IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

REVENUE DIVISION

JUDICIAL REVIEW CAUSE NO. 1 OF 2022

THE STATE
(ON APPLICATION OF ABDUL KARIM BATATAWALA t/a
LIDO GROUP OF COMPANIES ..... CLAIMANT

AND

MALAWI REVENUE AUTHORITY ..... DEFENDANT

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

RULING

The application

The claimant filed an application for permission to apply for judicial review of

1. a decision by the defendant demanding payment of taxes due from the claimant "without paying due attention to special circumstances regarding the total amount of taxes already collected and the outstanding taxes due vis-à-vis to the continuity of the claimant's business contrary to the true interpretation of section 105 of the Taxation Act;" and

2. a decision of the defendant to demand the taxes due without affording the claimant a pre-action hearing in view of the special circumstances of the case, namely
    a) that the claimant already paid huge sums of money to the defendant and the claimant has not exhausted the appeal process, and
    b) that the decision of the defendant to not dispose of the pending appeal for almost a year is unfair and inconsistent with fair administrative procedures under section 43 of the Constitution.

The claimant seeks the following declarations and orders:

1. a declaration that the defendant's decision demanding payment of all taxes due without paying due regard to the special circumstances, namely, the total taxes paid and the existence of a pending appeal is unreasonable in the *Wednesbury* sense and "is devoid of" the claimant's legitimate expectation of fair administrative treatment under the Constitution";
2. a declaration that on a true construction of section 105 of the Taxation Act and section 43 of the Constitution the principle of "pay and argue later" is subject to fair administrative treatment including conducting pre-action hearing where there are special circumstances as in the instant case hence the decisions are illegal and irrational;
3. orders of certiorari quashing the defendant's decision, stay of the decision and directions as to the hearing of the matter and for costs.

Upon my examination of the application and the grounds advanced therefor I formed the view that the application for permission would best be considered *inter partes*, and directed accordingly. This is my Ruling on the *inter partes* hearing of the same.

Facts relied on by the claimant

The claimant relies on the affidavit of Azery Mnyalira, holding himself out as the claimant's Tax Accountant.

He states that the defendant carried out investigations into the claimant's tax liabilities and issued an assessment amounting to K7 622 953 102.07 (hereinafter to be cited as "K7.6bn", unless otherwise necessary). The assessment is exhibited and marked "PTC 1". The said amount, he states, was paid by the claimant under protest who proceeded to lodge an appeal with the Commissioner General which the latter dismissed. He avers that he thereafter appealed to the Special Arbitrator who decided in the claimant's favour, which decision the defendant appealed against in the High

Court, therein succeeding, and being dissatisfied with the High Court's determination, the claimant lodged an appeal in the Supreme Court of Appeal, which appeal is pending.

It is averred that since the lodging of the appeal in the Supreme Court of Appeal, the claimant has submitted his annual corporate tax returns for financial years 2016/2017 up to 2020/2021 and that prior to the 2016/2017 financial year, and specifically before the High Court determination the claimant was in an assessed loss position and that the tax computations for that year were based on the said assessed loss carry forward and the taxes were paid under protest in the spirit that the appeal process had not been exhausted in view of the appeal pending in the Supreme Court of Appeal.

The deponent further avers that by letter dated 3rd September 2020 the defendant issued to the claimant a demand notice for the sum of K4 192 734.92, against which the claimant protested on the ground that the tax issues which gave rise to the claimant's assessed loss and refund position in the 2016/2017 financial year were subject of an appeal in the Supreme Court of Appeal and that the interest of justice tilted in favour of allowing the claimant to continue claiming the assessed loss carry forward until the final disposal of the appeal, and on the ground that the taxes due and demanded had been duly paid, though under protest, hence the defendant would not be prejudiced in any way. This submission was rejected by the defendant who proceeded to collect the K4 192 734.92. It is the view of the claimant, as deposed by Mr Mnyalira, that the defendant's decision declining the claimant's submission and proceeding to collect the K4 192 734.92 was in disregard to the claimant's business survival and unfair to him as a taxpayer having earlier collected huge sums of tax. Mr Mnyalira further avers that following this the claimant lodged an appeal to the Commissioner General with regard to the K4 192 734.92 which appeal is still pending before the Commissioner General and that there is no indication as to when the same will be determined. The appeal, exhibit "PTC 11" is dated 25th January 2021.

