IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

REVENUE DIVISION

JUDICIAL REVIEW CAUSE NUMBER 3 OF 2022

BETWEEN:

THE STATE (ON THE APPLICATION OF
THIRSTY JUICE COMPANY LIMITED) CLAIMANT

AND

MALAWI REVENUE AUTHORITY DEFENDANT

CORAM: HONOURABLE JUSTICE JOSEPH CHIGONA

MR. YAMBANI MULEMBA, OF COUNSEL FOR THE CLAIMANT

MRS. LONESS MICHONGWE, OF COUNSEL FOR THE DEFENDANT

MR. FELIX KAMCHIPUTU, COURT CLERK

CHIGONA, J.

ORDER

INTRODUCTION

[1] The claimant, a juice manufacturing company, operating from Lilongwe, filed an application for permission to apply for judicial review and interlocutory injunction against the decision of the defendant to levy distress pursuant to warrants issued. Upon perusal of the sworn statement by the managing director, Hider Diab, and the skeleton arguments, I ordered on 23rd February 2022 that both applications be brought interpartes on 16th March 2022. I therefore granted an interim injunction pending the hearing of the applications on 16th March 2022. Suffice to mention that the

hearing of the applications took place on 16th March 2022 and that this is now the court's determination.

CLAIMANT'S CASE

[2] In essence, the claimant, is against the following decisions of the defendant:

- The decision of the defendant's Commissioner General to issue a warrant, levy distress and place embargo on the claimant's property for corporate tax, domestic taxes and value added tax before making a determination on the claimant's appeal against the defendant's demand for the taxes.
- The decision of the defendant's Commissioner General not to determine the claimant's appeal.
- The decision of the defendant's Commissioner General to issue a warrant, levy distress and place an embargo on the claimant's property for corporate tax, domestic tax, domestic excise and value added tax without giving the claimant any or nay reasonable notice of the Commissioner General's decision not to determine the claimant's appeal.

[3] The claimant is seeking the following reliefs:

- A declaration that the defendant's Commissioner General is legally bound to hear or consider and make a decision on any appeal lodged with him by a taxpayer in terms of sections 97 and 98 of the Taxation Act and sections 43 and 44 of the Value Added Tax.
- A declaration, that on a true construction of sections 97 and 98 of the Taxation Act, the Commissioner General could not lawfully issue a warrant, levy distress or place an embargo on the claimant's property for corporate tax, domestic excise and value added tax before or without making a determination on the claimant's appeal against the defendant's demand for the same.
- A declaration, that on a true construction of sections 43 and 44 of the Value Added Tax Act, the Commissioner General could not lawfully issue a warrant, levy distress or place an embargo on the claimant's property for corporate tax, domestic excise and value added tax before or without making a determination on the claimant's appeal against the defendant's demand for the same.
- A declaration that in the premises of the declarations sought above inclusive hereof the decision of the Commissioner General not to determine the claimant's appeal against the defendant's demand for taxes was made without jurisdiction and is *ultra vires* the defendant, null and void *ab initio*.
- A declaration that in the circumstances, the defendant's decisions/actions and any subsequent processes based thereon are unlawful, unreasonable in the wednesbury sense, *ultra vires*, procedurally unfair and unjustifiable.
- An order akin to *certiorari* quashing the decisions
- An order akin to prohibition restraining the defendant from implementing the decisions
- An order akin to mandamus requiring the Commissioner General to hear, consider and make a determination on the claimant's appeal

- An order for costs and all necessary and consequential directions as the court deems just and appropriate in the circumstances.

[4] The facts are of the case are that on 12th May 2020, the defendant communicated to the claimant through a letter, findings of a preliminary investigation carried out in relation to the claimant's tax affairs. The copy of the said letter is exhibited and marked as **HD 1.** Upon receipt of the letter from the defendant, the claimant wrote the defendant on 15th July 2020 expressing surprise that the purported findings were based on information that was alien to and did not form part of the claimant's financial or business records. The copy of the said response is exhibited and marked as **HD 2.** The claimant states that several correspondences were exchanged between the claimant and the defendant. The letters are exhibited and marked as **HD 3, HD 4, HD5** and **HD 6** respectively.

