



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
REVENUE DIVISION
JUDICIAL REVIEW NUMBER 8 OF 2018

BETWEEN:

THE STATE

AND

THE COMMISSIONER GENERAL OF MALAWI REVENUE AUTHORITY
EX-PARTE JAMEEL SHAIBU.

CORAM: THE HONOURABLE JUSTICE JOSEPH CHIGONA

MR HARA, OF COUNSEL FOR THE APPLICANT

MR CHUNGU, OF COUNSEL FOR THE DEFENDANT

MR KAMCHIPUTU, OFFICIAL COURT INTERPRETER

CHIGONA, J.

JUDGMENT

The applicant brought an application for leave for judicial review under Order 19 Rule 20 (3) of the High Court Civil Procedure Rules, to

be referred herein as Civil Procedure Rules. Upon reading the applicant's supporting documents, I ordered the application to be brought interpartes. During the interpartes hearing, I ordered the defendant to file their sworn statement in opposition which was not ready at that time and I accordingly adjourned the application. When we met on the appointed date, the parties agreed to adjourn the matter to allow out of court settlement discussions. I granted the adjournment to allow for the possible out of court settlement. Unfortunately, the out of court discussions did not bear any fruits and the matter was therefore set down for hearing. Suffice to mention that there were other adjournments that occurred and that in the process, the defendants filed their sworn statement in opposition. During one of the hearings, it was agreed by the parties and the court that the main issue for adjudication is whether the defendant's action in detaining the motor vehicle of the applicant for non-payment of duty of other motor vehicles was legal. Put differently, was the defendant legally correct to exercise a lien over the applicant's motor vehicle pursuant to Section 92 of the Customs and Excise Act, a motor vehicle that had nothing to do with non-payment of duty. The parties agreed that this is the main issue that a scheduling conference could have set down and they agreed to abridge time which the court granted so that the matter should move to substantive.

FACTS

The facts of the case are as follows: The applicant who is a South African national on 23rd June 2018, arrived at Dedza Border post. He requested for a Temporary Importation Permit (TIP) to enter Malawi to attend the wedding of a relation and later return to South Africa. While processing the permit at the border, it is said that the defendant's officer in the name of Mr. S. Jumbo detained the applicant's motor vehicle on the sole ground that the applicant was to produce clearance documents of other motor vehicles he imported into Malawi. The said motor vehicle remain detained by the defendant. It is that decision by the defendant to detain the

applicant's motor vehicle that forms the basis of the present application for judicial review.

The applicant seeks the following reliefs:

- A declaration and an order that the decision of the defendant's officer detaining the applicant's vehicle Toyota Fortuner Registration Number FF25DR GP on the ground that the respondent requires clearance documents of other different vehicles has no basis at customs laws and without lawful justification.
- A declaration and an order setting aside the decision for being wednesbury unreasonable
- A declaration or order setting the decision for violating the constitutional right to property and not to be arbitrarily deprived of the same
- A like order to certiorari quashing the decision of the defendant
- An interim automatic order staying the decision to seize the vehicle until the determination of the matter
- Further or other relief
- Costs
- And that all necessary and consequential directions be given

THE APPLICANT'S CASE

Let me put it on record that I benefited also from the oral submissions made by both parties through counsel. During the oral hearing of the judicial review, counsel for the applicant adopted the court process filed in support of the application. Counsel submitted that the detention by the defendant was not pursuant to a lien as per Section 92 of the Customs and Excise Act nor was the detention due to non-payment of duty. Counsel submitted that pursuant to Section 92 of the Customs and Excise Act, there was no any court proceedings for them to rely on a lien and no mention of any amount of duty payable on the detention notice, which is **JS1**. Counsel submitted that the sworn statement, in precision paragraph 11, mentions 16 motor vehicles as uncleared by the applicant, as shown by **SM1**, that were

not communicated to the applicant through the detention notice. Counsel submitted that the list of the motor vehicles as contained in **SM1** is not helpful at all to the applicant and the court. He submitted that the list has no any chassis numbers and make of those vehicles for easy identification. Counsel submitted that the list does not even show the amount being claimed as unpaid duty by the defendant. Counsel submitted that the list does not show any linkage with the claimant. He submitted that from the list, there is no debt that the applicant owes the defendant. Counsel further submitted that no offence has been committed by the applicant and that there is no any warrant against him. He therefore prayed to this court for the grant of the reliefs sought and that the defendant be ordered to grant the TIP.

