

**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY
CIVIL DIVISION
JUDICIAL REVIEW CAUSE NO. 2 OF 2021
BEFORE HONOURABLE JUSTICE KONDOWE
BETWEEN**

**THE STATE
(ON APPLICATION OF EINSTEIN CONSTRUCTION LIMITED)CLAIMANT**

- AND -

**ATTORNEY GENERAL
(MINISTRY OF FORESTRY & NATURAL RESOURCES)DEFENDANT**

**CORAM: HONOURABLE JUSTICE MAUREEN KONDOWE
DEBWE, COUNSEL FOR THE CLAIMANT
CHISIZA, COUNSEL FOR THE DEFENDANT
MRS. F. MWAKHWAWA LUWE, OFFICIAL INTERPRETER**

ORDER

1. BACKGROUND TO THIS APPLICATION

1.1 The Claimant filed an application for permission to apply for judicial review and an order of interlocutory injunction without notice. The application is made under Order 19 Rules 20 (3) and 22 of the Courts (High Court) (Civil Procedure) Rules, 2017 ("the 2017 Rules"). Through this application the Claimant seeks to judicially review the decision of the Defendant through which he allegedly seized and detained the Claimant's red and yellow Iveco Tippers registration numbers BT 1910 and BT 4263 respectively. The Claimant also seeks an order of interlocutory injunction to compel the Defendant either through his servants, agents, subordinates or whosoever or acting on directions or orders or any other

- person acting on his behalf to release the allegedly seized and detained motor vehicles pending the hearing and determination of the main matter or another order of the court.
- 1.2 The Claimant filed a sworn statement verifying the facts on which it relies in support of its application for permission to move for judicial review and for an order of interlocutory injunction without notice. This sworn statement was allegedly sworn by the Managing Director of the Claimant in Blantyre before a Commissioner for Oaths based in Mzuzu.
 - 1.3 The Claimant also filed skeleton arguments dated 28th January, 2021. So did the Defendant whose skeleton arguments are dated 15th March, 2021.
 - 1.4 There is no prayer for an order of costs in the application.
 - 1.5 The notice of application for permission to apply for judicial review and an order of interlocutory injunction has a Statement of Facts.
 - 1.6 Paragraph 3.1 of the Statement of Facts states that the Claimant is a construction company that is registered under unspecified Laws of Malawi with capacity to sue and to be sued in its corporate name.
 - 1.7 Paragraph 3.2 of the Statement of Facts states that the Claimant has running projects across this country. One of these projects is allegedly underway at Jenda. Through this project the Claimant is allegedly constructing the Jenda – Chikangawa road.
 - 1.8 Paragraph 3.4 of the Statement of Facts states that the Claimant has been buying quarry [stones] from Nthungwa situated within the Chikangawa Forest Reserve from a quarry that is owned and managed by Mr Moyo [no further particulars of the identity of this person are stated].
 - 1.9 Paragraph 3.6 of the Statement of Facts states that on 11th January 2021 the Claimant bought 120 [metric] tonnes of quarry [stones] from the quarry site of Mr. Moyo. These were to be carried in 6 tipper-load trips.
 - 1.10 Paragraph 3.8 of the Statement of Facts states that the drivers of the Claimant collected the last two tipper loads of the quarry [stones]. The Defendant allegedly stopped them at a road block in Chikangawa Forest Reserve to check what they were carrying.
 - 1.11 Paragraph 3.9 of the Statement of Facts states that a Forestry Official who was at the road block in the company of some police officers allegedly told the drivers that the tippers would be seized and impounded.
 - 1.12 Paragraph 3.10 of the Statement of Facts states that upon enquiry the drivers allegedly learnt from the Forestry Official that the quarry site from which the quarry [stones] had been collected had issues with the Forestry Department. The seizure and

detention of the two tippers was allegedly the only way to get hold of the owner of the quarry site in order to stop him from mining and selling quarry [stones] illegally.

1.13 Paragraph 3.11 of the Statement of Facts states that the drivers of the Claimant drove the two tippers to Chikangawa Forestry Department. They parked them there and handed over their keys.

1.14 Paragraph 3.13 of the Statement of Facts states that the two detained tippers are registered in the name of the Claimant.

1.15 Paragraph 3.14 of the Statement of Facts states that the Claimant asked [an undisclosed person] whether or not the Ministry of Forestry or the Department of Forestry had issued any notice to stop it or other contractors or anyone else from buying quarry [stones] at Nthungwa site. There is no such notice allegedly.

1.16 Paragraph 3.15 of the Statement of Facts states that since 11th January, 2021 the date of the alleged seizure and detention of its tippers, the Claimant has been trying to enquire about the release of these motor vehicles from the Forestry Officials through Mr. Nyirenda [no further particulars of the identity of this person are stated] who is based at Chikangawa Forest Reserve.

