



**IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY
REVENUE DIVISION
JUDICIAL REVIEW CAUSE NO. 07 OF 2020**

THE STATE

AND

THE COMMISSIONER GENERAL

OF THE MALAWI REVENUE AUTHORITY DEFENDANT

EX-PARTE:

JAMES KAIFA SAIDI 1ST CLAIMANT

CHIMWEMWE GWAZA 2ND CLAIMANT

Coram HON. JUSTICE R MBVUNDULA

V Gondwe, W Chibwe, Counsel for the Claimants

Kambumwa, Counsel for the Defendant

Chimang'anga, Official Interpreter

JUDGMENT

Brief summary of the facts

This matter arises from the seizure on 15th May 2020 by the defendant of a Scania motor vehicle registration number BLK 7816 whose *de facto* owner is the 1st claimant (hereinafter “the claimant”). The 2nd claimant happens to be the person in whom the legal title vested at all material times in that 1st claimant bought the vehicle from him but title was yet to be formally transferred to the 1st claimant.

On the day of the incident giving rise to the dispute herein the said motor vehicle was hired by one Roman Mkandawire, who trades as Chimeto Investments, to transport some goods from Lilongwe to Mzuzu. Unknown to the claimant, Mkandawire had not paid customs and excise duty for the goods following their

importation. According to the claimant, as the vehicle was about to enter Mzuzu city the defendant's officers detained the vehicle on the ground that duty for the goods the vehicle was ferrying had not been paid.

Mkandawire paid a fine imposed by the defendant whereupon his goods were restored to him. However, according to the claimant, despite his informing the defendant that he had no knowledge about the duty evasion the defendant still imposed a fine and detained his motor vehicle. He later paid the fine in protest, in order to mitigate damages. The vehicle was released to the claimant on 10th August 2020 after the intervention of the claimant's lawyers. The claimant nevertheless sought to pursue the judicial review of the defendant's decision to detain the vehicle.

Claimant's position

The claimant is of the view that the defendant acted unlawfully, procedurally unfairly, unjustifiably and in bad faith because:

- a) The claimant had no idea that the owner of the goods had not paid duty for them;
- b) The defendant released the goods upon the owner settling the duty but continued to detain the claimant's motor vehicle resulting in the claimant losing business as the vehicle is for commercial use.

In arguing the application counsel for the claimant isolated as the main issue to be whether, having regard to the circumstances of the case, the defendant acted reasonably in continuing to detain the claimant's motor vehicle. Counsel posed the question whether, while appreciating that sections 134 (a) and 137 (2) of the Customs and Excise Act make it an offence for any conveyance to be used for smuggling or conveying goods for which duty had not been paid but where, as here, the owner of the conveyance was able to demonstrate that he took all reasonable precautions to prevent the act, the defendant would still be justified to detain the conveyance.

Counsel singled out four factors for the court to take into account as follows:

Firstly, that all that the claimant was doing was pursuing his right to economic activity he being in the business of a transporter, his only source of livelihood;
Secondly that he was transporting goods which were already in the country;

Thirdly that the one who hired the vehicle was not “any other stranger” but a well-known businessperson in Mzuzu who was also well-known to the defendant; and *Fourthly*, that the nature of the goods are goods traded in for a long time.

Counsel was of the view that in these circumstances there was nothing further that was reasonably expected of the claimant to do to prevent the act of conveying goods subject of customs control.

Counsel submitted that since the owner of the goods admitted liability and cleared them the further detention of the claimant’s motor vehicle by the defendant was *ultra vires* the defendant’s powers. In counsel’s view it should have been clear that the facts herein did not constitute a crime.

Counsel added (during his reply to defendant’s submissions) that detention of the vehicle by the defendant in the circumstances of this case had far reaching consequences on the rest of transporters as the same rendered such transporters enforcement officers just for doing their business. It would appear that counsel meant that an onerous duty is placed on owners of conveyances to make reasonable inquiry as to whether or not duty for the goods they are hired to convey was paid.