[5] On 18th January 2021, the defendant wrote the claimant advising that taxes amounting to MK718, 145, 305. 91 remained unpaid representing value added tax, corporate tax and domestic excise. The letter from the defendant is marked as **HD 7.** That on 20th January 2021 the claimant appealed against the defendant's determination as communicated in the said letter dated 18th January 2021. The appeal letter is marked as **HD 8.** The claimant submitted that since the appeal was lodged with the Commissioner General, no determination has been made and communicated to the claimant. That on 22nd October 2022, the claimant wrote the defendant following up on their appeal and seeking an explanation why the appeal had not been determined. The letter is exhibited and marked **HD 9.**

[6] The claimant states that on 16th February 2022, to his surprise, the defendant distrained upon and sealed the claimant's factory premises and placed an embargo upon their company vehicles, purportedly in recovery of the sums claimed in the defendant's letter of 18th January 2021. Copies of the warrant of distress, distraint certificate and notice of embargo are exhibited and marked as **HD 10, HD 11** and **HD 12** respectively.

[7] During the hearing of the application, counsel for the claimant adopted the sworn statement in support and skeleton arguments. On the application for permission to apply for judicial review, he emphasized that the issue is the defendant's action of not determining an appeal against their assessment of taxes before issuance of a warrant of distress. The claimant through counsel submitted that this action by the defendant is amenable to review by this court.

[8] Counsel submitted that the defendant has misunderstood the application and the sequence of events in this matter. He submitted that the defendant's assertion that the letter of 20th August 2021 acted as a final notice upon which the claimant was to lodge his appeal is wrong. Counsel submitted that a definitive decision was taken by the defendant through a letter dated 18th January 2021 as the parties were engaged in continuous discussions from May 2020. He submitted that the letter of 20th August 2020 was just one of such correspondences. Counsel submitted that the letter of 20th August 2020 should not be considered as a reference point from which the claimant was to lodge an appeal. Counsel pointed out that pursuant to section 121 of the Customs and Excise Act, aggrieved taxpayer is to lodge an appeal with a special referee. Counsel submitted that the issue of having to comply with the law by writing different letters of demand is unreasonable.

THE DEFENDANT'S CASE

[9] Counsel for the defendant adopted the sworn statement in opposition and the skeleton arguments filed herein in support of their objection to the application for permission to apply for judicial review. The sworn statement is by Stanford Khundi, Manager, Tax Investigations. The deponent avers that the purported appeal by the claimant is against a final assessment on value added tax, corporate tax and excise tax contained in a letter dated 20th August 2020 exhibited and marked as **SK 1.**

[10] The deponent avers that the appeal against assessment for value added tax and corporate tax was supposed to be lodged with the Commissioner General within 30 days of the notice of assessment being dispatched and received by the taxpayer. The deponent avers that contrary to what the law demands, the claimant lodged his purported appeal on 22nd January 2021, 5 months after the assessment was dispatched and received by the taxpayer, and upon being served with a strong notice of demand for the assessed sums. The deponent avers that the appeal was lodged out of time without even seeking an extension of time from the Commissioner General as stipulated by the provisions of Taxation Act and Value Added Tax Act. the deponent avers that the purported appeal does not even contain any grounds of appeal as required by the law.

[11] That the deponent avers that regardless of the appeal, the claimants were supposed to pay the assessed taxes or apply for a waiver from the Commissioner General. In the absence of such actions by the claimants, the deponent avers that the defendant was lawfully mandated to enforce the payment of the assessed sums.

[12] For the excise tax, the deponent avers that the claimant was supposed to appeal directly to the special referee and not the Commissioner General. As such, the purported appeal in respect of excise tax was erroneously lodged with the Commissioner General, the deponent submits.

