



IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
REVENUE DIVISION
JUDICIAL REVIEW NUMBER 3 OF 2021

BETWEEN:

INDO AFRICAN DISTILLERIES COMPANY LIMITED

CLAIMANT

-AND-

MALAWI REVENUE AUTHORITY

DEFENDANT

CORAM: HONOURABLE JUSTICE JOSEPH CHIGONA

MR. NYANDA, OF COUNSEL FOR THE CLAIMANT

MR. KHUMBO SOKO, OF COUNSEL FOR THE CLAIMANT

MS. FELISTUS FRANSISCO, OF COUNSEL FOR THE DEFENDANT

MR. FELIX KAMCHIPUTU, COURT CLERK

CHIGONA, J.

JUDGMENT

INTRODUCTION

[1] The claimant, Indo African Distilleries Company Limited, commenced judicial review proceedings against the defendant, Malawi Revenue Authority, a public body responsible for collection and administration of taxes in Malawi. The claimant also sought a stay order of the defendant's decision pending disposal of the matter. Upon hearing both parties, I granted the

claimant permission to apply for judicial review and stay order as prayed for. Thereafter, I had the opportunity to hear the substantive application on judicial review. This therefore is the judgment of this court on the substantive judicial review proceedings.

THE CLAIMANT'S CASE

[2] The facts of the present case are well outlined in the grounds seeking permission to apply for judicial review and interim reliefs. The claimant is a company involved in the manufacturing and distribution of various alcoholic drinks in Mzuzu. The claimant is against the decision of the defendant to close its factory in Mzuzu. The claimant is seeking a declaration that the said closure of the factory is unlawful. The Claimant is also seeking a like order to certiorari quashing the decision, further or other relief, order for costs and all necessary and consequential directions.

[3] The claimant states that on 17th June 2021, the defendant closed its factory in Mzuzu on the basis of a tax dispute which the defendant has with another company, Globe Beverages Limited. The claimant submits that it is/was shocked and aggrieved by the defendant's decision as it was not privy to the tax dispute between the defendant and Globe Beverages Limited.

[4] The claimant argues that the defendant has a duty under the law to act in a manner consistent with fundamental rights enshrined in the Constitution and the general principles of public law. The claimant further submits that the defendant did not provide the claimant an opportunity to be heard where as is the case in the present matter, the claimant is disputing the amount of tax payable. The claimant submits that the defendant's decision is illegal and *ultra vires* the tax legislation as the defendant has no legal right to close the factory in the absence of any tax dispute since the defendant has not made any demand for the payment of tax for a specified period.

[6] The claimant states that the defendant's decision to close the factory is contrary to section 171 of the Constitution which provides that no tax, rate, duty or levy or imposition shall be raised, levied or imposed by or for the purposes of the Government or any local government authority otherwise than by or under the authority of the law. The claimant submits the defendant's decision grossly violates section 43 of the Constitution and is therefore unconstitutional and invalid.

[7] In his skeleton arguments, the claimant submits that the defendant is misrepresenting facts pertaining to the criminal proceedings in the Chief Resident Magistrate Court sitting at Lilongwe. The claimant states that the criminal case before the lower court already commenced with charges

proffered and disclosures served. The claimant submits that none of the said disclosures deal with the claimant and that the defendant has not brought evidence connecting the claimant to the accused persons in the lower court.

[8] The claimant submits that they are not answering any criminal charges in the lower court under Criminal Case Number 741 of 2021 as it does not appear on the charge sheet. The claimant further argues that, as a body corporate, it has separate legal existence from its members. As a company, the claimant can sue and be sued, enter into contracts and become liable on those transactions. Counsel for the claimant cited the cases of **SALMON V SALMON AND COMPANY**¹, **MACAURA V NORTHERN ASSURANCE COMPANY**² and **YANU YANU BUS COMPANY LIMITED V MBEWE**³. The claimant submits that the Claimant and Global Beverages Limited are distinct companies/entities.

