



**IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY**

REVENUE DIVISION

JUDICIAL REVIEW CAUSE NO. 1 OF 2020

THE STATE

AND

**THE COMMISSIONER GENERAL
OF THE MALAWI REVENUE AUTHORITY 1ST DEFENDANT**

**MINISTER OF FINANCE, ECONOMIC PLANNING
AND DEVELOPMENT 2ND DEFENDANT**

EX-PARTE:

JUSTICE DINGISWAYO MADISE CLAIMANT

CORAM: HON. JUSTICE R. MBVUNDULA
V. Gondwe, Counsel for the Claimant
F. Fransisco, Counsel for the Defendant
Chimang'anga, Official Interpreter

JUDGMENT

Background and some preliminary issues

The claimant is a Judge of the High Court of Malawi. The 1st defendant, the Commissioner General of the Malawi Revenue, is an agency of the Malawi

Government mandated to implement and enforce national tax laws. The 2nd defendant is the Minister of the Government under whose Ministry the national tax portfolio falls and is responsible, *inter alia*, for the formulation of national tax policy.

Under the Conditions of Service for Judicial Officers in Malawi (hereinafter “the Conditions of Service”), as determined and approved by the National Assembly pursuant to section 114 (1) of the Constitution, the claimant is entitled to import, duty free, one motor vehicle every four years.

According to the claimant’s sworn statement, in 2016 the claimant imported a motor vehicle on the terms aforesaid, and in October 2020 sought to dispose of the same by way of sale to a third party without payment of duty. The 1st defendant, on being asked by the claimant to sanction the transfer of ownership to the buyer, the 1st defendant being the titleholder to the said vehicle, initially refused verbally to allow the transfer, advancing at that time the reason that it is only Ministers and Members of Parliament who are allowed to dispose of vehicles imported by them under similar conditions, duty free, and that judges are excluded from this benefit. Subsequently, however, by a letter dated 19th November 2020 (exhibit PC 3 to the affidavit of Patrick Chisasa, for the 1st defendant) the 1st defendant advanced the reason that the transaction could not be sanctioned as there was no legal provision in the current Customs and Excise (Tariffs) Order (“the CPC”), enabling the judges to dispose of their motor vehicle without payment of duty, except when such transfer is to another privileged person or project. Duty was on that ground demanded from the claimant. The claimant informs the court, and it is not disputed, that this demand was made notwithstanding that on previous occasions the claimant had disposed of motor vehicles purchased by him under the Conditions of Service on the same terms as obtaining herein and without paying duty therefor. The claimant, in this respect, contends that the 1st defendant’s demand herein amounts to a reduction of his employment benefits in violation of section 114 (2) of the Constitution.

It is in reaction to exhibit PC 3 that the claimant instituted judicial review proceedings, initially against the Commissioner General of the Malawi Revenue Authority, the 1st defendant, and later joined the Minister of Finance and Economic Planning as the 2nd defendant. Despite being served, through the office of the Attorney General, the 2nd defendant has not contested the claimant’s application and was not represented at the hearing of the application. On that account counsel for the claimant opined that the Attorney General saw no reason to defend the claimant’s

application and prayed that the orders and declarations sought against the 2nd defendant be granted.

In the same connection, the claimant's counsel also moved the court to consider whether the 1st defendant could competently or validly defend this application when the 2nd defendant, who the claimant viewed to be the 1st defendant's principal, has elected not to defend. Claimant's counsel was of the view that in the event that judgment was so entered against the 2nd defendant, it should follow that the 1st defendant would have no leg to stand on in his decision to disallow the claimant's sale of the motor vehicle duty free, since his principal, the 2nd defendant had not himself defended the decision. On the part of the 1st defendant, and somewhat related to the foregoing arguments for the claimant, the issue was raised as to whether the 1st defendant, being only an agent of the 2nd defendant and an implementer of the said 2nd defendant's decisions in terms of tax policy, should be made answerable to the claimant's claim herein eventhough the 2nd defendant is not contesting the claim. The 1st defendant's view was that it should not.

