IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY

REVENUE DIVISION

JUDICIAL REVIEW CAUSE NO. 19 OF 2019

BETWEEN
DR TISUNGANE MVALO ..... APPLICANT

AND
THE COMMISIONER GENERAL
OF THE MALAWI REVENUE AUTHORITY ..... RESPONDENT

CORAM: HON. JUSTICE R. MBVUNDULA
Mvalo, Counsel for the Applicant
Kambuwa, Counsel for the Respondent
Chimang'anga, Official Interpreter

RULING

In 2016 the applicant bought a Nissan Navara motor vehicle registration number LA 4979 thereby becoming the third owner thereof. The vehicle was imported into the country in 2012. The applicant informs the court that on 26th July 2019 officers of the respondent accompanied by uniformed and armed police approached the applicant at his place of work at Kamuzu Central Hospital whilst the applicant, a pediatrician, was attending to patients and asked him to produce documents showing that the motor vehicle had been cleared and duty paid for it. He did not have them but subsequently managed to secure then from its first owner. It turned out, however, that the documents produced by the vehicle's first owner pertained to the clearance of a Nissan March rather than a Nissan Navara.

It is the applicant's position that either there was gross negligence on the part of the respondent or its officers involved in the clearance of the vehicle were complicit in some fraud which resulted in this outcome. It is submitted in this regard that it would be grossly unfair that having been party to such a practice the respondent should seek to seize and sell the applicant's motor vehicle now owned by him as a third owner and seven years after the vehicle was cleared by the same respondent who charged duty on it as a Nissan March.

Counsel for the applicant referred to Order 19 rule 20 (1) (b) and submitted that the decision by the responded can be set aside under judicial review for being unlawful, for being procedurally unfair and for bad faith.

Regarding the unlawfulness of the decision counsel for the applicant referred to section 155 of the Customs and Excise Act and submitted that according to this provision the respondent's power to seize goods under section 146 of the Act may be exercised within two years of the date when the goods became liable for seizure but where fraud is a material element the said period shall be extended to five years, which five years had elapsed by the time the respondent seized the applicant's vehicle in 2019 because the vehicle was purportedly cleared in 2012. Counsel concluded therefore that in the circumstances the seizure was unlawful.

Counsel for the applicant further contended that duty was in fact paid although the records show that it was in respect of a Nissan March, that the documents show the amount that was paid and that the respondent's officers were under a duty to inspect the vehicle for which duty was paid. It was counsel's position that it is unconscionable to punish a third owner when the responsible party to the failure to collect is the respondent, and that it would be wrong for the respondent to benefit from its acts of fraud by demanding further duty when the duty paid was assessed by itself.

In response to this submission counsel for the respondent submitted that the applicant did admit fraud in the manner in which the vehicle clearance was handled and offered to pay the correct duty but later backtracked on the offer. Relying on sections 2(b) and 157 of the Customs and Excise Act counsel stated the position that duty is attached to the goods imported and it does not matter whether the person in possession is the 1st, 2nd or 3rd owner, that it is the person claiming ownership who must pay. That the respondent's only interest is in the goods. In the present case, so submitted counsel for the respondent, the applicant would have recourse to the

importer. That there were two options, namely that either the respondent seizes the motor vehicle or that the applicant pays the duty.

On procedural unfairness and bad faith counsel for the applicant referred to section 43 of the Constitution and said that the applicant needed to be heard, at the minimum, on the charges against him before the respondent proceeded to take administrative action by way of impounding and seizing the vehicle because his interests were affected. It is the applicant's case that the fact that the applicant was confronted at his workplace in front of his colleagues and patients and took him away totally embarrassed and traumatised was a sign of bad faith.

In response counsel for the respondent disputed bad faith in the manner the respondent's officers approached the applicant, explaining that their being accompanied by armed police officers was because in such circumstances the officers often encounter threats and that the reaction they may encounter is often unpredictable, hence the need for police cover.

Regarding the procedure followed counsel stated that the motor vehicle was not just seized but that the applicant was granted the right to be heard the car having been detained after his explanation and after he was allowed ten days to bring clearance documents. Counsel explained that it was only after he brought the documents and the discrepancies were noted that the vehicle was seized and that after seizure he remained with the option either pay the duty or to enter into a settlement arrangement for the payment of the duty which option he did not take but opted for judicial review.

Counsel for the applicant does not agree that the procedure taken is that narrated by counsel for the respondent. In his reading of the sworn statement of the applicant what started was not hearing out the applicant because he was heard after the vehicle had already been impounded, that the hearing was for the applicant to show cause why the respondent should not sell the vehicle.

I shall first consider the issues on procedural unfairness and bad faith and later those pertaining to section 155 of the Customs and Excise Act.

