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**IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)
JUDICIAL REVIEW CASE NO. 2 OF 2021**

BETWEEN

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

**IN THE MATTER OF SECTION 29 AND 43 OF THE CONSTITUTION OF
MALAWI**

BETWEEN

THE STATE

AND PESTICIDES CONTROL BOARD.....1ST DEFENDANT

AND

MALAWI REVENUE AUTHORITY2ND DEFENDANT

EXPARTE:

CHOONARA HIGHWAY EMPORIUM

CORAM : HON JUSTICE W.Y. MSISKA

Phombeya, Counsel for the Applicant

Mwafulirwa, Counsel for the 1st Defendant

Michongwe Counsel for the 2nd Defendant

C. Zude, official Interpreter

RULING

On 20th January, 2021 the Claimant filed an *ex parte* application under O.53 r. 3 of the Rules of the Supreme Court (RSC) as well as O.10 rr.1,3,4,27 and 30 as read with O.19 r. 22 of the Court [High Court] (Civil Procedure) Rules 2017 (CPR) seeking leave to apply for judicial review of a decision by the 2nd Defendant at the instance of the 1st Defendant not to release a consignment of 1,900 cartons of mosquito coils imported into the country by Claimant. The intended judicial review seeks certain orders and declarations as follows:

- (a) A declaration that the Defendants failure to furnish the claimant with justified reasons for the decision to detain the consignment of mosquito coils infringed the Claimant's right to administrative justice;
- (b) A declaration that the 1st Defendant's unspecified order to restrict the import of the mosquito coils in unreasonable and ultra vires the Pesticides Acts;
- (c) An order for costs and that all necessary and consequential directions.

Leave or permission to apply for judicial review was not granted ex parte and the Claimant was directed to serve the application for *inter partes* hearing scheduled to take place on 1st February, 2021. On 1st February, 2021 the matter failed to proceed as all the parties agreed to give time to the 1st Defendant to file a Sworn Statement in opposition.

In the meantime, the 1st Defendant filed a sworn statement in opposition to the application while the 2nd Defendant filed an application to be removed as a party. On the 8th February, 2021, by agreement of all parties to the proceedings, the 2nd Defendant was removed as a party. The court proceeded to hear the application as between the Claimant and the 1st Defendant.

Case for the Claimant

The case for Choonara Highway Emporium, the Claimant, is presented in the affidavit of Afzal Choonara, the Managing Director of the Claimant. He averred that in 2018, the Claimant started importing mosquito coils from China. As the Claimant was new in the business of importing mosquito coils, sought advice from Ministry of Industry, Trade and Tourism. The Ministry advised that there was no requirement for an import licence for mosquito coils from the Ministry under the Control of Goods Act. Based on that advice, the Claimant has been ordering the mosquito coils to the extent that the product infiltrated the local market. That when an officer from the 1st Defendant saw the mosquito coils bearing the name of the Claimant, he advised the Claimant to obtain a pesticide sale licence for the mosquito coils. The licence to sell was duly granted to the Claimant. The Claimant alleges that it was neither aware nor was it informed by the 1st Defendant

that the importation of the mosquito coils required the issuance of an import licence from the 1st Defendant.

The Claimant ordered a consignment which arrived at Dedza border post on 8th January, 2021. Upon payment of duty and all relevant clearance fees, the 2nd Defendant declined to release the consignment because there was a restriction by the 1st Defendant which has been imposed on the consignment of mosquito coils. Consequently, the actions of both the 1st and 2nd Defendants are unlawful and arbitrary and that the seizure of the consignment of coils is ultra vires the Pesticide Act, hence these proceedings.

Case for the 1st Defendant

The case for Pesticide Control Board is presented in the affidavit of Mr. Misheck Soko, the Acting Registrar. He states that he received communication from Malawi Revenue Authority (MRA) Station Manager at Dedza informing him that there was a consignment of mosquito coils branded "Choonara Mosquito Coils" imported by the Claimant. On 10th January, 2021, he informed the Station Manager at Dedza that the product in issue was not registered with the Pesticide Control Board as a pesticide and that the importer was not an authorized pesticide importer in accordance with the Pesticide Act. It was clarified to Mr. Choonara that the active ingredient in the mosquito coil is a pesticide which the law requires that it should be registered by the 1st Defendant. Importing an unregistered pesticide is a criminal offence under the Pesticide Act and therefore the Claimant has been committing a criminal offence since 2018. The 1st Defendant does not condone illegality and therefore cannot allow the Claimants' consignment into the country. The Claimant is at fault for failure to inquire about the necessary legal

and logistical requirements for importing a pesticide. Consequently, ignorance of the law is not a defence.

