**IN THE HIGH COURT OF MALAWI**
**PRINCIPAL REGISTRY, (REVENUE DIVISION)**
**REVENUE CAUSE NO. 7 OF 2019**

**THE STATE**
**(on the Application of NATION PUBLICATIONS LTD) .... CLAIMANT**
**AND**
**THE MALAWI REVENUE AUTHORITY ..... DEFENDANT**

**CORAM : THE HONOURABLE JUSTICE R. MBVUNDULA**
Dzonzi, Counsel for the Claimant
Chungu, Counsel for the Defendant
Chimamng'anga, Official court Interpreter

## RULING

The claimant was granted an injunction order pending the hearing of an application for judicial review, subject to its application for an order for the continuation of the said order to be made *inter partes*, with which it complied. The application for continuation of the injunction came up for hearing and was hotly contested. This is the court's Ruling on the same.

In the judicial review application the claimant challenges certain decisions of the respondent alleging illegality, mala fides, unreasonableness, and abusiveness. It raises the following questions for the court's resolution:

1. Whether the defendant's act of closing down the claimant's business operations under the guise of tax recovery is lawful when section 107 of the Taxation Act as read with section 40 of the Value Added Tax Act do not authorise the same;
2. Whether the defendant erred in law by refusing to take into account prior payments of the claimant and a tax rebate (credit) both of which were in possession of the defendant at the time of computing the alleged tax liability;

3. Whether the defendant erred in law by erroneously computing the claimant's corporate taxes without taking into account the claimant's allowable tax losses under sections 28(1) and 35 of the Taxation Act;
4. Whether the defendant erred in law by refusing to exercise its discretion to waive penalties it charged the claimant on wrongly computed taxes which were not due in the first place; and
5. Whether, generally, the defendant acted unreasonably, *mala fide*, and abusively towards the claimant despite the claimant acting within its legal rights throughout the events giving rise to the present proceedings.

With regard to the continuation or otherwise of the injunction the defendant raises the following issues:

1. Whether, the claimant having failed to satisfy its tax payment proposals, there can be a serious question to be tried;
2. Whether the claimant would suffer irreparable damage or harm, and whether damages would be an adequate remedy;
3. Whether the balance of convenience lies in favour of discharging the injunction and respective leave for judicial review; and
4. Whether the claimant came to court with unclean hands.

In my assessment the claimant does, *prima facie*, raise serious issues in all the four questions for determination at the judicial review. The defendant argues, however, that there can be no serious question to be tried where it is clear that the claimant owes the defendant a tax debt and respective interest and penalties and, particularly in this case, where there is no challenge to the mode of assessment of the tax. It is submitted that even if such was to be the case the same would not be properly addressed under judicial review. The cases *Mike Appel and Gatto v MRA*; *Banja la Mtsogolo v MRA*; and *Siku v MRA*, whose citations were not provided, have been referred to as authority for this proposition. It is argued that the better forum would be the Commissioner General. This, however, appears to be a doubtful proposition because the law does not grant the Commissioner General powers to determine whether or not his decisions are, for example, abusive, mala fide, lawful or otherwise, which is what the claimant seeks in the judicial review application. I would hold therefore that there do exist in this case serious questions to be tried at a judicial review hearing.

The defendant submits that damages would be an adequate remedy. The defendant's skeletal argument goes:

> "Logically, the damage is reparable. It can always be made good on remedied. What cannot be remedied is the irreparable damage that has always occasioned to the ultimate beneficiary on tax revenue. We are talking of some ordinary Malawian, in the deep rural, who would have had access to various social amenities if tax was paid when it was due, as the law dictates. Yet, the same was withheld by the applicant – through continued/repetitive dishonouring of their own tax settlement proposals. **This inconvenience to the voiceless villager; a villager who cannot take up this matter on their own—who form the majority of Malawians, is what cannot be quantified** –and need to be remedied by vacating the injunction and respective leave for judicial review." *(sic)*

With respect, this argument does not advance any legal principle for the position that any damage which could be occasioned to the claimant can be remedied in damages. No further comment need be made on the point.

On whether the balance of convenience lies in favour of discharging the injunction the defendant submits that against the background of its view that there is no serious question to be tried and there would be irreparable damage (which this court disagrees with), the balance of convenience lies in lifting the injunction

> "... so as to allow tax enforcement to take its course, for the simple reason that there shall always be growing needs to be served through taxes, ... if we were to allow this conduct, what precedent would we set? Wouldn't continuing the injunction in the long run open the gates of **shifting of the tax paying burden from such giants to the rest of the population ... Most of which is already overburdened with poverty?** If we opt for selective payment of taxes through injunctions, we will only achieve shifting of the burden – to the rest with no muscle to apply for waiver, through injunctions." *(sic)*

I am of the view that granted that this argument is premised on the claimant's opinion that there are no serious questions to be tried, with which I do not agree, then it must follow that the said argument cannot stand. It further cannot stand on the ground that it is not grounded on any principle relating to the discharge of injunctions. That there shall always be growing needs to be served through taxes, for example, does not of itself, if at all, justify, in principle or otherwise, the discharge of an injunction, nor does the fact that the claimant is regarded as a "giant" of some sort and/or that taxes are ostensibly relevant to poverty alleviation.

The next and last ground upon which the defendant seeks an order discharging the injunction is that the claimant came to court with unclean hands. It is asserted for the defendant that the claimant collected Pay as You Earn and Value Added Tax which it did not remit to the defendant. On its part, the claimant, through the sworn statement in opposition by Harold Mwafongo strongly disputes these allegations. Whether or not the opposing arguments are meritorious is a matter for consideration

at the judicial review. The picture one gets at this stage, however, is that the claimant blames the defendant for its difficulties to remit Value Added Tax (see paragraphs 6, 7, 8 and 9 of the sworn statement) and seems to allude to the fact that although it may be in arrears with respect to Pay as You Earn Tax, it has largely been faithfully remitting that tax over the years (see paragraph 10 and the table thereunder). There is also the assertion by the claimant concerning tax credits. In the circumstances I would be slow to hold that the claimant has approached this court with unclean hands, as alleged. The issue would better be carefully disposed of at the judicial review hearing.

All in all I am of the considered view that the circumstances of this case justify the maintaining of the *status quo ante* and thus the continuation of the injunction until the determination of the judicial review application. I order accordingly.

Costs are in the cause.

Made in chambers at Blantyre this 21st day of February, 2023.

R Mbvundula
**JUDGE**