IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

REVENUE DIVISION

CIVIL CAUSE NUMBER 21 0F 2019

BETWEEN:

SAM KAWALE & MOSAIC INVESTMENTS LTD PLAINTIFF

AND

MALAWI REVENUE AUTHORITY DEFENDANT

CORAM: THE HONOURABLE JUSTICE JOSEPH CHIGONA

MR. CHAPO, OF COUNSEL FOR THE CLAIMANT

MR. KAMBUMWA, OF COUNSEL FOR THE DEFENDANT

MR. KAMCHIPUTU, OFFICIAL COURT INTERPRETER

CHIOGONA, J.

ORDER

The defendant, Malawi Revenue Authority, brought the present application to vacate a mandatory injunction that was obtained by the claimant. The application is supported by a sworn statement by Mr. Thomas Seyani, a Customs Officer based at Kanengo Inland Examination Center. Counsel for the defendant adopted both the sworn statement and the skeletal arguments in support of the application.

The facts of the case are that the claimant on 7th May 2019 imported into Malawi a consignment of T-Shirts through Songwe Border Station and was cleared upon declaration. It is said that the import declaration used by the claimant was false. That the defendant's officers conducted physical examination whose results showed that the claimant imported 33, 980 pieces of T-Shirts, 6,500 pieces of Golf Shirts and 1, 4000 pieces of caps. The deponent submits that these results show that there were elements of false declaration in terms of misdeclaration and undervaluation because the caps were not declared and golf shirts were declared as normal T-Shirts. The deponent states that there was definitely false declaration. The deponent submits that the claimant was found to have committed an offence of smuggling by presentation of a false import declaration contrary to Sections 134 and 135 of the Customs and Excise Act and that was the reason for the detention of the claimant's goods. The deponent states that following discovery of false declaration, the consignment was detained through a seizure notice marked **TS 1.** The total value of the goods was MK9, 373, 439 and that duty was calculated at MK4, 473, 417. The deponent states that the claimant paid duty amounting to MK2, 936,310 and a balance of MK1, 537,107 was unpaid. The deponent submits that the defendant also imposed a fine of MK20,000,000 with an offer to the claimant to settle in accordance with Sections 162 to 164 of the Customs and Excise Act. It is submitted that the injunction was wrongfully obtained as the claimant came before the court with unclean hands by concealing the fact that there was an offence of smuggling through presentation of false declaration amongst the other many material facts. In other words, the defendant depones that the mandatory injunction was obtained under suppression of material facts. The defendant is also asking this court to allow them collect the unpaid duty from the claimant, MK20, 000, 000 penalty, damages and costs of the action.

The Claimant filed a sworn statement in opposition to the application. The claimant depones that there was distortion of facts by the defendant. The claimant submitted that the seizure notice was presented to him after the re-examination and that re-assessment of duty which he was ready to comply with. The claimant submitted that defendant did not impose a fine of MK20, 000, 000 and that this was not brought to the attention of the claimant. The claimant states that the initial amount of K2, 936, 310 was assessed by the defendant and that the claimant was given a release order and a gate pass thereafter to collect the goods at Kanengo Inland Office. The claimant believes that the defendant was holding on to the goods despite his willingness to pay the additional duty on political grounds. The claimant submitted

that the defendant has not presented to the court the material fact that was suppressed and denied that he was answering the offence of smuggling. The claimant depones that assuming there is a penalty of MK20, 000, 000 to be paid, the same is unjustifiable as the claimant was willing to pay duty. The claimant submitted that the additional duty was already paid into court as a condition for the grant of the mandatory injunction.

In his oral submissions, counsel for the claimant denied that the clamant committed an offence of smuggling of goods into the country. The claimant through counsel submitted that during the application for the mandatory injunction, he disclosed all the material facts to the court. He denied that the claimant suppressed material facts. He submitted that **SK6** shows that the claimant disclosed the issue of a seizure notice. The claimant through counsel submitted that they were surprised with the seizure notice as the defendant demanded payment of top up duty on the consignment. The claimant submitted that he was surprised with the actions of the defendant in issuing the seizure notice after re-examination. He submitted that the claimant was communicated on the amount payable. The claimant submitted that the defendant actions in this matter were suspicious as they aimed at delaying the release of the consignment to the claimant as these were campaign materials. In conclusion, the claimant prayed for dismissal of the application with costs.