THE DEFENDANT'S CASE

Counsel for the defendant started by adopting the statement of defence, sworn statement in opposition and skeletal arguments filed herein. In their statement of defence, the defendant submits that the Automated Systems for Customs Data (ASYCUDA) revealed that the applicant imported motor vehicles into Malawi under TIP and did not re-export the same after expiry of the TIP granted to him. The defendant states that all relevant information in their system link the claimant to the uncleared motor vehicles. The defendant states that the applicant committed technical smuggling and thus an offence of failure to comply with customs laws and failure to execute re-exportation or renewal of a TIP.

The sworn statement in opposition sworn by Skiviner Mlowoka also corroborate the contents of the defence. The deponent deposes that **SM1** is a list of motor vehicles that were not cleared in the system and are being used in Malawi without payment of duty. He deposes that the ASYCUDA clearly reveals that these 16 motor vehicles are all linked to the applicant.

During oral hearing, counsel started by submitting that though **SM1** does not show any chassis number, model or amount of duty payable,

it was not disputed that the said motor vehicles were imported. Counsel referred to Section 3 of the Customs and Excise Act that defines goods still under customs control to include goods previously imported into Malawi. Counsel submitted that the applicant has goods, in form of motor vehicles that he imported into Malawi and did not pay duty. Counsel submitted that the non-payment of duty was and still remains the basis for detention of the motor vehicle. He stated that even if Section 92 of the Customs and Excise Act does not apply, Section 17 of the Act will apply in these circumstances, as the provision gives power to the defendant's officer to stop and keep any motor vehicle. Counsel also submitted that Section 28 of the Act also applies. He said there is an implied importation of the motor vehicles and technical smuggling by the applicant which the system captured. Counsel submitted that the applicant committed an offence, which the court should not aid or abet. He therefore prayed for dismissal of the applicant's application in its entirety.

REPLY BY THE APPLICANT

Counsel for the applicant reiterated that there is no linkage between the applicant and **SM1**. He insisted that the list does not provide any chassis numbers and models of the motor vehicles in dispute. Counsel submitted that the reason for detention as contained in **JS1** is non-payment of duty of other vehicles, which according to counsel is unreasonable. Counsel submitted that Section 92 of the Act does not apply in this case as there was no mention of duty payable. Counsel prayed to this court for the grant of the reliefs sought including an order for the immediate release of the detained motor vehicle.

THE LAW ON JUDICIAL REVIEW

Judicial review as has been stated in many cases is aimed at reviewing the decision making process and not the merits of the decision itself. In the case of **JAMADAR-V-ATTORNEY GENERAL**¹, Justice Chimasula Phiri, as he then was, had the following to say:

¹ [2000-2001]MLR 175, pp 179-180

"one has got to understand the nature and scope of judicial review. The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case, that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected, and that it is no part of the judiciary or individual judges for that of the authority constituted by law to decide the matters in question.....Thus, a decision of an inferior court or a public authority, may be quashed where the court or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable or where the decision is unreasonable in the Wednesbury sense. The function of the court is to see that lawful authority is not abused by unfair treatment. Judicial review applies whether or not there is some avenue or appeal against the decision on the merits. In judicial review proceedings, the court can grant orders of mandamus, prohibition and certiorari. The court too has power in judicial review proceedings, to grant declarations and injunctions, and to award damages."