[13] The deponent avers that the claimant since May 2020 when the initial assessment was done, the claimant has been raising the same issues that they do not recognize the information that was used in the assessment that was obtained from their computers. That following discussions with the claimant, the defendant has amended the assessments up until the 20th August 2020 when a final determination was issued. The deponent avers that even after issuance of the final determination, the claimant continued to raise the same issues of not recognizing the information used in the assessment. The deponent avers that in all meetings that followed, the defendant insisted on the payment of the assessed sums. The deponent avers that it is not true that there are any issues hanging. A letter to the claimant dated 5th October 2020 on arrangement of a meeting and giving the claimant 7 days within which to pay the assessed taxes is exhibited and marked as **SK 2.**

[14] The deponent avers that their position did not change even after the meeting with the claimant on 20th October 2020. The deponent is of the view that the present application by the claimant is aimed at delaying the process of collecting taxes. The deponent avers that since January 2021 when the strong warning was issued and the purported appeal was filed, the claimant did not obtain a waiver from the Commissioner General against the collection of the taxes nor provided security.

As a result, the deponent believes that the defendant is at liberty to enforce the collection of the taxes.

[15] During the hearing, counsel for the claimant submitted that the purported appeal dated 22nd January 2021 was filed out of time as it was made after 30 days elapsed from 20th August 2020. Hence, to the defendant, there was no appeal before the defendant.

[16] Counsel submitted the appeal, as demanded by law, is to be filed in a prescribed manner. The defendant cited section 43(3) of the Customs and Excise Act that demands that an appeal be in writing specifying grounds supported by relevant documentation. Counsel submitted that the same applies with the Taxation Act and the Eighth Schedule to the Taxation Act. In reference to the purported appeal by the claimant, counsel submitted that there is no law cited, no grounds of appeal and no supporting documents as demanded by the law. In other words, counsel submitted that the appeal does not conform to the law.

[17] Counsel submitted that an appeal does not act as a stay of enforcement of collection of taxes. Counsel submitted that the claimant had options provided by the law which were not utilized. In conclusion, counsel submitted that there is no any triable issue herein as the purported appeal was not properly brought before the Commissioner General. Counsel therefore prayed for dismissal of the application for permission to apply for judicial review and interlocutory injunction.

[18] In reply, counsel for the claimant submitted that there was an appeal before the Commissioner General properly brought. He submitted that the court should look at substance over form in resolving the present application.

THE LAW AND ANALYSIS

[19] The purpose of permission stage in judicial review proceedings is to deal with applications which are frivolous, vexatious or hopeless and abuse of the court process. This is a sieving stage aimed at making sure that only deserving cases proceed to substantive hearing. The court is to grant permission only in applications where the court is satisfied that there are triable issues warranting further consideration. In the case of **Honourable George Chaponda and The State President of Malawi, Ex parte Mr. Charles Kajoloweka, The Registered Trustees of Youth and Society, The Registered Trustees of CCAP Synod of Livingstonia (Church and Society Programme) and The Registered Trustees of Centre for Development of People**[1], the Supreme Court of Appeal had the following to say on the permission stage:

> "We would like to agree with the court below on its understanding of the law when it stated that 'leave should be granted' if on the material then available the court thinks without going into the matter at depth, that there is an arguable case granting the relief claimed by the applicant. The test to be applied in deciding whether the judge is satisfied that there is a case fit for further investigation at a full interpartes hearing for a substantive judicial review is also discussed in **R v Secretary of State for Home Department, Ex**

[1] MSCA CIVIL APPEAL NUMBER 5 OF 2017 (Unreported)

> **parte Rukshanda Begum**[2]. ..Thus, in **R v Inland Revenue Commissioner, Ex parte National Federation of the Self Employed and Small Businesses**[3], it was instructively put that the right to refuse leave to move for judicial review is an important safeguard against courts being flooded and public bodies being harassed by irresponsible applications for judicial review. Further, in the same judgment it was stated by Lord Diplock that the requirement of leave may prevent administrative action being paralyzed by a pending, but possibly spurious, legal challenge. It is easy to understand that the aim of this requirement is therefore to 'sieve out' proceedings which in the court's view, are spurious, and remain with those which the court is satisfied are 'arguable cases'. The purpose for the requirement of leave is to eliminate at an early stage, any applications which are either frivolous, vexatious or hopeless and to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained is designed to prevent the time of the court being wasted by busy bodies with misguided complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."