1.17 Paragraph 3.18 of the Statement of Facts states that the Forestry Officials at Chikangawa allegedly continue to detain the two tippers without formal charges being brought against the Claimant. There is also allegedly no formal communication about why the two tippers were seized and detained.

1.18 Through paragraph 3.22 of the Statement of Facts the Claimant prays for permission to move for judicial review against the alleged decision of the Defendant to seize and detain its 2 Iveco Tippers. It further prays that if permission is granted, the hearing of the application for judicial review must be expedited. It finally prays that an order of interlocutory injunction should be granted to compel the Defendant to release its 2 Iveco Tippers.

2 SUPPORTING SWORN STATEMENT ALLEGATIONS

2.1 The sworn statement confirms the facts contained in the Statement of Facts as alleged.

3 OPPOSING SWORN STATEMENT ALLEGATIONS

3.1 The Defendant appeared during the hearing of this application owing to that the Claimant was denied permission to proceed with this application in his absence. The Defendant filed an opposing sworn statement to this application sworn by Custom Nkhamoza Nyirenda, the Plantations Manager for Viphya Plantations Division ("the Chikangawa Forest

Reserve”). Through this opposing sworn statement the Defendant states the following key matters:

- 3.1.1 Tinyoroke Limited, a company that specializes in mining quarry [stones] encroached onto Chikangawa Forest Reserve, started mining and selling quarry [stones] at a mining site inside the Forest Reserve.
- 3.1.2 The seizure and detention of the 2 Iveco tippers occurred on 11th January 2021, a day on which this company was not licensed to mine quarry [stones].
- 3.1.3 This company was allegedly subsequently granted a Medium Scale Mining Licence on 30th January 2021. The grant of this type of licence has conditions precedent which the licensee must fulfil. The most important condition precedent is that prior to the commencement of the mining operations, the Department of Environmental Affairs must conduct an Environmental and Social Impact Assessment through which the mining activities/ operations are approved.
- 3.1.4 The Defendant ordered the eviction of Tinyoroke Limited from its forest reserve on 8th January 2021. This eviction order was not complied with.
- 3.1.5 The Defendant ordered Tinyoroke Limited to produce a copy of the Medium Scale Mining Licence it had reportedly been granted on 30th January 2021. This was required to firstly, allow the Defendant to facilitate the Environmental and Social Impact Assessment. Secondly, the Defendant needed a copy of the licence for its records. The Defendant never received the requested licence copy from Tinyoroke Limited. The Defendant consequently ordered this company to vacate the forest reserve by 5th April 2021 through its letter dated 20th March 2021.

4 THE EVIDENCE

- 4.1 Through its supporting sworn statement the Claimant produced and exhibited uncertified copies of two motor vehicles registration certificates to prove that it owns the two tippers the Defendant is alleged to have seized and detained.
- 4.2 Through its opposing sworn statement the Defendant alleged that it ordered the eviction of Tinyoroke Limited from the Forest Reserve through its letter dated 8th January 2021 Ref. No. 8/01/Vol VI/77. A copy of this letter was not produced and exhibited to the opposing sworn statement. A further letter dated 20th March 2021 Ref. No. 8/01/Vol VI/73 through which the Defendant allegedly ordered Tinyoroke Limited to vacate the Forest Reserve by 5th April 2021 was also not produced and exhibited by the Defendant.

7.5 In terms of section 9(2) of the Forestry Act a seizure certificate must be issued in cases in which forest produce or article (s) used in committing offences that this law prescribes are seized and detained.

7.6 Section 10 of the Oaths, Affirmations and Declarations Act Cap. 4:07 of the Laws of Malawi states that any Commissioner for Oaths before whom any oath ... or sworn statement is made **shall state truly** in the *jurat* or attestation the place and the date the oath ... or sworn statement is made.

8. DETERMINATION OF THE APPLICATION OF THE CLAIMANT

8.1. There are two issues that this court needs to determine in this application. These are as follows:

- (a) Whether or not the Claimant must be granted permission to apply for judicial review against the Defendant; and
- (b) Whether or not the Claimant must be granted an order of interlocutory injunction against the Defendant.