Submissions by Counsel for the Claimant

Apart from adopting the sworn statement in support of the application and the skeleton arguments, Counsel submitted that there are triable issues requiring further investigation by the court at a substantive judicial review hearing. It was his argument that the first triable issue is, in light of s.2 of the Pesticides Act, whether or not a “mosquito” is a pest and whether or not a “mosquito coil” is a pesticide. The other issue to be tried by the court at a substantive hearing of the judicial review proceedings herein is whether or not the decision or unspecified order by the 1st Defendant to seize the consignment of mosquito coils is ultra vires the Pesticides Act. Therefore, Counsel prayed for leave or permission to apply for judicial review to be granted.

Submissions by Counsel for the 1st Defendant

In addition to adopting the sworn statement in opposition and the skeleton arguments, Counsel for the 1st Defendant submitted that the application for leave before the court is frivolous and vexatious and therefore does not pass the requisite standard for a matter to proceed to substantive hearing for judicial review. It was the argument of Counsel that the 1st Defendant has the mandate to regulate, among other things, the sale, manufacture, exportation and importation of pesticides in Malawi. A careful reading of s.2 of the Pesticides Act, a “mosquito” qualifies as a

pest and a “mosquito coil” that contains an active ingredient qualifies as a pesticide. The active ingredient is not registered by the Claimant.

It was further submission by Counsel that the Claimant does not possess an import permit to allow or authorize it to import a pesticide as prescribed and required under the Pesticides Act. As such, the Claimant is already contravening the law and is merely seeking to use the court to perpetrate such illegality. Crucially, s.44 of the Pesticides Act prohibits the importation of any unregistered pesticide and the Claimant has admitted in its sworn statement that it has been importing the mosquito coils since 2018 and has therefore been committing offences. The Claimant has also stated that it was not aware that the importation of the mosquito coils required authority under the Pesticides Act. It was Counsel’s submission that the Claimant has failed to show that the application has passed the standard required at the leave stage.

As regards the order of interlocutory injunction, it was submission by Counsel that there are no serious issues to be tried on account that the application is frivolous and vexatious. In that case, the balance of convenience or balance of justice lies in favour of the 1st Defendant not to permit the consignment into Malawi as pesticides are potentially dangerous to human life. The Claimant is, therefore, prevented from seeking an equitable relief when it does not have clean hands.

Reply by Counsel for the Claimant

In reply, Counsel for the Claimant submitted that the 1st Defendant was aware that the Claimant was importing mosquito coils as an officer of the 1st Defendant advised the Claimant to have a licence to sell the mosquito coils which the claimant dully obtained. The 1st Defendant did not give adequate notice to the

Claimant of the requirement of an import permit for the mosquito coils. Therefore, there has been no any notice of prohibitions of the importation of the mosquito coils without an import permit. It was the further submission of Counsel that under s.2 of the Pesticides Act, a "mosquito coil" is not a pesticide and also that a "mosquito" is not a pest. It is on that account that the court is called upon to grant leave or permission to warrant a substantive hearing of judicial review.

On the stay order or order of interlocutory injunction, Counsel maintained that there are serious issues to be tried and that damages would not be an adequate remedy on account that the 1st Defendant has financial resources. The 1st Defendant being a public institution, it should not be in the lead to spend public resources recklessly in times where the Government is facing financial difficulties. Since the 1st Defendant has deeper pockets, does not mean that the court should grant an interlocutory order of injunction. The court has to weigh the balance of convenience and find that it favours the Claimant.

Remedy of Judicial Review

The remedy of judicial review is there to protect an individual against abuse by authorities exercising judicial, extra-judicial or administrative powers. The concern of the court in such matters is reviewing the decision making process and not the merits of the decision upon which the application is made. The role of the court is to ensure that public bodies do not exercise their powers unlawfully or indeed outside the remit of the law.

