IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

REVENUE DIVISION

REVENUE CAUSE NUMBER 10 OF 2018

BETWEEN:

ZAMANI SOFALA CLAIMANT

AND

COMMISSIONER GENERAL OF MALAWI REVENUE AUTHORITY DEFENDANT

CORAM: THE HONOURABLE JUSTICE JOSEPH CHIGONA

MR. BRUNO MATUMBI, COUNSEL FOR THE CLAIMANT

MR ANTHONY CHUNGU, COUNSEL FOR THE DEFENDANT

MR FELIX KAMCHIPUTU, OFFICIAL COURT INTERPRETER

ORDER

The claimant brought an application for an interlocutory injunction on 19th day of December 2018. Upon perusal of the sworn statement, I ordered an inter partes hearing that was set down the following day after I abridged time following the

concerns raised by counsel for the claimant. The interpartes hearing took place on the following day, the 20th of December 2018. I now make my determination on that interpartes hearing.

The application for an interlocutory injunction is supported by a sworn statement that was sworn by counsel. Suffice to mention that counsel adopted the sworn statement in its entirety during the hearing.

The facts of the case are that Honourable Cecilia Chazama purchased a motor vehicle Registration Number BT 2146 Ford Ranger Double Cab on duty free owing to her status as a cabinet minister with a condition that duty be paid once the vehicle is sold. It is said that in 2017, the said motor vehicle was involved in a road accident, with the insurance assessment declaring the vehicle as a write off. It is said that Mrs. Chazama did not exercise her option to keep the salvage instead opting to collect the insured value. Thereafter, the insurance company sold the scrap to Nunes Panel Beaters who in turn, at an auction, sold the scrap to a car breaker in the name of Clement Maunde, who managed to put the vehicle to usable state. Thereafter, the vehicle was sold to the claimant. The defendant upon noticing that the vehicle is on the road, issued a seizure notice and impounded the vehicle on the ground of non-payment of duty. The vehicle currently is in the custody of the defendant.

Let me mention at this juncture that I benefited from the oral submissions made by both parties during the interpartes hearing. At the end of hearing, I ordered that written submissions be filed by 11th January 2019. Unfortunately, both parties did not comply with my order. The court had to send reminders to both parties for them to comply with the court order. I am of the considered view that both counsel as officers of the court are to comply with court orders so as to assist the court expeditiously dispose of matters. Suffice to mention that both parties finally filed their submissions.

THE LAW AND THE EVIDENCE

The law on the granting of interlocutory injunctions is contained in Order 10 Rule 27 of the Courts (High Court) (Civil Procedure) Rules, 2017. The law provides that a court may on application grant an injunction by an interlocutory order when it appears to the court that there is a serious question to be tried, that damages may not be an adequate remedy and that doing so, shall be just. These conditions for granting of interlocutory injunctions were well expounded in the case of **AMERICAN CYANAMID CO V ETHICON LTD**[1]

[1] [1975] A.C. 396

The first issue to resolve is whether there is a serious question to be tried. In deciding this issue, counsel for the claimant has submitted in his written submissions that there is a serious question to be tried on two fronts. The first is whether Section 90 of Customs and Excise Act provides two options for the collection of unpaid duty and whether those options are in order of priority. Counsel for the claimant submitted that Option **A** is to collect duty from the importer and option **B** is to collect from the one in possession. Counsel submitted that the defendant is to first exercise Option **A** before exercising Option **B.** Counsel for the claimant submitted that this is a serious question to be tried. Secondly, counsel submitted that another triable issue is whether the amendment of Section 90 of Customs and Excise Act was meant to cure a mischief by introducing Option **B.** Counsel submitted that there is no mischief that the amendment was supposed to cure as the duty is to be paid by the importer.

On the other hand, counsel for the defendant has submitted that there is no any triable issue. Counsel submitted that Section 90 of Customs and Excise Act as amended does not create hierarchy in terms of payment of duty. Counsel submitted that before the amendment, the duty was to be paid by the importer and that the amendment was effected with a view of curing this mischief that whoever imports goods into the country should pay duty.

