



**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY**

**REVENUE CAUSE NO. 13 OF 2017**

**MARTIN KANJOSOLO ..... CLAIMANT**

**AND-**

**SHOPRITE TRADING LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MALAWI REVENUE AUTHORITY ..... 2<sup>ND</sup> DEFENDANT**

**CORAM: HON. JUSTICE R. MBVUNDULA**

Pearson, Counsel for the Claimant

Phokoso, Counsel for the 1<sup>st</sup> Defendant

Kambumwa, Counsel for the 2<sup>nd</sup> Defendant

Chimang'anga, Official Interpreter

**RULING**

The claimant has applied for the court to enter summary judgment against both defendants on the ground that the defendants' defences are mere shams containing general denials which are evasive and fishing and meant to delay the just and expeditious determination of the matter. His claim arises from a purchase from the 1<sup>st</sup> defendant's shop of a product described as "Gendev Mackerel" and in respect of which the 1<sup>st</sup> defendant charged Value Added Tax (VAT). The claimant contends that the product falls into the category of "fish" which is exempt from VAT and therefore that the imposition of the VAT was unlawful not only under the Value Added Tax Act but also under the Constitution.

In main the claimant relies on the fact that neither defendant has denied that the product referred to is an exempt supply under the VAT Act nor have they argued

that it is a taxable supply. Counsel for the claimant has also argued that a look at the pleadings reveals that there is only one question to be determined, namely, whether the product is an exempt supply and that such a question in law does not call for a full trial but should be determined summarily.

Both defendants filed their defences. They both contend that contrary to the claimant's assertion, they have valid defences.

The 1<sup>st</sup> defendant submits that its defence raises the issues, *inter alia*:

1. Whether the 1<sup>st</sup> defendant collects VAT from customers on behalf of the 2<sup>nd</sup> defendant and remits the same to the 2<sup>nd</sup> defendant as the 2<sup>nd</sup> defendant's agent within the tax regime as alleged;
2. Whether the 1<sup>st</sup> defendant imposed tax on the claimant, and whether if at all such tax was receipted, it was a computer error (which is alleged in its defence) in tax receipting;
3. Whether the 1<sup>st</sup> defendant was ever served with any notice or demand for reimbursement of the allegedly wrongfully charged VAT, it being the 1<sup>st</sup> defendant position that the claimant ought to have done so before instituting the present action;
4. Whether the action is premature since if at all there was a wrongful charge of tax against the claimant, the claimant had a remedy by way of a claim for a refund of the same from the 2<sup>nd</sup> defendant and if not successful, appeal to the Special Arbitrator

The 1<sup>st</sup> defendant thus submits that it is not true that its defence contains general denials and that it has real prospect of succeeding at the trial.

On the part of the 2<sup>nd</sup> defendant it denied that its defence is general, evasive or fishing as it raises the following serious questions fit for trial as follows:

1. That whilst fish is generally an exempt supply judicial activism is derived to the extent that since Gendev Mackerel or tinned fish is not specifically mentioned, it therefore follows that it is included to be within the taxable supplies. These, it is submitted, are all in reference to the First and Second Schedules of the VAT Act as well as the Customs Tariff Order in relation to fish. It is submitted that that is what the framers of the law intended;
2. That there is no proof that the VAT so charged by the 1<sup>st</sup> defendant was remitted to the 2<sup>nd</sup> defendant as the receipt that was issued is not by itself proof of remission of taxes to the 2<sup>nd</sup> defendant. In reply hereto the claimant has



submitted that by virtue of sections 10, 11, 19, 20, 21, 30 and 34 of the VAT Act any VAT charged and collected is presumed to have been accounted for by operation of the law as the taxable person is required to account for VAT and file monthly returns not later than the 25<sup>th</sup> of the month immediately following the month in which the return relates. This submission, however, ignores the notorious fact that taxpayers do default in their duty to remit taxes despite having submitted their tax returns.

3. That the 2<sup>nd</sup> defendant is not involved in the classification of items on which the 1<sup>st</sup> defendant imposes tax or does not impose tax on and the 2<sup>nd</sup> defendant cannot therefore be liable for any misclassification by the 1<sup>st</sup> defendant; and
4. That the 1<sup>st</sup> defendant is not an agent of the 2<sup>nd</sup> defendant and the 2<sup>nd</sup> defendant cannot therefore be vicariously liable for the actions of the 1<sup>st</sup> defendant.

The 2<sup>nd</sup> defendant further points out that the claimant brought another action which was before the Honourable Chigona J in Revenue Cause No. 2 of 2017, *Martin Kanjosolo v Malawi Revenue Authority*, seeking various orders and declarations and that the subject matter therein was similar to the present and that after hearing the matter the court dismissed his claim. The 2<sup>nd</sup> defendant in this regard laments the claimant's tendency of bringing before the courts claims of the same or similar subject matter piecemeal and contends that such conduct is an abuse of the court process which should not be condoned. The claimant has made a reply to this point by stating, in essence, that the matter which was before the Honourable Chigona J concerned "tinned fish" and that herein "Gendev Mackerel" is merely a species of fish being an exempt supply.

In conclusion the 2<sup>nd</sup> defendant argues that it is clear that the 2<sup>nd</sup> defendant has a defence on the merits and that there are serious questions of both fact and law to be tried and consequently that the application for summary judgment should fail.

Assuming, on a balance of probabilities, that the product subject of this action is fish and therefore an exempt supply, in which case the VAT ought not to have been charged, I am of the view that the issue touched upon by the 2<sup>nd</sup> defendant concerning abuse of the process of the court ought to come to the fore albeit from a slightly different angle. The following facts are material to the issue.

Attached to the claimant's list of documents is a copy of a till emanating from the 1<sup>st</sup> defendant. Among the items bought are four entries of "GENDEV MACKEREL" each costing K1 899.99 hence a total cost of the four is K7 599.96. VAT is charged at the rate of 16.50% hence the actual VAT in relation thereto and presently in



contention amounts to K1 253.99. The claimant has presented a claim for the following reliefs:

- a) damages for breach of his constitutional right not to be subjected to tax not provided for under the laws of Malawi;
- b) damages for arbitrary deprivation of property;
- c) damages for breach of statutory duty;
- d) aggravated and exemplary damages;
- e) costs of the proceedings.

It should also be borne in mind that the 1<sup>st</sup> defendant has raised the point that, in its view, the present action is premature as the 1<sup>st</sup> defendant could easily have claimed a refund of the VAT from either defendant, in which case this action would more probably than not have been avoided. That the claimant has not sought to do. I do not hesitate, on the facts, and in particular consideration of the amount of VAT in issue, to agree that this action is an abuse of the process of this court, and to add that it is frivolous, and vexatious as much of the court as it is of the defendants. I am of the conviction, on the facts, that if anyone of the parties is fishing, it is the claimant who is prematurely fishing for damages when non-litigation avenues avail him. It certainly is an unreasonable waste of resources to pursue such a tiny claim by way of litigation when other avenues are available. On that score alone I decline to enter summary judgment.

Having said that I order that if the claimant will still be minded to pursue the claim, he shall file a notice of hearing within 14 days of this date. Should he not be so minded the action shall stand dismissed without a further order and the claimant shall bear the costs of both defendants to be taxed.

Made in chambers at Blantyre this 13<sup>th</sup> day of June 2019.

  
R Mbyundula  
**JUDGE**