IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

REVENUE DIVISION

JUDICIAL REVIEW CAUSE NO. 10 OF 2017

THE STATE
AND
COUNCIL OF UNIVERSITY OF MALAWI
(COLLEGE OF MEDICINE) ..... DEFENDANT

***EX-PARTE*:**
DR MWAYIWAWO MADANITSA ..... CLAIMANT

CORAM: HON. JUSTICE R. MBVUNDULA
Chalamanda, Counsel for the Claimant
Mlambe, Counsel for the Defendant
Chimang'anga, Official Interpreter

RULING

Brief background

The claimant is a student at the College of Medicine of the University of Malawi whose stipend, he asserts, has been unjustifiably subjected to Pay As You Earn tax. He applied for judicial review of the decision to subject the stipend to tax after obtaining the court's permission as required by the Courts (High Court) Civil Procedure Rules, 2017. The permission was granted on 13th October 2017. It may be pertinent to also mention that at that stage there were two defendants, the Malawi Revenue Authority (MRA) being the 2nd defendant, but was later removed by

consent of the claimant and the then 2nd defendant, after this application had already been lodged but before being argued.

The defendant has applied for an order setting aside the permission granted to the claimant to commence judicial review on four grounds:

1. the absence of arguable grounds for the judicial review;
2. the availability of alternative remedies;
3. obtaining the permission out of time without an order extending time; and
4. suppression of material facts.

Submissions and resolution

1. On absence of arguable ground

The submission of the defendant is that going through the claimant's case one notices that the claimant's case hinges on a decision made by MRA to tax the claimant's stipend, the decisive provision in the circumstances, it is submitted, being paragraph (u) of the First Schedule to the Taxation Act which provides as follows:

> "There shall be exempt from income tax any scholarship, exhibition, bursary or similar educational endowment paid to a person receiving full-time instruction at a university, college, school or other educational establishment approved by the Minister, and such allowances connected therewith as may be approved by the Minister."

Counsel for the defendant submits, correctly, in my understanding, that under that provision exemption from tax is on two conditions only, namely, full-time instruction at a learning institution approved by the Minister and approval by the Minister of the educational establishment, which conditions are mutually exclusive. Counsel points out that in the instant case no ministerial approval of exemption of tax was obtained in which case there can be no arguable case, and that the claimant could have had an arguable case if MRA had continued to tax him after the grant of ministerial approval.

Counsel for the claimant also draws attention to the fact that when communicating its decision to continue to tax the claimant, MRA suggested to the claimant to seek ministerial approval, which the applicant did not do but rather proceeded to this court.

In response counsel for the claimant submits that the foregoing arguments might have been valid had MRA been still a party to the proceedings, that the only issue remaining subject of the judicial review is the issue of discriminatory conduct by the

remaining defendant, being the way in which the defendant has purported to apply the taxation law. The question to be determined at the judicial review, it is submitted, remains whether the defendant has been discriminatory in applying the tax law, and that that case remains arguable. Counsel for the claimant goes on to state that it is not the claimant's case that he should not be subject to tax law, but whether the taxation law can be implemented in a discriminatory manner.

In reply, counsel for the defendant submits that even if it may be established that there has been differentiation in the manner the stipends are collected, that may be for a number of reasons, including approved exemption, or it may be a matter of omission or failure on the defendant's part to withhold the tax, but whichever may be the reason the only way to proceed is to require the defendant to discharge the legal obligation. Counsel takes the position that if the defendant did not withhold and remit tax from similarly situated students that is not discrimination against the claimant because the claimant has been treated as the law requires him to be treated, and the only remedy is to require the defendant to do what the law requires of the defendant in respect of the other students.

Court's finding and decision

The defendant is under an obligation to comply with the law in respect of the claimant's stipend as well as any other students whose stipend the defendant handles. The law being clear that the stipends can only be tax free with the approval of the Minister the claimant has to demonstrate that such approval has been granted in his favour. In the absence of such evidence any demand that no tax should be deducted from his stipend would be tantamount to inciting the violation of the provisions of paragraph (u) of the First Schedule to the Taxation Act. And if indeed similarly placed students' stipend was illegally untaxed the solution does not lie in extending the illegality to the claimant. The court cannot do so for the reason that courts are there to uphold rather than to aid the violation of the law. This court therefore agrees with the defendant that the claimant has not demonstrated an arguable case.

2. *On the availability of alternative remedies*

The defendant points out that the claimant is in fact pursuing an alternative remedy. Reference has been made to exhibit MM3 to the sworn statement relied upon to obtain permission, a letter dated 29th May 2017, from MRA to Tax & Account Serve Consult addressing the issue of exemption and clarifying why the deduction was made. This letter was in response to the addressee's letter dated 2nd May 2017, on

instructions from the claimant (exhibit MM2), addressed to the Commissioner General of MRA arguing for the tax exemption of the claimant's stipend. Exhibit MM4 is also singled out, being a letter dated 4th September 2017, from the claimant's lawyers to the Commissioner General, requesting for extension of time to appeal to the Special Arbitrator under the Taxation Act over the same issue.

In response counsel for the claimant argues that the foregoing had been overtaken by events in the sense that MRA was no longer a party to the proceedings.

Court's finding and decision

The time of reference as to whether or not permission should have been granted is the date on which the permission was actually granted, namely 13th October 2017. The question then is whether on that date the claimant had available to him an alternative remedy and indeed, as counsel for the defendant asserts, the claimant was actually pursuing an alternative remedy. The answer must be in the affirmative given that the claimant's agents had started to engage MRA on the issue in May 2017, and having not convinced the Commissioner General, his legal practitioners, in September 2017, were seeking to appeal the Commissioner General's decision to the Special Referee. All this activity was taking place before the permission for judicial review was sought and obtained and there is nothing to show that the alternative remedy had been exhausted. The claimant had indeed an alternative remedy at the time and as such the permission was prematurely sought and should not have been granted.

On obtaining the permission out of time without an order extending time and suppression of material facts.

Having found for the defendant on the two grounds above I am of the view that in the interest of judicial economy it is not necessary to consider the other two grounds.

I hereby set aside the permission. The claimant shall bear the defendant's costs.

Made in chambers at Blantyre this 15th day of March 2019.

R Mbvundula
JUDGE