**IN THE HIGH COURT OF MALAWI**
**PRINCIPAL REGISTRY**
**REVENUE DIVISION**
**JUDICIAL REVIEW CAUSE NO. 1 OF 2020**

**THE STATE**
**(on the Application of DBR INTERNATIONAL WAP LTD) ..... CLAIMANT**
**AND**
**THE COMMMISSIONER GENERAL**
**OF THE MALAWI REVENUE AUTHORITY ..... DEFENDANT**

**CORAM : THE HONOURABLE JUSTICE R. MBVUNDULA**
Sauti-Phiri, Counsel for the Claimant
Micongwe, Chungu, Counsel for the Defendant
Chimamng'anga, Official Court Interpreter

## RULING

The claimant was granted permission to commence judicial review proceedings and an injunction order pending the hearing of the application for judicial review. The defendant subsequently filed an application to vacate the permission as well as the attendant injunction. The application is opposed.

The grounds relied upon by the defendant are firstly that the matter is not amenable to judicial review and secondly that the claimant has not exhausted all available alternative remedies.

In the judicial review application the claimant challenges, in main, the decision of the defendant "calculating excise tax based on a Ministerial Budget Statement and imposing a penalty on the same excise tax at 20%." The prime disputes arising in the judicial review application is as to whether the defendant can rely on the Ministerial Budget Statement and as to what the correct formula for calculating excise is applicable to the claimant's business. The two are in disagreement as to the

applicable formula. The claimant also asserts that the formula relied upon by the defendant deviates from the defendant's own previous advice to the claimant on the same as well as the formula provided for in Paragraph 2(b) of the Fifth Schedule to the Gaming Act. The claimant also asserts that by deviating from the advice the defendant provided to the claimant the defendant violates the claimant's right to a legitimate expectation as regards the applicable formula.

The claimant's application for permission to apply for judicial review and the injunction is supported by a reasonably lengthy sworn statement made by the claimant's Malawi Operations Manager, details contained in which will not be dwelt with at length in the present application, as they will be more relevant to the judicial review application.

The application to vacate the leave and discharge the injunction is supported by a sworn statement made by the defendant's Deputy Commissioner in the Large Tax Payers office. Contrary to the claimant's assertion that the defendant cannot rely on the Minister's Statement it is contended for the defendant that because section 82(f) and paragraph 3(1) of the Tariff Book do not provide a formula or explain on what specifically the excise tax will be charged, only the Minister's Budgetary Statement provides for the same.

The parties are also in disagreement as to the correct interpretation of the letter advising the claimant on the correct formula which the claimant asserts to have itself relied upon in calculating the excise. The material part of the letter is quoted in paragraph 10 of the claimant's sworn statement as follows:

> "The gaming levy is an ordinary business expense and irrelevant in determination of the excise tax base. According to excise tax legislation, gaming is subject to 10% excise tax. Our understanding of the nature of gaming transactions is that the amount paid by the customer is inclusive of the excise, so that before any other deductions are made from gross takings [ ], the gross takings are equivalent to the gaming company's net takings plus excise thereon at 10%..."

In the understanding of the claimant the essence of the foregoing advice was that the defendant had guided that excise tax be based on revenue. It is however contended in the defendant's sworn statement that the claimant has deliberately misunderstood the advice as the same is clear that excise is on the amount paid by the customer, in other words, bets, and that the claimant miscalculated the excise tax payable. In his submissions counsel for the defendant argued that since the dispute herein is about

calculation on the basis of Ministerial Statements and statutory interpretation and what the correct formula was in accordance with section 82(f) of the Customs and Excise Act then the matter herein was not fit for judicial review. On the other hand it was submitted for the claimant that the matter is fit for judicial review because the claimant contends that in terms of Order 19 rule 20 of the Courts (High Court) (Civil Procedure) Rules, 2017 it is illegal for the defendant to fail to apply the law. Under Order 19 rule 20 a decision is amenable for judicial review for, among other grounds, its lawfulness. It being contended that the use of the Ministerial Budget Statement as the basis for calculating excise is an illegality and smacks of arbitrariness it is my finding that the dispute herein is a triable issue under judicial review in terms of Order 19 rule 20 (1) (b) (i).

On availability of alternative remedies it was contended for the defendant that the claimant has an alternative remedy under section 121 of the Customs and Excise Act in that claimant has a right to appeal to a Special Referee. It was argued that the claimant had not proved any circumstances as to why they must be permitted to proceed by way of judicial review and not before a Special Referee or that the procedure under section 121 was inadequate. The defendant's position is the correct one because section 121 relates to disputes arising between the owner of any *goods* and the Controller as to the amount of duty payable *on those goods*. It must follow then that since the present matter has nothing to do with duty payable on goods, the Special Referee lacks jurisdiction and his adjudicative powers are not available to the claimant as an alternative remedy.

With regard to the defendant's application to set aside the injunction it was the defendant's counsel's submission that since the defendant had demonstrated that there were no triable issues then it must follow that the injunction must fall away. This argument necessarily falters on the ground that it has been established that there are in fact triable issues herein.

It was further argued for the defendant that the balance of convenience lies in discharging the injunction since the defendant has a refund policy under section 96 of the Customs and Excise Act, hence damages would be an adequate remedy and the defendant would be able to pay them in the event of the claimant succeeding. In response, for the defendant it was argued that the amount in issue being around K17 billion the least the defendant ought to have done is to produce financial statements demonstrating that the defendant would be able to pay such a large sum. It was the defendant's further assertion that its loss would be difficult to quantify. I am inclined

to be of the view that the defendant has not ably, if at all, demonstrated the defendant's ability and capacity to pay the claimant's damages in the event of the claimant succeeding. Whilst there may indeed be provided for a refund policy, as asserted, there has to be further demonstrated the efficacy and active implementation of the said policy. The principle that he who alleges must prove the affirmative comes into play here. In my finding the defendant has fell short of demonstrating their capacity to make good the claimant's estimated possible loss. I accordingly find that damages may not be an adequate remedy.

The application to vacate the permission to apply for judicial review and the accompanying injunction is, for the above reasons, unsustainable and accordingly dismissed with costs.

Made in chambers at Blantyre this 22nd day of March, 2023.

R Mbvundula
**JUDGE**