Counsel for the 1st defendant conceded that the 2nd defendant ought to have defended the application who determines duty free status, which responsibility, so stated counsel, is not within the discretion of the 1st defendant. Counsel also submitted, however, (in apparent self-contradiction) that the lack of response on part of the 2nd defendant was not a bar to the 1st defendant's opposing the claimant's application, hence the 1st defendant's position herein as to the claimant's status regarding the disposal of the vehicle duty free or otherwise.

It is worth putting on record in this judgment that at an earlier sitting of this court in the present matter the 1st defendant made an application to be removed as a party on the ground that the 1st defendant was not the author of the primary decision complained against by the claimant, but this court found that it was in fact the 1st defendant's decision as communicated in its own verbal and written communications that was being challenged, and further that the 2nd defendant was in fact not involved at all in making that decision. Therefore as regards the question raised on behalf of the 1st defendant as to whether the 1st defendant should remain a party herein eventhough the 2nd defendant is not contesting the claim this court held that the 1st defendant was a proper party. If the 1st defendant is not to answer for those decisions there will be nobody responsible therefor.

The 2nd defendant's challenged decision

As regards the claimant's prayer that the application, in so far as it applies to the 2nd defendant be granted as presented, this court is in agreement that the claimant is entitled to the orders and declarations prayed for as against the said 2nd defendant on the ground that the 2nd defendant has not defended the claim notwithstanding that the Attorney General was served on the 2nd defendant's behalf.

That notwithstanding the claimant does raise issue with a decision attributed to the 2nd defendant. The said decision of the 2nd defendant is stated as follows in the application:

2. The decision of the 2nd defendant made on the 12th June 2020 in his budget statement amending the Customs Procedure Codes for Cabinet Ministers and Members of Parliament respectively to allow them dispose of their motor vehicles duty free if they are disposed of after a period of 5 years without doing likewise with respect to the Customs and Procedure codes for judicial officers who have a similar entitlement" (*sic*)

The "similar entitlement" alluded to, as I understand it, is the entitlement to import a vehicle duty free once during the period prescribed. In my understanding, therefore, the claimant's position is that similarly placed persons ought to be treated similarly, that is to say, in the present matter, if Ministers and Members of Parliament, who enjoy the same duty free privilege as judges, may dispose of their vehicles without payment of duty, the same must also be the same in the case of judges and other officers judicial officers so entitled.

In this regard the claimant seeks a declaration or order that the said decision is arbitrary, unreasonable, discriminatory, and made in bad faith. He seeks a further declaration or order that the said decision is *Wednesbury* unreasonable such that no authority lawfully and properly exercising their powers could have arrived at that decision.

The 2nd defendant having not provided any justification before this court why similarly placed persons, namely, persons entitled to the duty free status in question were not treated alike by way amendment of the CPC or otherwise, I do accept the claimant's uncontested contention that the said decision is arbitrary, discriminatory, and *Wednesbury* unreasonable. My reasons follow below.

Section 20 of the Constitution provides against discrimination in any form as follows:

20. Equality

(1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.

In the case of *Malawi Congress Party v Attorney General* [1996] MLR 244 it was held that it is arbitrary to pass legislation the effect of which is to treat an individual's rights in a different manner from that which is accorded to others who are similarly placed. At page 306 the court stated:

This is an extension of the equality before the law principle. Courts will intervene on a statute that is overtly discriminatory (*Asian American Business Group v City of Pomona* 716 F Supp 1328). ... Under the equality before the law provisions of our Constitution, laws that are promulgated by our national Parliament must be directed to all in class. Short of that, they will be attacked for discrimination. (*sic*)

Earlier at page 298 the court had said:

Equality before the law is a fundamental right. Moreover, a law which applies to only a particular person or class of persons may be arbitrary. In *Quiban v United States Veterans' Administration* 713 F Supp it was held that when persons similarly situated with others are denied benefits pursuant to an arbitrary and irrational classification, they have not received due process regardless of whether their right to benefit is considered a property right, a fundamental right, or not a right or benefit, the key right is not the right to benefits *per se* but the right to be treated on the same basis as others with whom a person is similarly situated. Equality before the law is a fundamental right.