[9] The claimant further argues that there was no proper statutory authority to close the factory. The claimant through counsel states that the Embargo in section 149 of the Customs and excise Act is only resorted to where the goods are being imported into Malawi and are under the customs control of the defendant. The claimant states that the Embargo does not authorize the defendant to close down factories and hence the notice of Embargo is a nullity for want of statutory authority.

[10] On procedural impropriety, the claimant argues that the defendant did not accord a chance to the claimant to demonstrate that there was no tax dispute between the parties. Counsel cited sections 97 and 98 of the Taxation Act governing disputes pertaining to assessment of tax. Citing the case of **BLANTYRE CITY ASSEMBLY V NGWALA**⁴, the claimant submits that failure by the defendant to provide any details of any tax dispute between itself and the Claimant is an infringement to fair administrative action. Further, the claimant argues that the action of the defendant is unconstitutional as it infringes on the claimant's right to fair administrative justice pursuant to section 43 of the Constitution. The claimant submits that the defendant has not heard the Claimant's appeal nor provided him with any adequate opportunity to be heard especially since the defendant has detained the claimant's business records.

¹ [1897] A.C. 22

² [1925] A 619

³ 10 MLR 377

⁴ Miscellaneous Number 183 of 2012 (Mwaungulu J as he then was)

[11] During the hearing of the substantive application for judicial review, I also benefited from the submissions made by counsel for the claimant. In his submission, counsel submitted/reiterated their position as stated above that the defendant's decision to close the factory was illegal and procedurally wrong as the claimant was not heard before closure of the factory. Counsel for the claimant submitted that there was no any tax dispute between the parties herein. Counsel stated that the claimant being a person with legitimate expectations was entitled to a hearing before closure of the factory. Counsel submitted that the decision is unjustified in the circumstances and concluded by praying to this court to quash the defendant's decision with costs.

THE DEFENDANT'S CASE

[12] The defendant through counsel adopted all the supporting documents in opposition filed in the present matter. Counsel submitted that the matter, in their view, was disposed of by virtue of the Order made by this court during the application for permission to apply for judicial review. Counsel is of the view that the said Order is protecting interests of both parties as the Court ordered that the claimant be at liberty to continue operating the factory and not to dispose of the machinery before conclusion of the present matter.

[13] The claimant through counsel prayed to this court to maintain that *status quo* and that for all purposes of the present matter, the issues were exhausted by that Order. Counsel submitted that the defendant has an interest in the machinery and that the claimant continues to operate the factory until the issues are dealt with to finality by this court. Counsel prayed to this court not to award costs to the claimant and prayed that each party should bear its own costs. Counsel also prayed to this court not to make any order as to damages.

[14] However, in their final submission to this court, the defendant argues that before placing an Embargo on the claimant's equipment and closing the factory, the Defendant interviewed the claimant's general manager Mr. Manti Rama Mohani who wrote a statement to Malawi Revenue Authority explaining the relationship between Indo African Limited (claimant) and Globe Beverages Limited. The defendant therefore disputes the Claimant's assertion that they were not heard.

[15] On legality of its action, the defendant argues that the law allows the defendant to undertake the action they did pursuant to section 149 of the Customs and Excise Act. The defendant submits

that section 149 allows officers of the defendant where they have reason to believe that an offence has been committed to place goods on an Embargo where proceedings will be commenced. The defendant therefore argues that criminal proceedings were commenced by the defendant before the Chief Resident Magistrate Court where the goods on Embargo are subject to State's evidence. As such, the defendant argues that their action is justified under the law.

[16] The defendant also makes reference to section 15 (1) of the Customs and Excise Act. The defendant argues that section 15(1) of the Customs and Excise Act empowers the defendant's officers to enter any customs area or any place intended for trade of which a search warrant has been issued and carry out such examination and enquiry, as they consider necessary and lock, seal or otherwise secure any part of such area.