It is averred further for the claimant that, to the claimant's dismay, by letter dated 21st December 2021, the defendant issued an initial warning notice for domestic tax arrears amounting to K192 840 781.40 whose correctness the claimant queried and this resulted in the defendant revising the amount to K74 317 813.66 and demanding the immediate payment thereof, or in any event, not later than 9th February 2022, without, so it is averred, "engaging the claimant on the payment plan". Mr Mnyalira

states that according to the advice proffered by the claimant's lawyers, which he verily believes to be true, the manner in which the defendant is treating the claimant as a taxpayer is unfair, illegal and unreasonable of a public body and amenable to judicial review. He states that in view of the circumstances relating to the total taxes paid under protest and the appeal pending in the Supreme Court of Appeal and the Commissioner General, there are special circumstances requiring the defendant to call for a pre-action hearing on the further taxes payable before issuing any demand letter as in the instant case, hence the defendant's demand for further taxes due without a pre-action hearing is, in his view, unreasonable and unfair by all standards. It is contended that the defendant's actions taken in totality are aimed at choking the claimant's business and/or killing it completely without any legal justification whatsoever, and only driven by malice.

It is explicit from both the affidavit of Mr Mnyalira and the submissions of counsel for the claimant, that this application is in relation only to the decision embodied in the defendant's letter dated 21st December 2021, demanding domestic tax arrears amounting to K192 840 781.40 and later reduced to K74 317 813.66 (hereinafter "K74 million" unless otherwise necessary) to be paid not later than 9th February 2022, and it is that decision which the claimant argues ought to have been preceded by a pre-action hearing, the failure of which must be subjected to judicial review. In this regard the issue which the court would have to decide at the judicial review, if permission was granted, may be summarized as follows:

> Whether the defendant's decision demanding payment of the K74 317 813.66 under the section 105 Taxation Act principle of "pay and argue later", without conducting a pre-action hearing in view of what the claimant perceives as special circumstances, namely that the claimant has previously paid huge amounts of taxes, and in light of the appeal pending in the Supreme Court of Appeal, is unreasonable in the *Wednesbury* sense and in violation of the claimant's right to fair administrative treatment under section 43 of the Constitution, and therefore illegal and irrational.

Claimant's Submission

Counsel reiterated that the present application emanates from the collection of the K74 million; that the claimant's expectation is that before the enforcement of that amount, and taking into account the amount of tax already collected under protest (74bn and 4bn), it would only be fair if the defendant would call for a pre-action hearing notwithstanding the terms of section 105 of the Taxation Act principle of

"pay now argue later" if you have any objection. In this regard counsel referred the court two decisions of this court, namely *Alliance One Tobacco v Commissioner General of the Malawi Revenue Authority* Judicial Review Cause No. 5 of 2017 (Chigona J) and *Blantyre Printing and Publishing Co Ltd v Commissioner General of the Malawi Revenue Authority* Revenue Cause 15 of 2017 (Mbvundula J) where, as counsel submitted, it was held that instances may arise where a the defendant must call for a pre-action hearing and affording the taxpayer fair administrative procedures.

According to counsel if this court finds that the decision is unreasonable the court should grant a quashing order, which order, so he submitted, would not entail that the taxes due will not be paid but, rather, fairness to the claimant by way of a pre-action hearing where fair terms will be agreed. Counsel thus submitted that the present application raises a ground fit for further inquiry by way of judicial review.

The defendant's response

The defendant relied on two affidavits, the first by Lilian Nyirenda, holding herself out as a "Manager Collection and Filing Enforcement Large Tax Payer Office" and a supplementary one by Mr Anthony Chungu, of counsel, both in the employ of the defendant.

In her affidavit Mrs Nyirenda refers to the affidavit by Mr Mnyalira and gives the following account.

She avers, in relation to the demand for the K74 million that on 9th February 2022 the defendant was served with the present application for permission to apply for judicial review. The background facts, according to her affidavit, are that the claimant was audited from May 2021 to 16th June 2021 for the period April 2019 to March 2020 covering Value Added Tax (VAT) and Corporate Tax and following the audit a total of K32 515 685.57 was quantified for Corporate Tax and VAT which was communicated to the claimant in the final audit report dated 28th June 2021.

She avers further that the claimant was given seven days in the audit report (Audit 2) to settle the tax liability failing which the defendant would be compelled to escalate enforcement measures. She states that the case was then handed over to the defendant's Collection and Filing Office (CFE), for collection of those taxes, on 30th November 2021. As of that date, so she avers, the claimant had other outstanding taxes from a previous audit conducted in 2019 (Audit 1) and a corporate tax balance, and as at 21st December 2021, the defendant's records reflected arrears amounting

to K192 840 781.40. As at 2nd February 2022 the amount reflected a tax arrears balance of K74 317 813.66. This is in agreement with the averments by Mr Mnyalira in the affidavit in support.

Mrs Nyirenda goes on to state that following failure by the claimant to settle the debt, the CFE issued an Initial Warning Notice on 21st December 2021 which demanded K192 840 781.40, to which the claimant responded in his letter of 23rd December 2021, enclosing therewith some withholding tax certificates for 2016 and 2020 which had not been credited in the assessments and stating that he was working on settling the arrears within the shortest possible time. She states that action was taken to enter the necessary credits.