The court was further clear in that case that the duty to ensure equal treatment binds "Government, the legislature or the executive branches". The principle therefore applies to decisions made by the 2nd defendant, a member of the executive branch of the Government.

An arbitrary and discriminatory decision is unlawful as it violates the legal principles as to equality before the law as a fundamental right. And I entertain no doubt that an unlawful decision is unreasonable for want of legal justification. No authority properly direction his/her mind to the circumstances would arrive at an unlawful decision. In the premises, aside the fact that the 2nd defendant did not contest the application herein, I find myself in agreement with the claimant's position, on the merits, that the 2nd defendant's decision above is arbitrary, *Wednesbury* unreasonable, unlawful and discriminatory to the extent that it purports to differently treat similarly placed persons, and therefore in violation of the claimant's right to

equal treatment under the law. Further, in my assessment, and no contrary argument having been advanced, I accept the claimant's contention that the decision was made in bad faith and ought to be quashed.

On section 121 (1) of the Customs and Excise Act

Counsel for the 1st defendant raised the issue whether or not the claimant's application is prematurely before this court in view of the provisions of section 121 (1) of the Customs and Excise Act. Counsel submitted in the affirmative. Counsel for the 1st defendant therefore prayed that the judicial review motion be dismissed on the ground that the claimant has not exhausted an alternative remedy, namely appealing to Special Referee under section 121 of the Customs and Excise Act.

In the view of counsel for the 1st defendant the decision as to whether the vehicle should be disposed of duty free or not is a dispute that must be determined on the merits by the Special Referee as this a dispute whether or not duty should be paid. It was further argued that notwithstanding that this court has original unlimited jurisdiction under section 108 of the Constitution, the court is nevertheless bound by the rules and procedures obtaining in other statutes such as the Customs and Excise Act, and since this is a tax dispute the dictates of the relevant tax law, i.e. the Customs and Excise Act, must bind this court, otherwise there would be unnecessary floodgates of cases coming to the High Court.

On his part the claimant's counsel submitted that the requirement under section 121 (1) of the Customs and Excise Act to appeal to a Special Referee only covers situations where there is a dispute as to the amount of duty payable, not, as in this case, where the challenge is about whether, in the first place, duty is payable at all. It was counsel's view that that the Special Referee under that provision merely acts as an assessor of the amount of duty, where the same is payable, and that it does not give the Special Referee such powers as those of the High Court to review a decision or the decision-making process of a public body like 1st defendant where the dispute is not about the amount of duty payable.

In my finding the position taken by the claimant is the correct one.

Section 121 (1) of the Act provides as follows:

(1) If a dispute arises between the owner of any goods and the Controller *as to the amount of duty payable on those goods*, the owner may, if he pays the amount demanded as duty by the Controller or furnishes security to the satisfaction of the Controller for the

payment of that amount, within three months after the payment or furnishing of security, appeal to the Special Referee against such demand. [Emphasis supplied]

There is no doubt that section 121 (1) confers upon the Special Referee jurisdiction over disputes only as to the amount of duty payable. The provision confers no further jurisdiction on the Special Referee as to whether duty is payable or not. There is no ambiguity. The Special Referee's jurisdiction is clearly limited as in the italicized part of the section as quoted above, that is "as to the amount of duty payable ...". If the Special Referee were to exceed those powers they would be acting outside their jurisdiction and unlawfully. Therefore, the dispute herein being not about the amount of duty payable, but about whether or not duty is payable cannot be entertained by the Special Referee. Consequently, the 1st defendant's submission that the claimant has an alternative remedy under section 121 (1) of the Customs and Excise Act is not legally sustainable and fails.