[17] The defendant submits that in the present matter, the defendant had some information that Global Beverage Limited had been closed down in Lilongwe and operations has since commenced under the name of another company in Mzuzu through Indo African Distilleries. The defendant submits that their suspicion was confirmed when the claimants Officer Mr. Manti Rama Mohani stated in his statement that operational equipment belonging to Global Beverages Limited was now being used at Indo African Distilleries. The defendant further submits that they found alcoholic beverages at Indo Africa Distilleries in the name of Global Beverages Limited.

[18] The defendant submits that upon their entry into the premises of Indo Africa Distilleries pursuant to a search warrant, they found machinery that could not be moved and that this necessitated the locking of the factory premises as an officer at Indo confirmed that their operating machinery had been obtained from Global Beverages Limited.

[19] The defendant contends that there was no any wrong application of the law in these circumstances as they exercised the powers in accordance with section 15 (1) of the Customs and Excise Act and a court issued search warrant.

[20] On damages, the defendant argues that the claimant is not entitled to damages. The defendant submits that section 154 (2) of the Customs and Excise Act debars any claim for damages or costs against Malawi Revenue Authority unless it is demonstrated that officers of the defendant conducted themselves in bad faith when dealing with the claimant. The defendant states that the

claimant has not proved any bad faith on the part of the defendant's officers who dealt with the claimant.

THE LAW AND DISPOSAL OF THE MATTER

[21] Order 19 rule 20 (1) of the Courts (High Court) (Civil Procedure) Rules, 2017 provides that judicial review shall cover the review of a law, an action or a decision of the Government or a public officer for conformity with the Constitution, a decision, action or failure to act in relation to the exercise of a public function in order to determine its lawfulness, its procedural fairness, its justification of the reasons provided, if any, or bad faith, if any, where a right, freedom, interests or legitimate expectation of the applicant is affected or threatened.

[22] I remind myself that judicial review, as stated in many cases, is aimed at reviewing the decision-making process and not the merits of the decision 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 treatment⁵.

[23] Reverting to the present case, the genesis of the matter is the closure of the claimant's factory in Mzuzu. The defendant obtained a search warrant from the Principal Resident Magistrate Court at Mzuzu authorizing the defendants to search the premises of the claimant and Global Beverages Limited. The search warrant is exhibited and marked **ENB 3**, attached to the sworn statement in opposition to the grant of leave to apply for judicial review by Eleanor Naming'ona Banda. The search warrant is dated 16th day of June 2021 and was executed on 17th day of June 2021.

⁵ JAMADAR-V-ATTORNEY GENERAL [2000-2001] 175, PP 179-180. See also BLANTYRE CITY ASSEMBLY-V-KAM'MWAMBA & 6 OTHERS [2008] MLR 21, P24; COUNCIL OF CIVIL SERVICE UNIONS-V-MINISTER OF CIVIL SERVICE [1985] AC 374.

[24] Upon searching the claimant's factory in Mzuzu on 17th June 2021, it is submitted that the defendants' officers upon discovering that the company's equipment was heavy and could not be moved to the warehouse in Lilongwe, placed an Embargo against Indo African Distilleries Limited stopping them from moving any of the company's machinery and equipment outside the factory building as evidenced by the Notice of Embargo marked as **ENB 6**. In addition, the Notice of Embargo, pursuant to section 149 of the Customs and Excise Act provides that the goods may not be moved, sold, lent, hired, offered as a security or in any other way dealt with until the Embargo has been withdrawn in writing. There is a penal notice which states that failure to comply with the terms of the Embargo will render the claimant liable to prosecution or forfeiture of the goods forthwith.

[25] Section 149 of the Customs and Excise Act provides as follows:

“Where an officer has reason to believe that an offence has been committed under the customs laws in respect of any goods which have been released from customs control and in respect of which any proceedings could be commenced under the customs laws, he may, instead of seizing such goods, place an embargo on them regardless of where or in whose possession such goods are found.”

[26] The claimant has submitted that section 149 can only be resorted to where the goods are being imported into Malawi and are under the customs control of the defendant. In essence, it was the claimant's contention that the Notice of Embargo does not authorize the defendant to close factories or business premises.

