



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**JUDICIAL REVIEW CAUSE NUMBER 41 OF 2016**

**BETWEEN:**

**THE STATE**

**AND**

**CONTROLLER OF CUSTOMS AND EXCISE**

**RESPONDENT**

**EX PARTE: MARY LEONARD MTELEMUKA**

**APPLICANT**

**CORAM: JUSTICE M.A. TEMBO**

Chipeta, Counsel for the Applicant  
Likomwa, Counsel for the respondent  
Chanonga, Official Court Interpreter

**ORDER**

This is an order of this Court on the respondent's preliminary objection to the judicial review proceedings commenced by the applicant after obtaining leave, ex-parte, to commence judicial review proceedings in this matter.

This Court granted leave to commence judicial review proceedings to the applicant to review the respondent's decision to raise the customs value of the applicant's imported motor vehicle, a Toyota RunX, from its actual transaction value of US\$1,100.00 to US\$2,660.00. And also the decision of the respondent to detain the applicant's said vehicle pending payment of duty on the raised customs value of



US\$2,660.00 when the applicant has already paid duty the respondent charged her on the actual transaction value of US\$1,100.00. The applicant sought various declarations including that the respondent's conduct was unreasonable, unconstitutional and invalid.

The applicant also sought an order of this Court that the respondent's decision be stayed pending determination of the judicial review proceedings. This Court declined to grant that order ex parte and ordered that the application for the said order should be heard on notice to the respondent. On the return date for the application for stay the respondent filed a preliminary objection to the proceedings herein and sought dismissal of the proceedings on the ground that the proceedings should have been brought first before the Special Referee in accordance with section 121 of the Customs and Excise Act. This Special Referee is the Resident Magistrate Court.

The argument of the respondent is therefore that the applicant has an alternative remedy to judicial review.

It must be pointed out that section 121 of the Customs and Excise Act provides that

(1) If a dispute arises between the owner of any goods and the Controller as to the amount of duty payable on those goods, the owner may, if he pays the amount demanded as duty by the Controller or furnishes security to the satisfaction of the Controller for the payment of that amount, within three months after the payment or furnishing of security, appeal to the Special Referee against such demand.

(2) If a dispute arises as to the amount of duty payable in respect of goods which a person proposes to import or manufacture he may appeal to the Special Referee at any time prior to such importation or manufacture but if he imports or manufactures the goods before the dispute has been determined he shall pay such amount of duty as the Controller shall demand or give security therefor.

(3) A notice of appeal shall be in writing and shall state clearly and specifically the grounds of the appeal.

(4) The date of the hearing of any appeal shall be determined by the Special Referee.

(5) Where the appeal arises solely as a result of the Controller's classification of goods for tariff purposes the Special Referee shall publish in the Gazette the date of the hearing of the appeal at least one month prior to that date, and any person who satisfies



the Special Referee that he has a legitimate trade interest in the appeal and who not later than ten days before that date enters an appearance in the manner specified in the notice may be heard on the appeal.

(6) On the hearing and determination of any appeal the Controller, or any person authorized by him, may appear in support of his decision, and the appellant and any person who has entered an appearance in accordance with the provisions of subsection (5) may appear either in person or by a legal practitioner.

(7) The Special Referee may on any appeal confirm or set aside the demand or assessment made by the Controller and, if he sets aside such demand or assessment, shall refer the matter back to the Controller with such observations as he considers proper.

(8) Where the Special Referee refers the matter back to the Controller, the Controller shall make a new demand or assessment and if such new demand or assessment is for a lesser amount of duty or no duty, then notwithstanding the provisions of section 100 any amount of duty overpaid shall be repaid by the Controller.

The applicant agreed with the respondent that where a dispute involves the amount of duty payable under the Customs and Excise Act then the challenge must be made before a Special Referee. The applicant however argued that the challenge in this matter goes deeper than against the value of duty payable. The applicant argued that she is challenging the decisions made by the respondent in terms of valuation.

This Court notes that in fact when it dealt with the papers of the applicant ex parte the question of alternative remedy did exercise this Court's mind. There was some doubt about the actual nature of the dispute. Hence leave was granted.

However, upon further careful reflection on this matter in view of the instant preliminary objection this Court has come to the conclusion that the dispute herein is really about the amount of duty payable. This is the case no matter how the applicant tries to explain that she is challenging the decisions by the respondent. At the end of the day the dispute is about the amount of duty payable for whatever reason. In that case, this Court agrees with the respondent that its preliminary objection is well taken.

In that case, the applicant should have challenged the respondent's determination on value of duty payable before the Special Referee prior to seeking this Court's

intervention. The applicant therefore has an alternative remedy to judicial review that she must resort to before coming to this Court.

Where there is an alternative legal remedy judicial review cannot lie. See *Ex Parte Chiombankhanga* [2009] MLR 209.

In the foregoing premises, where the applicant clearly has a statutory alternative remedy the leave to commence judicial review proceedings obtained herein was obviously misplaced and it is accordingly discharged with costs to the respondent.

Made in chambers at Blantyre this 23<sup>rd</sup> June 2016.

A handwritten signature in blue ink, consisting of a large, stylized loop that crosses itself, followed by a horizontal line.

**M.A. Tembo**

**JUDGE**