[20] I am also persuaded by what my brother Judge said in the case of the **State (on the application of Zuneth Sattar) v The Director of Public Prosecutions and The Director of Anti-Corruption Bureau and the Attorney General**[4], when he stated the following:

> "Permission to apply for Judicial Review will be granted if the court is satisfied that there is an arguable case for granting the relief claimed by the Applicant. At this stage there is no need for this court to go into the matter in depth. Once the court is satisfied that there is an arguable case then permission should be granted. The discretion that the court exercises at this stage is not the same as that which the court is called on to exercise when all the evidence in the matter has been fully argued at the hearing of the application for judicial review."

[21] At this stage, I am not called upon to consider all the evidence adduced before me. What I have to decide is whether the claimant has, on the available sworn statement evidence, made out a *prima facie* case for permission to apply for judicial review.

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[2] [1990] COD 109 CA

[3] [1982] A.C. 617. See also State and Governor of the Reserve Bank of Malawi ex parte Finance Bank of Malawi, Miscellaneous Civil cause Number 127 of 2005 (High Court, unreported).

[4] Judicial Review Case Number 68 of 2021 (High Court, Principal Registry, Unreported). See also Ombudsman v Malawi Broadcasting Corporation [1999] MLR 329

[22] Reverting to the present case, I have noted that the main issue to resolve is whether there was an appeal before the Commissioner General or not. The claimant has submitted that there was an appeal while the defendant has submitted that there was no appeal filed before the Commissioner [23] General. Counsel for the claimant submitted that the letter of 20th August 2020, **SK 1/HD 3,** should not be treated as a final assessment but rather as one of the correspondences made between the parties. The defendant is advising the claimant to settle the amount of MK694, 859,114.48, failing which the defendant was to escalate enforcement measures.

[24] On 5th October 2020, a meeting took place between the parties where the position of the defendant did not change as evidenced by **SK 2/HD 5.** The defendant demanded immediate payment of the amount and advised the claimant that failure to pay would compel the defendant to escalate enforcement measures. After this meeting, the claimant wrote the defendant responding to the assessment through a letter, **HD 6.** On 18th January 2021, the defendant wrote the claimant advising that taxes amounting to MK718, 145, 305. 91 remained unpaid representing value added tax, corporate tax and domestic excise. The letter from the defendant is marked as **HD 7.** That on 20th January 2021 the claimant appealed against the defendant's determination as communicated in the said letter dated 18th January 2021. The appeal letter is marked as **HD 8.**

[25] I am of the considered view that the claimant was supposed to appeal immediately the letter dated 20th August 2020 was received. In that letter, it is clear to me that the defendant is making an express demand for payment of taxes. The correspondences that followed the letter of 20th August 2020, in my considered view, did not change the position of the defendant. What this means is that the claimant had 30 days to appeal, with respect to value added tax[5]. The claimant had also 30 days to appeal against the assessment of the taxes under the Taxation Act[6]. Unfortunately, the claimant did not file the appeal before the Commissioner General. As for the domestic excise taxes, the correct procedure under the Customs and Excise Act is to lodge an appeal before a special referee[7]. What this means is that for domestic excise, there is no appeal as the purported appeal before the Commissioner General is illegal as it was filed before a wrong forum.