[27] Let me mention that I do not agree with the defendant's interpretation of section 149 that an Embargo only applies to goods being imported into Malawi and are under the customs control of the defendant. My reading of section 149 shows that an Embargo applies to goods already released from customs control. What this means is that all importation processes are almost concluded and the defendant is not in control of such goods. What section 149 provides is that once the goods are no longer in control of the defendant but there is suspicion that an offence has been committed under customs laws in respect of such goods and in respect of which proceedings may be commenced, the defendant is bound to place an Embargo on such goods.

[28] In the present matter, I do not think that the machinery or equipment found in the claimant's factory, the subject of the Notice of Embargo, are goods under customs control or are goods being imported. These goods were already processed. I am of the considered view that the claimant's interpretation of section 149 is faulty. Having said that, I am of the view that the machinery or equipment as contained in the Notice of Embargo are subject to section 149 of the Customs and Excise Act.

[29] The only issue I agree with the claimant is that my reading of section 149 of the Customs and Excise Act shows that closures are not covered in section 149. Even the Notice of Embargo placed on the claimant's machinery and equipment did not include closure as an option. Therefore, it was legally wrong for the defendant's officers to use section 149 to close the claimant's factory unless accompanied by a seizure notice. The Notice of Embargo only restricted the claimant from indulging in any of the actions contained in the Notice of Embargo. The Notice of Embargo did not restrict the claimant to use the equipment or machinery. What this means, in my view, is that closure will interfere with usage of the machinery despite the Notice of Embargo not covering that aspect. What this means is that the claimant was to continue operating its factory until such a period the Notice of Embargo is not in force.

[30] Further, section 149 of the Customs and Excise Act empowers the defendant to place an Embargo on goods in respect of which any proceedings may be commenced under customs laws. Hence, for section 149 to apply, there must be likelihood of commencement of proceedings. Reverting to the present case, the defendant's assertion is that the machinery placed on Embargo is subject to State's evidence under Criminal Case Number 741 of 2021 in the Chief Resident Magistrate Court sitting in Lilongwe.

[31] I totally agree with the claimant herein that there are no any criminal proceedings in the Chief Resident Magistrate Court connected to the claimant. Criminal Case Number 741 of 2021 in the lower court does not mention the claimant as one of the accused persons. The accused persons in the lower court are the directors of the claimant who also happened to be directors of wound-up Global Beverages Limited. Indeed, it is a company law principle that the directors or shareholders of a company are totally different from the company that enjoys a separate legal personality, as

enunciated in the land mark case of **SALOMON V SALOMON AND COMPANY LIMITED**⁶ cited by counsel for the claimant.

[32] The mistake that the defendant made is to equate the criminal proceedings in the lower court to their actions with respect to the claimant. As submitted by the claimant, the disclosures in the lower court do not mention the claimant as a party or the machinery on Embargo as evidence. This fact was and remain unchallenged by the defendant. One wonders how the connection will be established between those criminal proceedings in the lower court and the machinery on Embargo. In other words, it is my finding that there are no any proceedings connected to the equipment placed on Embargo. The Embargo was placed in June 2021 as alluded to above. Until now, the defendant has not commenced any proceedings with respect to those goods on Embargo. I doubt if the defendant will do that after failing to do the same in the last 7 months. In these circumstances, I am of the considered view that the Embargo cannot stand since the defendant has not brought any evidence as to which proceedings it is related to. I am of the view that for an Embargo to be effective under section 149 of the Customs and Excise Act, the details of the proceedings contemplated or otherwise need to be disclosed. I therefore declare the Embargo a nullity.

[33] Let me mention that the defendant is at liberty to make necessary application in the lower court pertaining to the machinery in question. Assuming that the lower court agrees with the defendant, I am of the view that the court may grant orders protecting the interest of the defendant depending on the evidence adduced by the defendant.