Section 146 of the Customs and Excise Act provides that a customs officer or a police officer may seize any goods which he reasonably suspects may be liable to forfeiture and where any such goods are seized under the customs laws, the proper officer shall, within 30 days of such seizure, give notice to the owner in writing of such seizure. Section 145 defines goods liable to seizure as any goods in respect of

which an offence has been committed under the customs laws. It would appear from a reading of both the applicant's and the respondent's sworn statements that this statutory procedure was followed by the respondent's officers. Under section 146 there is only one prerequisite to seizure, namely, reasonable suspicion that the goods may be liable for forfeiture on the ground that an offence has been committed under customs laws. In this case it is not disputed that reasonable suspicion that duty had not been properly paid obtained. Indeed the applicant through his agents, EK Tax Consultants (exhibit TTM7 to his sworn statement and also exhibit AM3 to the sworn statement in opposition) confirms that at some point both parties agreed that duty was not properly paid, the applicant offering to make good the default.

It is not quite clear from both sworn statements what precisely happened at the time the respondent's officers approached the applicant. The applicant narrates what happened as follows in paragraph 13 of his sworn statement:

> "13. On 26th July 2019 officers from the Respondent's Customs and Excise Division accompanied by armed and uniformed Police Officers came to Kamuzu Central Hospital looking for the motor vehicle and stormed into my office demanding the vehicle. I left with them … At their office …they issued me a Detention Notice and detained the vehicle."

In paragraph 3 of the sworn statement in opposition it is stated that:

> "3. That we managed to trace the where abouts (sic) of the vehicle, where the said vehicle was detained pending production of customs clearance documents by the applicant. Exhibited hereto marked "AM" 1 (sic) is the copy of the said detention notice dated 26 July 2019."

The point I make here is that one cannot say with certainty what discussion took place at the point when the customs officers approached the applicant. I would have taken a properly informed position had the full substance of what transpired had furnished. Did the officers, for example, simply said we are here to take the vehicle or they first gave the reasons for demanding the vehicle whereupon the applicant might have said something in response? Neither sworn statement provides this kind of detail. The claim that what started was not hearing out the applicant because he was heard after the vehicle had already been impounded, that the hearing was for the applicant to show cause why the respondent should not sell the vehicle, as counsel for the applicants asserts, in my reading and understanding, is not borne out

paragraph 13 of the applicant's sworn statement. The applicant has not therefore ably shown that there was procedural unfairness. Nor can one say that the fact that the customs officers were accompanied by armed and informed police officers be evidence of bad faith. This is in view of the fact that under section 146 of the Customs and Excise Act police officers on their own have the power to seize goods reasonably suspected to be liable for forfeiture on account of violation of customs laws. Hence the presence of police officers was not extraordinary.

I now consider the arguments regarding section 155 of the Customs and Excise Act. The relevant part of the section 155 of the provides:

> 155. Limitation of proceedings
> (1) Any proceedings for an offence against the customs laws may be commenced within two years of the date of the offence and the powers of seizure under section 146 may be exercised within two years of the date when the goods first became liable to seizure: Provided that—
> (i) in any case where fraud is a material element the said periods of two years shall be extended to five years; and
> (ii) prohibited goods may be seized at any time.

The rationale behind statutory limitation provisions was spelt out clearly in *Malawi Railways Limited v KK Millers Limited* [1992] 15 MLR 223, namely that "lawful claims must be prosecuted with all due dispatch so that there should be protection against stale demands." One policy reason behind limitation clauses in statutes has been said to be "that long dormant claims have more cruelty than justice in them": *Makhalira v State and another* [2004] MLR 203. Limitation clauses bar the remedy albeit not the claim: *Binali v Portland Cement Co (1974) Ltd* [1990] 13 MLR 64. In making reference to the above I am alive to the fact that all these principles were pronounced in relation to civil claims but I find nothing that offends their application in the present circumstances. The legislature in section 155 has made it clear that in matters such as the one at hand the proceedings in respect of the goods shall not commence later than two years in matters not involving fraud and not later than five years where fraud is involved. The provision is incapable of being assigned another interpretation. In the case at hand it is abundantly clear that the proceedings in relation to the applicant's motor vehicle were commenced two years after the longer of the two limitation periods provided for in section 155. One must therefore agree with counsel for the applicant that the respondent's claim for duty on the vehicle in question herein is out of time and statute barred. The applicant succeeds on his claim unlawfulness of the respondent's action on the ground of its being statute barred. I

effect the respondent's hands are tied by section 155 and cannot enforce the claim for duty in respect of the Nissan Navara as against the applicant.

The following orders and declarations are hereby made:

1. An order sustaining and rendering permanent the stay order made by the court on 28th August 2019.
2. An order quashing the respondent's decision to impound, detain and seize the applicant's motor vehicle.
3. A declaration that the proceedings to claim duty in respect of the vehicle being statute barred are unlawful.
4. An order for costs in favour of the applicant.

Pronounced at Lilongwe this 19th day of December, 2019.

R Mbvundula
JUDGE