[26] The letter dated **HD 7** from the defendant was just advising the claimant of the unpaid taxes as they had done in the past. I do not think that the letter constituted a final notice of assessment. It was, in my interpretation, a reminder. I do not think that the claimant was to lodge the appeal on the reminder. Rather, the appeal was to be lodged after the assessment as communicated in the letter dated 20th August 2020. I therefore agree with the defendant that the purported appeal through a letter dated 20th January 2021 against the reminder dated 18th January 2021 was made out of time and therefore ineffectual. The proper course of action for the claimant was to seek an extension of time from the Commissioner General within which to file the appeal. This was not done. I am of the considered view that bearing in mind all these circumstances, there was no any valid appeal before the Commissioner General. In my considered view, the claimant should not hide behind the letters written after 20th August 2020. These letters did not change anything nor did they extend time within which the claimant was to appeal. Since there was no any appeal before

[5] Section 43(1) of the Value Added Tax Act
[6] Eighth Schedule to the Taxation Act
[7] Section 121 of Customs and Excise Act

the Commissioner General, I do not think there is any arguable or triable issue or issues for further consideration at a substantive hearing. I am of the firm view that the application for permission to apply for judicial review should fail and I so order.

[27] Be that as it may, let me deal with the issue of the purported appeal as filed through a letter dated 20th January 2021. Counsel for the defendant submitted that the purported appeal is against the clear provisions of the law as to the requirements of a valid appeal. The defendant argued that the appeal through the letter did not cite any law from where it was made, grounds of appeal were not cited and attachments/documents were not attached to substiate the appeal. The claimant submitted that what matters in the present application is substance and not form. In other words, the claimant is not disputing the submission of the defendant. I take it that the claimant agrees that the appeal is to comply with a certain format. The only defence is that the court should consider the substance and not the form. In the case of **Chidzankufa v Nedbank Malawi Limited**[8], the Court stated as follows on compliance with forms provided in statutes:

> "I have seriously considered the defendant's submission and the authorities cited and in my view the case at hand can be distinguished from those cases on one point. The issue at hand is one that involves strict compliance with the law, an Act of Parliament to be specific. The Act itself prescribes the form that a bill of sale must take. It provides that that form must be complied with at all times. Further, it specifically states that non -compliance with the form renders a bill of sale void. Thus, the Act demands absolute compliance with the form. I would like to believe that the law did not require strict compliance with the prescribed Form for nothing. It must have been for a purpose. A good purpose for that matter. Therefore, in my judgment, it would be grossly wrong and contrary to public policy if this court were to hold that parties can ignore the prescribed form (thereby flouting the law) but still be able to benefit from the law. In other words, and put it more precisely, the court cannot validate what the Act has specifically invalidated".

[28] Though in the present application I am not dealing with a particular Form, I am of the considered view and agree with the court that the purpose of having the appeal comply with a certain format is for a purpose. I do not think that the claimant was to ignore what the law provides and later argue before this court to disregard the law. The Value Added Tax Act provides that every appeal shall be in writing, and shall specify grounds in details, supported by relevant documents upon which it is made[9]. I do not think that the purported letter of appeal conforms to what the law provides. The grounds of appeal and supporting documents are not part of the letter. The same applies to the Eighth Schedule to the Taxation Act that demands an appeal to be in writing specifying the grounds on which the appeal is made. Hence, I am of the view that had the

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[8] 1 of 2008, Commercial Court, unreported.

[9] Section 43(3) of Value Added Tax Act

claimant lodged the appeal within the prescribed time through the letter dated 20th January 2021, the same could have failed on this aspect of not complying with the format.

[29] In conclusion, it is my finding that there is no any valid appeal before the Commissioner General to compel this court to allow the claimant permission to apply for judicial review. Put it differently, it is my finding that there is no any arguable claim for further consideration at an *interpartes* hearing.

[30] In the same vein, I do not think that the present matter is one where this court should exercise its discretion to grant the claimant an interlocutory injunction. In the absence of any triable or arguable issue as my finding above, there is no any reason for this court to grant an interlocutory injunction. Further, assuming that there was a triable issue, I am of the considered view that damages could have been an adequate remedy. I therefore set aside the interim injunction I granted in this matter.

[31] Each party to bear its own costs.

MADE IN OPEN COURT THIS 16TH DAY OF JUNE 2022 AT PRINCIPAL REGISTRY, REVENUE DIVISION, BLANTYRE.

Joseph Chigona
JUDGE