[34] The defendant also submitted that section 15 of the Customs and Excise Act empowers officers of the defendant to do what they did with the Claimant's company. Section 15(1) provides as follows:

“The proper officer may in the course of his duty

- (a) Enter any customs area or any place used for the reception or storage of goods in use for or intended for trade or of documents or computer records and other electronic data relating to such goods, or any place in respect of which a search warrant has been issued, supervise any operations therein and carry out such examination

⁶ supra

and inquiry as he considers necessary and lock, seal or otherwise secure any part of such area or place or any goods there found for so long as he deems fit.”

[35] My reading of section 15 (1) (a) of the Customs and Excise Act shows that the defendant has to exercise those powers in situations where there is a likelihood of a commission of an offence by the owner of the premises as provided for in the search warrant. In the present case, as already alluded to, the defendant based its action on the criminal proceedings in the lower court, which as already stated, do not relate to the claimant. In the absence of any proceedings or tax dispute related to the claimant, it baffles me that the defendant proceeded to close the factory of the claimant. The defendant had ample time to carry out and conclude their investigations and place charges against the claimant, a thing they did not do until now. However, as said above, the defendant is at liberty to make necessary applications in the lower court regarding the machinery/equipment that was placed on Embargo.

[36] Let me also mention that my finding could have been different had it been that the machinery/equipment placed on Embargo evaded payment of necessary duty under the customs laws. Tax follows the goods regardless in whose possession they are. In the present matter, the issue is not about unpaid taxes on the machinery/equipment placed on Embargo.

[37] On damages, the claimant prayed to this court for damages following the action of the defendant in closing the claimant’s factory. Section 154 of the Customs and Excise Act provides as follows:

“Where any proceedings may be brought by or against the Controller under the customs laws and judgment is given against the controller herein, if the court before which such proceedings are heard is satisfied that there were reasonable grounds for the action giving rise to the institution of the proceedings, the plaintiff shall be entitled to recover anything seized, or the value thereof, but shall not otherwise be entitled to any damages, and no costs shall be awarded to either party.”

The claimant prayed for damages based on the ground that the actions of the defendant were in bad faith. However, I am of the considered view that the actions of the defendant were not actuated

by malice or bad faith. It is clear to me that the defendant's wrong interpretation of section 149 and section 15 (1) (a) of the Custom and Excise Act pushed them to do what they did. I do not think that their wrong interpretation amounts to bad faith. In these circumstances, I decline to award any damages to the claimant.

[38] On the claimant's argument that they were not accorded a chance to be heard contrary to section 43 of the Constitution, I am of the considered view that since the defendant had a search warrant from a competent court of jurisdiction, they were mandated to search the premises/factory of the claimant. In those circumstances, I do not think that the defendant was to first give chance to the claimant to be heard before executing the search warrant. Moreover, assuming section 149 and section 15 (1) of the Customs and Excise Act were legally applied, I do not think that the law demands a right to be heard before application of the law. I am certain as explained in this judgment that the law under section 149 and 15 (1) of the Customs and Excise Act presumes the commission of an offence under the customs laws. In that vein, I do not think that the scheme of things under these sections demand what the claimant is asking this court to do. I therefore find nothing contrary to section 43 of the Constitution herein.

CONCLUSION

[39] In conclusion, it is my finding that the defendant's application of sections 149 and 15 (1) (a) of the Customs and Excise Act was illegal in the absence of any tax dispute between the defendant and the claimant and also in the absence of any criminal proceedings known to this court and the parties herein related to the claimant. As stated in this judgment, for avoidance of doubt, the criminal proceedings under Criminal Case Number 741 of 2021 in the Chief Resident Magistrate Court sitting at Lilongwe do not relate to the claimant. In these circumstances, I set aside the Embargo placed on the machinery of the claimant in their factory in Mzuzu and I quash the decision of the defendant to close the claimant's factory in Mzuzu. As stated above, the defendant, in my view, has remedies available in the lower court.

[40] On costs, the discretion lies with the court. I therefore order that each party should bear its own costs.

**MADE IN OPEN COURT THIS 28TH DAY OF JANUARY 2022 AT HIGH COURT
LILONGWE DISTRICT REGISTRY.**


JOSEPH CHIGONA

JUDGE