It is the deponent's further account that on 10th January 2022 the claimant made some payments towards the arrears and provided details of how some of the amounts in audit 1 were settled and upon verifying the payments the same were acknowledged in the defendant's letter dated 2nd February 2022, and the interest previously charged was accordingly recalculated.

Following that, so it is stated, the claimant through his Tax Manager, Mr Mnyalira, contacted the CFE case officer, Rhoda Chibwana, on 4th February 2022, indicating that due to the slowness of business the claimant would not manage to pay the whole sum demanded by 9th February 2022 and requested to pay that the arrears be settled by installments, in response to which the officer advised Mr Mnyalira to put the request in writing and deliver it to the Manager CFE before 9th February 2022. On the same day, it is averred, Mr Mnyalira visited the deponent herein with a proposal to be paying K10 million every month and the deponent rejected the proposal, advising him to present the same in writing so that the defendant may respond officially. It is stated that when the case officer called Mr Mnyalira for the letter, his response was that the letter had not yet been signed. To-date, it is stated, the claimant has not disputed the tax liability.

In the view of the deponent the defendant has duly accorded the claimant the claimant the right to be heard through the various letters of demand and warning letters (exhibited and marked "MRA 1", "MRA 2" and "MRA 3". She avers that in addition the claimant is at liberty to appeal to the Commissioner General, if aggrieved with the outcome of the process and outcome, the enforcement of which the claimant is said to have participated in by offering payment modalities.

Thus she prays that the prayer for leave to apply for judicial review should be refused.

The supplementary affidavit of Mr Chungu merely seeks to clarify what he considers misconceptions in the position taken by the claimant and of no sesrios consequential effect.

Defendant's submissions

Counsel for the defendant countered the claimant's application with two issues, namely

a) whether there were serious issues fit for judicial review;
b) and whether the claimant has exhausted all the alternative remedies at his disposal and related thereto, whether the application is academic and a waste of the court's time. [min 20]

Counsel argued the issues in reverse order.

a) On whether the claimant has exhausted alternative remedies

Counsel referred to a statement by counsel for the claimant that it would not be novel for the parties go back to the drawing table, which in defendant's counsel's understanding related to exhaustion of alternative remedies. With reference to the affidavit of Mrs Nyirenda, counsel seemed to have erroneously understood that the claimant had already started paying towards the assessment. Contrary to that understanding the affidavit pointed out that the claimant had verbally requested for payment terms which he was yet to reduce to writing. In the submission of counsel that the claimant was requested to formally put in writing his offer for payment by installments to the Commissioner General, which he did not take up within the number of days stipulated by the defendant, left it clear that there is still an alternative remedy that has not been exhausted.

In line with section 105 (2) of the Taxation Act, so submitted counsel, tax is payable unless the Commissioner General directs otherwise. In the present case, it was submitted, no appeal had been lodged before the Commissioner General relating to the assessment in issue. Secondly, no application for waiver to pay at once was sought and granted. All these, in the submission of counsel for the defendant, are alternative remedies still at the disposal of the claimant, and not been exhausted. Counsel made specific reference to the fact that under both the Taxation Act and the Value Added Tax Act the claimant has outstanding alternative remedies.

On whether there are serious issues to be examined at a judicial review

Counsel submitted that in the present case the claimant defaulted in his duty to carry out a self-assessment and submit a return which prompted the defendant under its statutory duty to assess him and demand payment accordingly. In the submission of counsel, doing what is provided in the law, as the defendant did, cannot be a ground for judicial review. Consequently, so proceeded counsel, there will be no question to be considered in judicial review.

Determination

I form the view that the issue of availability of alternative remedies is dispositive of this application. Granted that the parties agree that the application herein relates only to the K74m tax assessment which is not in dispute, and therefore due as a tax liability, and it not being disputed that the claimant was asked to submit his written proposal for settlement, which he did not honour, it cannot lie in the claimant's mouth that the defendant should be restrained from demanding the said tax merely because there was no pre-action hearing. Whilst it has been held in previous court decisions that in certain circumstances a pre-action hearing ought to be held, it is my opinion that where the tax payer has been granted an opportunity to state his case and present a proposal for settlement, and he ignores it, as is the case herein, he cannot justly claim want of a pre-action hearing or that his rights under section 43 of the Constitution have been violated. The notion of a pre-action hearing, as a matter of fact, simply connotes or extends to an opportunity for the taxpayer to make submissions in relation to his tax assessment in whatever way. In the premises I find myself in agreement with the defendant that the claimant has had an alternative remedy by way of submitting his payment plan to the defendant, which for his own reasons he has not utilised. Accordingly the prayer for permission to commence judicial review proceedings is denied. Consequently all and any restraint orders granted herein against the defendant are set aside.

The claimant shall bear the costs of the application.

Made in chambers at Blantyre this 6th day of May 2022.

R Mbvundula
JUDGE