It is trite law that the first step in judicial review proceedings involve the mandatory "leave stage". It is the understanding of the court that the purpose of the leave stage is to eliminate at an early stage any applications which are either frivolous, vexatious or hopeless and secondly to ensure that the application is only

allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration. The requirement of leave is in my view designed to prevent the time of the court being wasted by busy-bodies with misguided or trivial complaints or administrative errors, 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 are actually pending even though misconceived.

Issue for Determination

The issue for determination in the present hearing is whether or not the material before the court discloses a case that should proceed for further investigation by way of judicial review process. The Claimant at this stage is only required to persuade the court that the application raises a serious issue. A serious issue is determined if the court believes that the Claimant has raised an arguable issue that can only be resolved by a full hearing of the substantive judicial review application. If the court is not persuaded, leave will be denied and the matter proceeds no further.

For the court to determine whether or not leave or permission to apply for judicial review should be granted, it is imperative herein that the court resolves the following two issues. Whether or not a “**mosquito**” is a pest, and whether or not a “**mosquito coil**” is a pesticide.

According to s.2 of the Pesticides Act-

“Pest means an unwanted species of animals or plants including vectors of human or animal disease causing harm during or otherwise interfering with, the production, processing, storage, transportation or marketing of

food, agricultural commodities, wood and wood products or animal feedstuffs”.

It is common knowledge that a mosquito for what it does is an unwanted species of animal and at the same time a vector (**carrier**) of human disease which otherwise interferes with the production, processing, storage transportation or marketing of food, agricultural commodities, wood and wood products or animal feedstuffs. The infection of an individual with a malaria parasite for which a mosquito is a vector (**carrier**) and the individual suffers from malaria, at that point there is interference with the production, processing, storage, transportation and so forth. A careful reading and consideration of the definition of “pest” leaves this court in no doubt that a mosquito is a “pest” under the Pesticide Act.

On whether or not a “mosquito coil is a pesticide, it is again important that the definition of “pesticide” should be reproduced in full. According to s.2, the definition of “pesticide” reads as follows-

“pesticide means any substance or a mixture of substances intended to be administered on animals, plants or humans for preventing, destroying or controlling any pest, and includes any substance intended for use as a plant growth regulator, defoliant, desiccant, or agent for thinning fruit or preventing the premature fall of fruit, and substances applied to crop either before or after harvest to protect the commodity from deterioration during storage and transport; for purposes of this act, any pesticides which do not have the same manufacturer, formulation and trade name shall be treated as different pesticides”.

The underlined part of this definition is what is critical for the purposes of the present applicatio. Upon consideration, it comes out clear that a mosquito coil fits

into this definition. It is either a substance or a mixture of substances administered on humans for preventing, destroying or controlling any pest in this case mosquitoes. The phrase "administered on" should be looked at in context of the type of pesticide and the mode of application. On that basis, the meaning ascribed to the phrase "administered on" in the definition should be broad and purposive and not literal.

Disposal

The Claimant in paragraph 12 of the sworn statement in support of the application appears to state that he was unaware of the requirement to have an import licence to be able to import a pesticide in this case the mosquito coils. As should be known ignorance of the law affords no defence or protection to the wrong doer. It is not disputed, in spite of obtaining a licence to sell the mosquito coils, the mosquito coil is not registered as a pesticide which is a contravention of the law. The orders being sought seem out rightly aimed at perpetuating the commission of offences and illegalities. These illegalities are importing an unregistered pesticide contrary to s.17(1) of the Pesticides Act and importing a pesticide without a permit contrary to s.17(3) of the Pesticides Act.

Upon analyzing all the material facts before me and upon considering the arguments advanced by both parties, I find that the Claimant has not satisfied the threshold for this court to grant leave as sought. Having so concluded, it is not necessary for me to consider the next issue namely whether leave should operate as a stay of the decision of the 1st Defendant.

The effect is that the leave or permission sought to commence judicial review proceedings is refused and the application for leave or permission dated 19th January, 2021 is hereby dismissed with costs to the 1st Defendant.

Made this 22nd day of February, 2021 at Lilongwe in the Republic of Malawi.

A handwritten signature in black ink, appearing to be 'W.Y. Msiska', written in a cursive style.

W.Y. Msiska
JUDGE