Section 90 of the Customs and Excise Act provides as follows:

> "Where any amount of duty has been underpaid or not paid, the person who should have paid such duty or the person in whose possession the goods in respect of which the underpayment was made shall pay such outstanding amount."

As was decided in **PAUL SIBALE V THE COMMISSIONER GENERAL OF MALAWI REVENUE AUTHORITY AND THE STATION MANAGER-MALAWI REVENUE AUTHORITY-FAST SOUTH[2],** Section 90 of the Customs and Excise Act in its current form accords an option to the defendant to go for the importer (Mrs. Chazama) or the person in possession of the goods (the Claimant). In other words, Section 90 of Customs and Excise Act gives discretion to the defendant depending on circumstances as to who should pay duty. I do not think, with due respect to counsel for the claimant, that what Section 90 does is to create a hierarchy as to who should pay duty. In **MALAWI REVENUE AUTHORITY V AZAM TRANSWAYS[3]** , the Court held as follows:

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[2] Civil Cause Number 27 of 2017

[3] MSCA CIVIL APPEAL NO 48 OF 2007

> "The fundamental rule of statutory interpretation is that courts must endeavor to give effect to the express intention of them that made the statute under consideration. If the words of the statute are in themselves precise and unambiguous no more is necessary than to expand those words in their natural and ordinary sense, the words in themselves in such case declaring the intention of the legislature."

I find the interpretation of counsel for the claimant herein wanting. Applying literal interpretation, as the Supreme Court held, one will certainly get the meaning of the words as used in Section 90 of the Customs and Excise Act. I am of the considered view that the legislature did not intend to create a hierarchy in terms of categories of people to pay duty. If the legislature intended that, definitely Section 90 could have provided so. As it was held in **REPUBLIC AND THE COMMISSIONER OF DOMESTIC TAXES LARGER TAX PAYER'S OFFICE EXPARTE BARCLAYS BANK LTD[4],** in a taxation Act, one has to look at what is clearly said and that there is no intendment as to tax. Nothing is to be read in, nothing is to be implied. The words used in Section 90 of the Customs and Excise Act are so clear that the defendant has an option either to go for the importer or the one in possession. Reading that Section as counsel for the claimant has submitted will be tantamount to prescribing a meaning contrary to the wishes of the legislature. May be before the amendment, the position of the claimant could have held water. As for the second issue, I do not think that there is any issue at all. Whether the amendment was introduced to cure a mischief or not, is not an issue in my considered view. What is clear is that Section 90 of Customs and Excise Act as it stands gives an option to the defendant to go for the importer or the one in possession.

All in all, I am of the considered view that there is no any serious question to be tried at full trial. As already stated, Section 90 of the Customs and Excise Act is so clear that the defendant is at liberty to pursue either the importer or the one in possession. There is no dispute that the claimant is in possession. This also means that all issues raised by the claimant on discrimination cannot stand.

Even assuming that there is a triable issue herein, I do not think that the application will satisfy the requirement on damages. I am of the view that damages herein are adequate remedy, a fact that was even admitted by the claimant through counsel. I am of the view that the defendant is in a position to pay damages once

[4] HC (KENYA) MISC. APPL.NO.1223 OF 2007

ordered to do so. Further, I am of the view that it is possible to assess the damages herein. See **PAUL SIBALE V THE COMMISSIONER GENERAL OF MALAWI REVENUE AUTHORITY AND ANOTHER[5].** This does not necessarily mean that well to do litigants will always triumph over poor litigants. I am of the view that each case needs to be decided on its own facts and circumstances. All litigants are equal before the law.

FINDING OF THE COURT

Having decided that there is no any serious question to be tried and that damages are adequate remedy, I do not think that I can therefore even consider the issue of convenience of justice. I am of the view that the application for an interlocutory injunction has failed and I so hold. I therefore dismiss the application with costs to the defendants.

MADE IN CHAMBERS THIS 8TH DAY OF MARCH 2019 AT PRINCIPAL REGISTRY, **REVENUE DIVISION.**

JOSEPH CHIGONA

JUDGE

[5] Supra