to regard the interests of the respondents when it impounded or seized the respondent's trucks as being paramount. See ***New Building Society V Mumba*** MSCA Civil Appeal Number 26 of 2005.

Further, the case of ***Dimon (Malawi) Limited V Malawi Revenue Authority*** Civil Cause Number 1041 of 2002, that was referred to me by counsel for the appellant, is clearly in my opinion distinguishable. That case, as my brother judge Kapanda, J adumbrated comprehensively dealt with the issues that were before it, dealt with the provisions of section 154 of the Act, and not section 153. The matter that is before me is one of "bad faith", and in as far as this is concerned the decision in ***Dimon (Malawi) V Malawi Revenue Authority*** is of little or no help at all and if I may add, irrelevant to the issues under determination. Section 153 of the Act is not discussed in that case, neither was the issue of good faith or even bad faith. Good faith, on the part of the appellants in the instant case would have entailed that the appellants had to keep holding on to

the respondents vehicles (trucks and trailers) only for a good reason and that this was not good faith. So far the uncontroverted evidence of the respondents is that the amount of revenue involved and demanded by the appellants was MK9, 356,676.92. The respondents contention was that this was equal the value of one truck and one trailer, and the argument that the appellant should have only kept one truck and one trailer instead of keeping all the four(4) trucks and 4 trailers with a total value of over MK36, million. Further good faith in the instant case, in my view would have presupposed that the interest of the appellant, if at all was only limited to MK9.5 million, which they had themselves calculated and therefore to hold goods worthy MK36 million, was surely not acting in good faith. Moreover to hold such trucks with an immence value, for a period of over 9 months when the appellants knew that that the respondents used the chattels for business is itself in my view acting in had faith, especially when one considers that, if the claim for revenue proved successful then the appellant would need the money from the respondent, which in any event could only have been realized from the use of the chattels was in itself an act of bad faith.

Further, when the matter came in the lower court, Counsel for the respondent made a prayer that as the amount of revenue in question was roughly, Mk9 million, which was nearly the equivalent of the value of one truck, and that therefore the appellant was requested to only hold on to one truck and trailer, which request was turned down by the appellant although the lower court made a similar order, which when the appellant appealed to this court was dismissed. As a matter of fact, this court found that the continued detention or seizures of the respondent's vehicles was clearly unlawful. Moreover, the evidence on record shows that the respondent followed all the laid down procedures from point of entry to point of off-loading, and that the information requested by the appellant on goods that were carried by the respondents in 2004 was provided to them. Such information clearly showed the trucks in question and their corresponding trailers, importers names, ATP Numbers date and description of goods and the alleged revenue involved. However despite all this the appellant still insisted on detaining the four trucks, whose total value was MK36 million. This action by the appellant could not in my most humble view be justified. Even the fact, as was argued by Mr Ngutwa, that there was a stay order, since when the matter came to this court on appeal, the appellants appeal was dismissed in its entirety. The fact still remains in my considered opinion, that the appellants actions in detaining all the four trucks

contrary to the order that was made by the lower court was not only wrongful but was unreasonable and in bad faith as the Order from this court was in tandem with the lower court's order. By reason of the foregoing and on the basis of the circumstances it is my finding that the appellants herein, namely, the Malawi Revenue Authority did not act, in good faith and that they accordingly acted in bad faith contrary to the spirit of the provisions of section 153 of the Act, hence the appellants are liable in damages. Accordingly, to it is my finding further that section 154 of the Act is not applicable here as the claim is founded on the ground that the appellants did not act in good faith as is required of the them by law under section 153 of the Act. The appellants, in my view, failed to observe or carry out the obligation that is placed on them under section 153, to wit to act in good faith, and that failure to so acts in good faith or that where the appellants act in bad faith, then an action for damages would lie. Further, it must be understood that the argument by the appellants that the appellant is immune from legal actions as per section 153 falls short of being sound as it is unconving. Firstly, as I have already found the immunity would only apply where as is envisaged under the section, the appellant acts in good faith. The finding of this court is clear that the appellant did not act in good faith. Secondly, under the new democratic dispensation, no person or institution is above the law. To say that the appellant is immune to legal proceedings as where like here it acted in bad faith, is akin to saying that the appellant can act with impurity. In my most considered opinion, this can not be. Section 12(1) of the Constitution is enlightening on this aspect. The said section provides:

> S12 "This Constitution is founded upon the following underlying principles-
>
> (V1) all institutions and persons shall observe and uphold the Constitution and the rule of law and no person or institution shall stand above the law.

Clearly therefore, where the appellant is guilty of bad faith or ***mala fides***, then the plea that it is granted immunity by virtue of section 153 does not hold. The plea of immunity can only be available to the appellant only where the appellant acts in good faith. Section 153 therefore does not give the appellant"blanket" immunity.

Let me now at this juncture turn to the issue that was raised by Counsel for the appellant, that this action is ***res judicata***, to wit that the same issues were adjudicated upon and determined between the parties. Mozley and whiteley's ***Law Dictionary*** 11th Edition, Butterwoths defines a matter as being ***'res judicats'*** as being a matter which has been adjudicated upon. In the case of ***Inspector of Taxes V Sacranie*** [1923 -60] AL Mal 615 at 621, the Chief Justice Spencer Wilknson had this to say:

> "The matter does not, however stop here. It is stated in the Annual Practice, 1958 at 577 that … '[I]f a party seeks to raise a new a question which has already been decided between the same parties by a court of competent jurisdiction this fact may be brought before the court by affidavit, and the statement of claim, though good on the face of it, may be struck out and the action dismissed; even though a plea of ***'res judicata'*** might not strictly be an answer to the action, it is enough if substantially the same point has been decided in a prior proceeding."