Concerning the 1st defendant's decision

The decisions of the 1st defendant which the claimant attacks is expressed as follows in the application:

The decision of the 1st defendant made around 24 October, 2020, refusing to allow the Claimant to transfer ownership of the Motor Vehicle Mercedes Benz Registration Number MZ 15 on disposal of the same duty free after more than 4 years lapsed from acquisition of the said Motor Vehicle duty free by the Claimant as per his entitlement as Judge of the High Court (*sic*)

I isolate the issues emanating from the application as regards the 1st defendant's decision as follows:

1. Whether the 1st defendant's decision amounts to a reduction of the claimant's employment benefits as a judicial officer, without his consent, as stipulated under section 114 of the Constitution, and whether the 1st defendant has such powers;
2. Whether the 1st defendant's decision is in violation of the claimant's right to a legitimate expectation that he will not be restrained from disposing of any motor vehicle purchased by him duty free under the Conditions of Service without the defendants demanding payment of duty therefor;

3. Whether the said decision violates the claimant's right to property and to freely engage in economic activity;
4. Whether the 1st defendant has acted unlawfully, procedurally unfairly, unjustifiably and in bad faith in coming up with his decision;
5. Whether, generally speaking the 1st defendant, in making the decision has failed to appreciate and discharge his public, constitutional and administrative law duties.

Claimant's submissions

The claimant informed this court, and this was expressly acknowledged by the 1st defendant, that whereas there is an express provision in the revised CPC allowing Ministers and Members of Parliament to sell their duty-free purchased vehicles after the prescribed period without payment of duty, there is no such express provision for judges and other judicial officers. The court was also informed that prior to the 2020 revision of the CPC, the original CPC was silent as regards judicial officers, but expressly prohibited Ministers and Members of Parliament from disposing such vehicles duty free. In the submission of counsel for the claimant, it must follow that the CPC, prior to and after the 2020 amendment, has never expressly prohibited the disposal of motor vehicles duty free by judicial officers, unlike in the case of Ministers and Members of Parliament where, prior to the 2020 amendment, it was expressly prohibited.

Counsel submitted further that taking the foregoing into account, it is essential to examine the Conditions of Service for Judicial Officers, in particular Clause 35 thereof, which provides that judicial officers are entitled to purchase a vehicle duty free every five years, without qualification of whatever nature. Counsel then argued that it must also follow that if any intention existed that judicial officers must pay duty upon their disposal of the said vehicles, there would have been an express provision to that effect. Further, so further argued counsel, if the defendants desired that judicial officers should pay duty on disposal, they should have clearly provided for such a requirement in the CPCs because judicial officers enjoy the duty free status jointly with Ministers and Members of Parliament. The decision to exclude judicial officers from the privilege, so submitted counsel, was without any legal basis but discriminatory and arbitrary, especially taking into account that previously the applicant has always disposed of his vehicles duty free, a fact conceded by the 1st defendant. In the final analysis, counsel submitted that since the claimant had always disposed of the affected vehicles without demand for duty and in line with the

Conditions of Service that right or privilege cannot be taken away without his consent in line with the Constitutional provisions prohibiting the diminution of the employment benefits of judicial officers without their consent.

1st defendant's position

In her submissions counsel for the 1st defendant stated that the main basis for opposing the claimant's application was, first of all, that all the 1st defendant does is to simply implement the provisions of the law. In regard to the amendment of the CPC removing the obligation for Ministers and Members of Parliament to pay duty on disposal after the prescribed period, and yet demanding duty as against judicial officers, counsel took the view that since the CPC specifically permits MPs and Ministers to dispose of their vehicles duty free, following the 2020 amendment duly approved by Parliament and duly gazetted, the court must consider whether there exists any irrationality on the part of the 1st defendant in the manner in which he acted to arrive at the decision refusing the claimant's application to dispose of the vehicle without paying duty. It was counsel's submission that the 1st defendant's decision was not *ultra vires* as a decision of a public body becomes *ultra vires* when it is made outside the provisions of the law, but in this case the 1st defendant acted within the parameters of the law. Counsel argued that it would in fact be *ultra vires* to allow the claimant to dispose of the vehicle duty free, considering that that has not been provided for by the law.

Counsel went further to suggest that what should rather happen is for the judicial officers to lobby through the Judicial Service Commission or any other body representing their interests for equal treatment with Members of Parliament and Ministers. So far, so counsel said, the law has not granted the like privilege to judicial officers as those of MPs and Ministers, a matter that is beyond the mandate of the 1st defendant. Counsel opined that it would be very unfair to condemn the 1st defendant for not granting the approval sought by the claimant as that has not been provided for in the law.