8.2. This court declines to grant the Claimant the permission to apply for judicial review and an order of interlocutory injunction for the following reasons:

- (a) The Claimant has no arguable case against the Defendant owing to the following matters:
 - (i) In the supporting sworn statement the Claimant has only produced and exhibited two uncertified copies of the motor vehicle registration certificates for the two tippers the Defendant is alleged to have seized and detained. The case of **Mc Greevy and Another v. Sattar [1987- 1989] 12 MLR 258 at 263** held that in cases involving the ownership of a motor vehicle, proof of registration creates a rebuttable presumption that the person in whose name the motor vehicle is registered is its legal owner. It is the view of this court that this cannot be proof of the alleged seizure and detention of the two tippers. A certified copy of a seizure certificate would suffice as evidence of their alleged seizure and detention in line with section 9 (2) of the Forestry Act. This provision is totally silent on when, how and where the Defendant must issue the seizure certificate and give it to any person who is unhappy about his decision(s). These are matters that require urgent reform;
 - (ii) The Claimant has alleged that it purchased 120 [metric] tonnes of quarry [stones] from Mr. Moyo. The Claimant has not produced and exhibited certified copies of the receipts for the payments it made for this alleged purchase. It has also not produced and exhibited a certified copy of the contract it has with Mr. Moyo if it is written or disclosed its terms and conditions if it is oral;

- (iii) The Claimant has alleged that it is registered as a construction company under unspecified Laws of Malawi. The Claimant has not produced and exhibited certified copies of its certificate of incorporation issued by the Registrar of Companies and its certificate of registration with the National Construction Industry Council of Malawi;
- (iv) The Claimant has alleged that Mr. Moyo owns and manages the Nthungwa Quarry at Chikangawa Forest Reserve. A quarry cannot be operated without a licence. This is implied by paragraph 3 (aa) of the Business Operations provision contained in the Third Schedule to the Forestry Act where application, operational and residential fees are prescribed. This provision must also be read in context by reference to section 46 (a) of the Forestry Act which states as follows: '**Unless under a licence**, no person shall... take ... collect and remove forest produce from a forest reserve...'
- (v) In opposing this application, the Defendant has also categorically confirmed that a Medium Scale Mining Licence is required for the operation of a quarry. The Claimant has not produced and exhibited a certified copy of the licence on the basis of which Mr. Moyo operates the quarry. At the minimum it was expected that the Claimant was furnished with a certified copy of this important legal document not only at the time it contemplated transacting with this Mr. Moyo and conducted some due diligence about him and his business but also every time such a licence expired to confirm its renewal dependent on the history and duration of their alleged business dealings.
- (vi) The Defendant executes a statutory mandate granted to it by the Forestry Act. Section 6 (b) of this Act is clear that stopping and inspecting any carrier or vehicle which an officer reasonably suspects to be carrying any forest produce which has been obtained in circumstances that contravene this law are matters that are within its statutory mandate. To grant an interlocutory injunction in the particular circumstances of this case would be a mockery of the statutory mandate of the Defendant. Such an injunction would also defeat the purpose of the Defendant to provide for licensing and sustainable use of forest land and utilization of forest produce in forest reserves in line with section 45 of the Forestry Act.
- (vii) It is not possible for a deponent of a sworn statement to swear it in Blantyre before a Mzuzu - based Commissioner for Oaths. The fact that the sworn statement that

the Claimant relies on alleges that this is what happened speaks to the casual manner in which this important matter was handled by both the Commissioner for Oaths and its own legal practitioners.

8.3 Given the matters stated in paragraph 8.2 (a) (i) (ii) (iii) (iv) (v) (vi) and (vii) above this court dismisses the application of the Claimant for permission to move for judicial review and for an order of interlocutory injunction. It is so ordered. Section 30 of the Courts Act Cap. 3:02 of the Laws of Malawi states that the costs of court proceedings are in the discretion of a court. Order 31 rule 3 (a) (b) and (c) of the 2017 Rules amplifies this matter. The Claimant is condemned to pay the Defendant the costs of this application. It is so ordered.

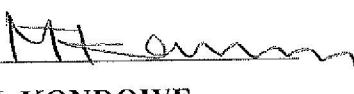
9. THE CLAIMANT'S RIGHT OF APPEAL AGAINST THIS DECISION

9.1. This court has dismissed the application the Claimant brought by refusing to grant it the permission to move for judicial review and an order of interlocutory injunction against the Defendant. The following pertinent facts have persuaded this court to arrive at this decision:

- a) The Claimant transacted with Mr. Moyo whom the Defendant does not know and has not been licensed to so transact with it as he allegedly did;
- b) The drivers of the Claimant's alleged 2 Iveco Tippers and the tippers themselves were not properly and lawfully in the Defendant's Chikangawa Forest Reserve;

The above facts compel this court to also further decline to grant the Claimant leave to appeal against this order to the Supreme Court of Appeal. It is so ordered.

Delivered at Mzuzu this^{21st}.....day of ...^{APRIL}..... 2021


M. KONDOWE
JUDGE