And Lordd Pensance in ***Wytcherley V Andrews*** (1871), LR 2 P & 327 had this to say on the topic:-

> "There is a practice in this court by which any person having an interest may make himself a party to a suit by intervening and it was because of the existence of that practice that the judges of the Prerogative Court held that if a person, knowing what was passing was content to stand by and see his battle fought by somebody else in the same interest he should be bound by the result, and not be allowed to re-open the case.

As was noted by Chief Justice Spencer Wilkinson in the ***Sacranie case***, there is a lot of case authority in support of the proposition quoted above in the annual practice. In the case of ***Badar***

Bee V Habib Merican Noordin [1909] AC 615 at 623 101 LT, 161 it is stated in the judgement of the Privy Council:-

> "It is not competent for the court in the case of the same question arising between the same parties to review a previous decision is wrong it ought be appealed from in due time."

Further, it must always be borne in mind that for the defence of ***res judicata*** to be successful, it must be shown firstly that the same parties were involved in the former, as well as the present proceedings. Secondly, it must be shown that the same issues were involved in the former proceedings as are in the present proceedings and thirdly that a final order was made by a court of competent jurisdiction. In the case of ***Mbilizi V Nkhata*** 8 MLR 223 Justice Jere, as he then was stated thus:

> "The question of ***res judicata*** is a principle applicable in this country. Lord Blackburn in ***Lockyer V Ferryman*** [1877] 2 App Cas 519 at 530; 'The object of the rule of ***res judicata*** is always upon two grounds – the one on public policy that is in the interest of the state that there should be an end to litigation, and the other, the hardship on the individual, that he should be vexed twice for the same cause' ."

Further, the defence of ***res judicata*** can not be raised unless it is specifically pleaded Lord Reid in the case of ***Carl – Zeiss – Stiftung V Rayer*** [1967] AC 853; [1966] 2AllER at 550 discusses the matter as follows:-

> "The general principle is clear that the earlier judgment relied on must have been a final judgement, and that there must be identity of the parties and of subject – matter in the former and in the present litigation…"

Clearly therefore the defence of ***res judicata*** is only successful where there is identify of the parties and also the subject matter or the issues both in the former as well as the present proceedings. The matter that came before the lower court was on the release of the vehicles that had been seized by the appellant as belonging to the respondent. Although, the proceedings both in the lower court and in this court involved, the same parties, admittedly the issues under determination are different. There it was that the respondent's vehicle had been wrongfully seized under section 146 of the Act, and the respondent was praying for their release, while, in the present proceedings the respondent's main contention is that in so acting, seizing and detaining the said trucks, the appellants acted ***mala fides***. I fail to see any identity or indeed similarity in the issues in the instant proceedings and those that came both before the lower court and High Court. Accordingly, I do find that the defence of ***res – judicata*** is not made out, it is not available to the appellant and I accordingly dismiss the appellant's plea of ***res – judicata***.

Finally, let me deal with the question that the appellant raised that the respondent can not claim damages against the appellant by way of Originating Summons and that the respondent should instead have commenced the claim for damages by a Writ of Summons under Order 5 of the Rules of Supreme Court because as was argued by Counsel for the appellant there has to be a pleading. However, Mr Chagwamnjira for the respondents counter-argued that it is not entirely correct that every time one wants to make a claim for damages, then the same has to be made by Writ of Summons. Counsel, cited Order 53 of the Rules of the Supreme Court, where in an application for judicial review under Order 53 rule 7 (1) the court may on an application for judicial review, subject to rule 7(2) award damages to the applicant, if the said applicant has included in the statement in support of his application for leave, a claim for damages arising from any matter to which the application relates and secondly where this court is satisfied that if the claim had been made in a action begun by the applicant at the time of making his application, he could have been awarded damages. However, let me state clearly that this is not an application for judicial review, suffice to say that such an application, one can also claims for damages. Further, Mr Chagwamnjira argued that the prayer for damages is not completely outside the scope of Order 5. Order 5 rule 4 is in the following terms:-

Order 5 r 4(1) "Except in the case of proceedings which by these rules or under any act are required to be begun by writ or originating summons or are required or authorized to be begun by originating motion or petition proceedings may be begun either by writ or by originating summons as the plaintiff considers appropriate

(2) Proceedings-

(a) in which the sole or principal question at issue is or is likely to be, one of the construction of an Act or of any instrument made under an Act, or of any deed will, contract or other document or some other question of law, or

(b) in which there is unlikely to be any substantial dispute of fact.

The court was called to determine whether the acts of the appellant amounted to bad faith under section 153 of the Act. Undoubtedly this fits very well into Order 5 rule 4(2) (a), in that the court had to determine whether of the appellant was guilty of bad faith, then a claim for damages would lie against the appellant. This is a matter of both law and fact. Secondly as has been demonstrated and argued by Counsel for the respondent, there was hardly any dispute as to matters of fact, the factual issues raised by the respondents were as matter of fact uncontroverted. I therefore find that the respondent's originating summons was perfectly within the purview of order 5 rule 4 of the Rules of the Supreme Court.

CONCLUSION:

In these circumstances and by reason of the foregoing, I do find that the appellant acted in bad faith when it seized and detained the respondent's four (4) trucks and trailers, and that I am satisfied that the respondent thereby suffered damage and as a result of loss of business, as the

respondents were deprived use of their 4 trucks and trailers for a period of 9.41 months, at a net profit of R16, 746.00 at 3 round trips per month. On the basis of foregoing, I consequently award the respondents the sum of ZAR 1,892,967.84 being loss of income.

PRONOUNCED in CHAMBERS at Principal Registry, Blantyre this 16th day of April, 2007.

Josleph S Manyungwa

JUDGE

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