THE LAW ON VACATION OF INJUNCTION AND DISPOSAL OF THE MATTER

The Court has power to vacate an injunction that was obtained in the absence of the other party where the applicant failed to disclose all relevant material facts to the court. In these *ex-parte* applications, the applicant is legally bound to disclose all material facts in his or her knowledge to assist the court arrive at a just decision as whether to grant or refuse the injunction. I am of the considered view that the law demands such disclosure even in circumstances where they are adverse to the applicant's case as long as the court has all facts on which to base its decision on. In the case of **KENSINGTON INCOME TAX COMMISSIONERS**[1] ex – parte Princes Edmond de Polignac, Warnington L J had this to say on page 506.

> "It is perfectly well settled that a person who makes an ex – parte application to the court, that is to say, in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his

[1] [1017] KB 486

knowledge and then if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings and he will be deprived of any advantage he may have already obtained by means of the order which has thus been wrongly obtained by him."

In **MKWANDA -V-NEW BUILDING SOCIETY**[2], the court stated as follows:

"On the dissolution or discharge of interlocutory injunctions obtained exparte, the law is to this effect: The court may discharge or dissolve any such injunction if it appears that the order for the interlocutory injunction was irregularly obtained by the suppression of facts: Boyce v Gill [1891] 64 LT 824. The court may also do so, if it subsequently becomes apparent that the injunction was founded on a decision which was wrong in law. Regent Oli Co. Ltd V JT Leavesley (incfield) Ltd [1962] ALL ER 454."

Reverting to the present case, the issue for determination is whether the claimant failed to disclose to the court the issue of the offence of smuggling of goods. The defendant position is that the claimant committed the offence when he undervalued the consignment that he imported into the country contrary to the customs laws. The defendant has submitted that the seizure notice was solely issued as a result of that offence of smuggling goods into the country. The question before me is whether there was disclosure of the offence purportedly committed by the claimant and not whether such an offence was committed.

I have read the supporting documents especially the exhibits attached to the sworn statement in support of the application for a mandatory injunction. I am of the considered view that the court was aware of the seizure notice as evidenced by **SK 6.** The claimant has mentioned the existence of a seizure notice in **SK 6.** Definitely, the court could have known that a seizure notice is mainly issued in circumstances where a taxpayer has contravened customs laws. Of much importance is Section 155 (2) of the Customs and Excise Act, which provides as follows:

"For the purposes of this Section, the date when any goods are seized shall be deemed to be the date of commencement of any proceedings for an offence in respect of such goods."

I do not think that the court was not aware of the notice. I am inclined to believe that after evaluating all the facts of the case, as one condition for the granting of the mandatory injunction, the court ordered that the top-up duty be paid into court,

[2] [1997] 1 MLR 210

which was done. As I have already alluded to, the issue as to whether the claimant committed the offence is an issue for determination at substantive stage. It is therefore my finding that by virtue of the seizure notice, the court was aware that there was a suspicion that the claimant had contravened customs laws. I do not therefore hold the view that there was suppression of this fact by the claimant when he applied for the mandatory injunction.

On the amount paid into court as ordered by the court during the granting of the mandatory injunction, I am of the view that the same be paid out of court as the claimant is not disputing such a payment of top up duty. The only issue for determination now is whether the claimant committed an offence or not. It was therefore the agreement of the parties that the top up duty paid into court be paid out to the defendant once all procedural requirements are fulfilled.

Costs are in the discretion of the court. I therefore exercise my discretion and order that each party should bear its own costs.

MADE IN CHAMBERS THIS 13TH DAY OF DECEMBER 2019 AT LILONGWE.

JOSEPH CHIGONA
JUDGE.