In the case of **BLANTYRE CITY ASSEMBLY V KAM'MWAMBA AND SIX OTHERS**², Justice Kamwambe had this to say on the purpose of judicial review:

"...it is trite law that the remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made but the decision making process. The purpose of this judicial review remedy

² [2008] MLR 21 at page 24. See also par. 53/41/19 Rules of Supreme Court, 1999, *Nangwale V State, Speaker of the National Assembly and Another*, [2005] MLR 303 at 310, and *Chief Constable of North Wales Police V Evans* [1982] 1 WLR 1155 at 1160.

is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question."

The Judge went further to say:

"A decision of a public authority may be quashed where that authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable, or where there is an error of law on the face of the record, or that the decision is unreasonable in the wednesbury sense. The court does not in a judicial review application act as a Court of Appeal from the authority or body concerned. The function of the court is to see that lawful authority is not abused by unfair treatment."

In the case of **Council of Civil Service Unions-V-Minister for Civil Service**³, it was stated that the remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. Commenting on the grounds of judicial review, Chombo J in the case of **State and Another -V-Malawi Electoral Commission**⁴ said the following:

"grounds for judicial review are numerous but there are three commonly used classifications. These are illegality, irrationality and procedural impropriety. Illegality refers to decisions or actions that are *ultra vires* the relevant legislation see **Padfield v Minister of Agriculture Fishing and Food [1960] AC 997**. In this case, a decision was held to be *ultra vires* the relevant statute because of a refusal to refer a complaint relating to milk price-fixing to a committee of investigation contrary to the policy

³ [1985] AC 374

⁴ [2004] MLR 374 at pp378-379.

and objects of the relevant statute. Illegality also refers to decisions or actions based upon an incorrect interpretation of the law; see **Re: Islam (Tafazzul) [1983] 1 AC 688**. An incorrect interpretation of the law can in turn result into want of jurisdiction or excessive exercise of jurisdiction; see **Rocal Communications Limited [1981] AC 374, [1980] 2 ALL ER 634**. Irrationality is multifaceted and is reflected in any of the following conduct by a public authority: (a) acting for an improper purpose; (b) acting with bad faith; (c) typically fettered discretion; (d) improperly delegating functions; (e) reaching a conclusion that nobody properly directing itself on the relevant law and acting reasonably could have reached (Wednesbury unreasonableness); (f) failing to take into account relevant matters or taking into account irrelevant matters; (g) abuse of power; (h) acting in a disproportionate manner. Procedural impropriety is the most common and most ancient ground for judicial review. What is of concern here is the right to a fair hearing; obligation on public bodies to comply with express procedural rules and to avoid bias."

In a nutshell, the above is the law on judicial review.

THE ANALYSIS OF THE EVIDENCE

The starting point in this matter is Section 92 of the Customs and Excise Act, which provides as follows:

"The correct amount of duty payable in respect of any goods or services shall, from the time when it should have been paid, constitute a debt due to the Government by the person concerned, and shall, at any time after it becomes due, be recoverable in court by proceedings in the name of the Controller, and, any goods in a bonded warehouse or in the custody of the Department or any goods or produced in the business concerned and belonging to that person, and any goods

afterwards imported or entitled for exportation by the person by whom the duty is due, shall, while still under the control of the Department be subject to a lien for such debt and may be detained by the Department until such debt is paid, and the claims of the Government shall have priority over the claims of all persons upon the said goods of whatever nature and may be enforced by sale or other proceedings if the debt is not paid within three months after the date upon which it become due."

My reading of Section 92 is that the defendant first has to prove existence of a debt to the Government in form of unpaid duty. The defendant in **JS1**, the detention notice, communicated to the applicant that his motor vehicle, Toyota Fortuner, has been detained pending production of clearance documents of another vehicle. In addition, there is **SM1** showing various numbers, some bearing the name 'DED' and others 'MWA' meaning Dedza and Mwanza respectively. The question I have to answer is whether **JS1** and **SM1** constitute a debt. I am of the humble view that **JS 1** does not provide sufficient particulars to constitute a debt. In the first place, it does not mention the vehicles in issue and the duty payable for each motor vehicle. I am of the considered view that a debt connotes some amount that can as well be deduced with some mathematical precision. It is difficult to deduce the amount of unpaid duty from **JS1**. I am of the view that the defendant could have done better by providing more information with regard to the so called debt to the applicant, which was not done in this case.