Determination

I will begin by considering the submission by the 1st defendant's counsel that all the 1st defendant does is to implement the law. I do this against the background of my earlier finding that the CPC as amended violates the legal principle of equality under the law, including the principle against discrimination amongst equally placed persons. In my considered opinion, to the extent that the CPC as amended, falls foul of those principles, its validity stands on sinking sand.

I will leave it at that for now and proceed to consider the issues outlined above.

Whether the 1st defendant's decision amounts to a reduction of the claimant's employment benefits as a judicial officer, without his consent, as stipulated under section 114 of the Constitution, and whether the 1st defendant has such powers;

Section 114 of the Constitution is in the following terms:

114. Remuneration

(1) The Chief Justice and all other holders of judicial office shall receive a salary and other employment benefits for their services and, on retirement, such pension, gratuity or other allowance as may, from time to time, be determined by the National Assembly.

(2) The salary, any allowance and other employment benefits of a holder of judicial office shall not without his or her consent be reduced during his or her period of office...

It is not disputed that under the Conditions of Service for Judicial Officers a Judge of the High Court (in which category the claimant falls) and other categories of judicial officers may purchase a motor vehicle duty free once within the prescribed period. It is also not in dispute that there is no legal restraint, generally speaking, as to the judicial officer's right to dispose of the vehicle. Also not in dispute is the fact that the claimant has previously been allowed to dispose such vehicles without demand and payment of duty in respect of such vehicles. What is evidently in dispute is whether duty should be paid at such disposal.

At the peril of undue repetition I re-state some material facts as follows.

The prior position under the CPC was that only Members of Parliament and Ministers were expressly required to pay duty on disposal, and that no such express provision was in place as regards judicial officers. Subsequently, when the CPC was amended, an express provision was entered removing the obligation on the part of the Members of Parliament and Ministers to pay duty on disposal of the vehicles, and no obligation was created to pay duty on the part of judicial officers. What, in effect, happened is that Ministers and Members of Parliament were reinstated to the original position where no requirement to pay duty on disposal of the duty free vehicles existed, which privilege had been taken away under the CPC. Claimant's

counsel argues that this implies the no such requirement has ever existed in the case of judicial officers, whether before or after the amendment. I am inclined to agree with said claimant's position for the following reasons.

The situation herein where the initial CPC expressly required only Members of Parliament and Ministers to pay duty on disposal, and excluded judicial officers should, in my view, be construed in the light of the legal principle expressed in the Latin maxim *expressio unius est exclusio alterius*, which means, in English, to express one thing is impliedly to exclude another.

The learned author, Francis Bennion, at page 873 of the 2nd Edition of his book, *Statutory Interpretation*, comments on the principle as follows:

- (1) The maxim *expressio unius est exclusio alterius* ... is applied where a statutory proposition might have covered a number of matters but in fact mentions only some of them. Unless these are mentioned merely as examples, or *ex abundante cautela*, or for some other sufficient reason, the rest are taken to be excluded from the proposition.
- (2) In particular the *expressio unius* principle is applied where a formula which in itself may or may not include a certain class is accompanied by words of extension or exception naming only some members of a class. The remaining members of the class are taken to be excluded from these words.

Applying this principle to the circumstances of this matter, the fact that the original CPC expressly required only Members of Parliament and Ministers to be paying duty on disposal of motor vehicles bought by them duty free, and imposed no such requirement on the part of judicial officers, who are equally and concurrently entitled to the duty free privilege, implied, at law, that it was the express intention of the 2nd defendant, and Parliament which approved the provisions of the CPC, that judicial officers be exempted from paying duty on disposal of the vehicles concerned. And I expressly find that to be the case. On that score alone, I would and do find that the claimant and those judicial officers entitled to that privilege have been and remain legally exempted from paying duty on disposal of motor vehicles so purchased. In this regard the 1st defendant's argument that they are merely enforcing the law does not hold because the law does not provide so.