Albeit that the motor vehicle would appear to have already been released counsel for the claimant still prayed for an order of its release with costs and for a further order that the money paid in protest be refunded.

Defendant’s position

The defendant relied, in main, on the affidavit of Good Chakaka Nyirenda of 30th July 2020 in which he narrated the following material facts.

He stated that on 14th May 2020 during night patrols the defendant’s officers intercepted the truck in question which was carrying 10 new cookers, 35 new upright fridges and 10 new bar fridges. The officers requested for customs clearance documents or any supporting documents to no avail. Consequently the truck was taken to the defendant’s warehouse at Luwinga where a seizure notice for smuggling goods into Malawi was issued to the owner of the goods. Similarly a seizure notice was issued to Chimwemwe Gwaza the registered owner of the vehicle in respect of the truck for the offence of conveying smuggled goods. Mr Nyirenda stated that both the owner of the goods and the truck were fined K3 800 000.00 and both applied to the Commissioner General of the defendant for a waiver of the fine but the Commissioner General merely reduced both fines to K2 000 000.00. After this the owner of the goods paid his fine and his goods were released whilst the owner of the

truck re-applied for a waiver which was rejected and the truck continued to be kept at the defendant's warehouse.

In the view of Mr Nyirenda, since two separate offences had been committed, the fact that the owner of the goods had paid the fine imposed on him did not exonerate the owner of the truck used in conveying the goods from paying his fine hence the then continued detention of the truck.

In his submissions counsel for the defendant mentioned that this was a case concerning goods subject to customs control where an offence was committed contrary to section 137 (2) of the Customs and Excise Act. He also pointed to the fact that it was not disputed that it was an offence to transport smuggled goods subject to proof that the claimant took steps to prevent the act constituting the offence.

Counsel also referred this court to section 146 of the Act which empowers officers of the defendant to seize goods or conveyances involved in the commission of customs offences.

Counsel then referred to the claimant's assertion that he took all reasonable precautions to prevent the offence and submitted that he did not. In this regard he referred to paragraph 10 of the claimant's affidavit where the claimant stated that some documents, which the claimant assumed pertained to the goods, were handed over to Roman Mkandawire when the goods were transferred from another truck to the claimant's truck. The argument by counsel herein seemed to be that the claimant should have inquired if those documents were customs clearance documents for the goods he was about to transport.

In so far as is material, counsel for the defendant prayed that the application be dismissed as it was not amenable to judicial review as it raised issues on the merits and that the claimant had failed to prove that he did all he could to ensure that he did not carry smuggled goods.

Issues

The following issues stand to be resolved:

1. Whether payment of the fine in respect of the goods and their consequent release entitled the owner of the conveyance to the release of the conveyance before payment of the fine imposed in respect of the conveyance.

2. Whether the claimant, in the circumstances of the case, did everything which he could reasonably do to prevent the act constituting the offence against him, if at all/any, and, consequently whether the defendant's detention of the claimant's truck was *ultra vires* its powers.
3. Whether the remedies prayed for are tenable.

Relevant statutory provisions

The material provisions of section 145 (1) of the Customs and Excise Act are as follows:

“145. Goods liable to forfeiture

(1) Any goods in respect of which an offence has been committed under the customs laws shall be liable to forfeiture.

(2) Any conveyance which has been used without lawful authority for the importation, landing, removal, conveyance, exportation or carriage coastwise or in transit of goods liable to forfeiture, shall be liable to forfeiture:

...”

Section 134 (a) provides:

“134. Offences in respect of goods

Any person who—

(a) imports, exports, carries coastwise or in transit, loads, unloads, removes, possesses or conveys goods contrary to the provisions of the customs laws ... shall be guilty of an offence.”

Section 137 (2) (a) provides:

“137. (2) If—

(a) any conveyance is used in smuggling or in the carriage of smuggled goods ... the person in charge of the vehicle ... shall be guilty of an offence unless he proves that he took all reasonable precautions to prevent the act which constituted the offence.”