As for **SM1**, it only shows 16 different numbers as alluded to above. The defendant indicated that those numbers represent the 16 motor vehicles that the applicant brought into the country under TIP but all remain unacquitted. However, I agree with the observation made by the applicant that **SM1** does not indicate the total amount of duty unpaid as to constitute a debt. It does not even show the chassis numbers of these motor vehicles. The defendant is always under a

duty to provide sufficient information to taxpayers. I do not think that the defendant has discharged their duty properly. In conclusion, it is my finding that **JS1** and **SM1** are insufficient to constitute a debt for the purposes of Section 92 of the Customs and Excise Act as the amount of duty is not known.

Secondly, Section 92 envisages court proceedings to recover the unpaid duty. It is not in dispute that there are no any court proceedings to recover the unpaid duty. Therefore Section 92 of the Act, in as far as a lien is concerned, cannot apply. For the defendant to exercise a lien under Section 92, there is need for correct amount of unpaid duty and court proceedings. In other words, the defendant's action is caught by illegality as Section 92 was not fully complied with.

The defendant also relied on Section 17 of the Customs and Excise Act. The Section provides as follows:

"(1) An officer in the course of his duty, and any person assisting him, may enter upon, patrol and pass freely within any place other than a building.

(2) An officer in charge of any conveyance employed in the prevention of smuggling, may take such conveyance to such place as he considers most convenient for that purpose and may there keep such conveyance for such time as he considers necessary for that purpose".

My reading of Section 17 is that it gives power to officers of the defendant to freely patrol and pass within any place other than a building. Section 17(2) of the Act provides for prevention of smuggling using a conveyance that can be taken anywhere where the officer deems fit. I am at pains to understand the application of Section 17 to the present proceedings. It is not an issue to do with patrolling not is it a case of detection of smuggling using any conveyance. I do not think Section 17 is useful in these circumstances.

The defendant also cited Section 28 of the Customs and Excise Act on arrival of vehicles other than trains. I am of the humble view that Section 28 of the Act provides for procedures to be complied with by persons in charge of any vehicle arriving from a foreign port. It does not provide detention powers to the defendant. I also find Section 28 wanting in the present circumstances.

CONCLUSION

It is my finding that the actions of the defendant's officer to detain a motor vehicle for non-payment of duty of other motor vehicles was contrary to Section 92 of the Customs and Excise Act. The defendant's action was illegal and unreasonable.

RELIEFS SOUGHT

The applicant prayed for several reliefs. Upon consideration of the prayers, I grant an order similar to certiorari quashing the defendant's decision to detain the applicant's motor vehicle. However, I am of the considered view that the defendant has so many **legal** avenues for the recovery of the unpaid duty, among them, commencement of criminal proceedings for the offence of smuggling immediately as indicated in their submissions. I have to mention that the actions of the defendant are tantamount to aiding and abetting commission of an offence. After discovering that there is reasonable suspicion that the applicant imported motor vehicles that were not acquitted in the system, instead of taking appropriate measures when the applicant availed himself at the border, they just thought of detaining his motor vehicle and asked him to bring clearance documents for other motor vehicles. I find the defendant's action wanting in these circumstances. Should we conclude that the value of the motor vehicle detained is more than the unpaid duty for the 16 motor vehicles? This question is for the defendant to answer. As to whether the defendant should grant TIP to the applicant upon release of the motor vehicle, that is in the discretion of the defendant.

COSTS

On costs, each party to bear its own costs.

MADE IN OPEN COURT THIS 31ST DAY OF AUGUST 2018 AT PRINCIPAL
REGISTRY, BLANTYRE.


JOSEPH CHIGONA

JUDGE