Section 171 of the Constitution is violated when revenue not provided for under any law is sought to be levied. The section provides:

171. Revenue

No tax, rate, duty, levy or imposition shall be raised, levied or imposed by or for the purposes of the Government or any local government authority *otherwise than by or under the authority of the law*. [Emphasis supplied]

The functions of the 1st defendant are stipulated under section 4 of the Malawi Revenue Authority Act, and in so far as they are relevant to this matter are in the following terms:

4. Functions of the Authority

(1) The Authority shall be an agency of the Government responsible for the assessment, collection and receipt of specified revenue, ...and shall be accountable to and operate under the general supervision of the Minister.

(2) Without prejudice to the generality of the foregoing, the functions of the Authority shall be—

(a) to administer and *enforce the laws or the specified provisions of the laws* set out in the Schedule; [Emphasis supplied]

A proper reading of the provisions of section 171 of the Constitution as well as section 4 of the Malawi Revenue Authority Act will show that the point should not be (as argued by the defendant) that the CPC does not provide that judicial officers shall not pay duty but, rather, that neither the CPC nor any other statutory instrument requires such duty to be paid. Where, particularly, Parliament, pursuant to powers conferred upon it by supreme law of the land, has determined, in the Conditions of Service, that duty shall be exempt, the 1st defendant lacks authority to demand it. That is the combined and correct import of the two sets of provisions just cited.

It seems to me clear, therefore, that no law being in existence requiring that judicial officers should pay duty on disposal of the motor vehicle bought by them duty free, the decision the 1st defendant to demand such duty violates the provisions of section 171 of the Constitution and is therefore unconstitutional, illegal and *ultra vires* the 1st defendant's powers.

Counsel for the claimant argued, correctly in my view that the letter which gave rise to the present application is the letter dated 19th November 2020 where the 1st defendant communicated their decision to the claimant stating "We regret to advise that your application has not been successful because there is no legal provision to the current Customs and Excise (Tariffs) Order to dispose the motor vehicle without the payment of duty", yet in the 1st defendant's own statement in opposition, there are attached correspondences confirming that the 1st defendant previously cleared such vehicles duty free. Counsel then queried, if there is no legal provision allowing disposal of the vehicles duty free, on what basis such vehicles have previously been allowed duty free disposal. According to counsel the only plausible reason must be

that the 1st defendant appreciated the foregoing legal position, to which I agree entirely.

There is yet another canon of interpretation applicable to the present facts, and it is that against a construction that produces absurd results. An absurd result has been described as “virtually any result which is unworkable or impracticable, inconvenient, *anomalous or illogical*, futile or pointless, *artificial*, or *productive of a disproportionate counter-mischief* ... or a result that is *contrary to sense and reason*.” See *Bennion* (supra) at page 679. In his commentary the author states:

In their dicta on statutory interpretation, the courts by tradition give ‘absurd’ a far wider import than it has in modern English (where it simply means foolish, ridiculous or silly). Judges keep the older meaning. The Oxford English Dictionary puts it as this: *out of harmony with reason or propriety; incongruous, unreasonable, illogical*... We commonly speak even today of a person being deaf to reason... So it is not surprising to find the judge even in a 1982 case (on the sober question of the date from which interest should run on a judgment debt) saying that he is preferring one of the opposing constructions above the other in ‘order to avoid absurd results’. [All emphasis supplied]

It is the “artificial”, “anomalous or illogical”, “out of harmony with reason”, and “contrary to sense and reason” aspects of the definition of “absurd” that attract my attention in respect of the present matter. Briefly it is in regard to the suggestion that one be may allowed to import an item duty free and later be required to pay duty for it. In effect the privilege is taken away by another hand and such could not be the intention as the privilege would not, in reality, be privilege, but just “artificial”, and not real. The position advanced by the 1st defendant is effectively to convert the claimant’s duty free privilege into a deferred tax obligation, which as already, found does not in fact exist under the present circumstances. Put differently it effectively artificialises the privilege and fails to accord with sense and reason. The proper construction of the CPC under this canon must be in favour of the position that, in the case of judicial officers, duty is not payable on disposal under the law as it stands.