Sections 146 is also relevant. Sections 146 (1) and (4) provide:

“146. Seizure of goods

(1) An officer or police officer may seize any goods or conveyance which he reasonably suspects may be liable to forfeiture.

...

(4) Any goods or conveyance which have been seized shall, as soon as convenient, be delivered into the care of the proper officer or, in the event of their being of such nature that they cannot be so delivered, the officer seizing such goods or conveyance may declare them as having been so delivered in the place where he found them.”

Resolution

Issue 1:

Whether payment of the fine in respect of the goods and their consequent release entitled the owner of the conveyance to the release of the conveyance before payment of the fine imposed in respect of the conveyance.

It is evident from an objective reading of the foregoing provisions of the Customs and Excise Act that the offences of smuggling and that of conveying smuggled goods are two separate offences. In the presents the same were charged against two separate persons namely the owner of the goods and the transporter thereof. That the importer paid the penalty imposed on him therefore discharged only him and not the transporter on conveyancer. The argument cannot therefore stand that because the importer discharged his penalty then the conveyancer was on that score entitled to be discharged.

Issue 2:

Whether the claimant, in the circumstances of the case did everything which he could reasonably do to prevent the act constituting the offence against him and, consequently, whether the defendant's detention of the claimant's truck was ultra vires its powers.

According to the affidavit evidence of Mr Nyirenda the items that were being transported by the claimant were 10 new cookers, 35 new upright fridges and 10 new bar fridges. And according to counsel for the claimant the hirer of the vehicle was not “any other stranger” but a well-known businessperson in Mzuzu who was also well-known to the defendant, and further that the nature of the goods are goods he traded in for a long time. Implicitly counsel was stating that it was common knowledge that Mr Mkandawire was in the business of importing goods in which case the goods involved in this case might well have been recently imported. Considering then the number of new items the claimant was hired to transport he should have been put on inquiry as to whether those new cookers and fridges, numbering 55 had been duly cleared with the revenue authority. Further, as counsel

for the defendant pointed out, the claimant noted that an envelope containing documents which he appears to have assumed to be customs clearing documents but fell short of verifying if indeed they were such documents. Had he done so he might have established whether or not Mr Mkandawire had or not proof of clearance of the goods. Absent such inquiry I find that the claimant's assertion that he took all precautionary steps to be without merit.

Regarding the claimant's argument that detention of the vehicle by the defendant in the circumstances of this case had far reaching consequences on the rest of transporters as the same rendered such transporters enforcement officers just for doing their business, I am of the view that the point extends beyond the issues at hand as, in my view, each case must be considered on its peculiar facts and circumstances.

Counsel for the claimant asked this court to take into account that all that the claimant was doing was pursuing his right to economic activity he being in the business of a transporter, his only source of livelihood, and also that he was transporting goods which were already in the country. The short answer was correctly provided by counsel for the defendant, namely that such right must be pursued within the confines of the law. Here the right was pursued in violation of statute.

As regards the fact that the goods in issue were already in the country, counsel did not elaborate on the significance of the fact. However, it is this court's view that that is neither here nor there particularly taking into account that the claimant failed to inquire whether 55 evidently new fridges and cookers had been duly cleared with customs.

Issue 3:

Whether the remedies prayed for are tenable.

As earlier stated above albeit that the claimant's motor vehicle has since been released, counsel for the claimant still prayed for an order of its release. He also prayed for a further order that the money paid in protest be refunded.

The motor vehicle having already been released the said prayer for its release is superfluous and is accordingly dismissed.

As for the prayer for an order for the refund of the fine paid in protest, having held that the offence of conveying goods subject of customs control was committed and that the payment of the fine imposed against the owner of the goods could not and did not exonerate the owner of the conveyance, it follows that the fine imposed against the owner of the conveyance was legitimate and is therefore upheld. The prayer is accordingly dismissed.

Costs

The claimant's case having wholly failed the said claimant shall bear costs.

Delivered this 7th day of October, 2021.


R Mbvundula
JUDGE