In further consideration of this matter, I take judicial notice that under the Customs and Excise Act, the older the vehicle, the higher the duty payable. Therefore, the demand for duty after four years would mean that a higher amount of duty would be payable by the judicial officer at the time of disposal than at the time of importation. What could be more absurd in so far as one’s duty free privilege is concerned?

Regarding 1st defendant’s submission that if anything the judicial officers ought to lobby with 2nd defendant for waiver of duty there appears no necessity for the same in view of the fact that no obligation to pay duty on disposal exists in the first place.

In his wisdom the 2nd defendant with Parliament's approval already granted an exemption.

On reduction of the claimant's remuneration/benefits

Now addressing the question whether the decision of the 1st defendant amounts to a reduction of the claimant's remuneration, the answer must be in the affirmative. Granted that the judicial officers have always been entitled to dispose duty free motor vehicles in the class under discussion, pursuant to the Conditions of Service, it would be a diminution of that right, which must be done only with consent in as far as the provisions of section 114 of the Constitution provide. To do otherwise is in violation of that constitutional provision. The claimant's contention is therefore upheld.

And as to whether or not the 1st defendant has powers to do the foregoing, the position must by now be clear. No law having granted the 1st defendant authority to demand duty on disposal of motor vehicles acquired duty free by judicial officers, and the claimant not having granted his consent to the payment of such duty (which amounts to a diminution of his benefits), under to section 114 (2) of the Constitution, the 1st defendant lacks the said powers.

Whether the 1st defendant's decision is in violation of the claimant's right to a legitimate expectation that he will not be restrained from disposing of any motor vehicle purchased by him duty free under the Conditions of Service without the defendants demanding payment of duty therefor;

Claimant's submission

The claimant's submission, in brief, was that by the fact that the 1st defendant has in the past always allowed the claimant to dispose of such motor vehicles duty free, a legitimate expectation has been created on his part that such practice will continue.

Defendant's submission

On the other hand the submission for the 1st defendant was that section 44 (2) of the Constitution provides for a limitation of constitutional rights, that as such the claimant's rights are not absolute, as they are limited by the Constitution itself. It was submitted that the 1st defendant's decision was in tandem with the Customs and Excise Act and as such the claimant is precluded from benefitting under the CPC, and that his rights are only limited to the extent of importation and not on disposal

of the vehicle duty free. It was argued that the claimant cannot enjoy a right that has not been provided for under the CPC. Therefore, so it was submitted, 1st defendant's decision is not a violation of the claimant's legitimate expectation because acquiring a motor vehicle duty free is a privilege under the Customs and Excise Act and the CPC, and nothing is mentioned as to non-payment of duty on disposal, therefore the argument of the claimant that judicial officers are permitted to dispose of motor vehicles acquired duty free cannot stand, so it was submitted.

Determination

I will firstly address the argument raised by counsel for the 1st defendant concerning the application of the Customs and Excise Act and the CPC by reiterating the position that under the circumstances under discussion, the law, including the CPC before and after amendment, never required that judicial officers pay duty on disposal of the duty free vehicles. The law must be interpreted in the context discussed above and be applied as such.

Secondly it is not correct that acquiring a motor vehicle duty free is a privilege under the Customs and Excise Act and the CPC. The correct position is that they are acquired as such under the Conditions of Service for judicial officers and that the Customs and Excise Act CPC only come in to facilitate clearance.

Regarding the issue of section 44 (1) of the Constitution counsel did not state on what basis that provision applies in this case and I am unable to find such basis with regard to the right to a legitimate expectation.

A legitimate expectation, at law, arises either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. See the judgment of Lord Fraser in *CCCU v Minister for the Civil Service* [1985] AC 374.

In *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 their Lordships took the view that the word "legitimate" falls to be read as meaning "reasonable" and, accordingly "legitimate expectations" are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis.

That the 1st defendant has always allowed the claimant to clear motor vehicles imported by him duty free without having to pay duty amounts a regular practice which the claimant can reasonably expect to continue, for there appears nothing pointing to the contrary. This, in my understanding falls squarely within the scope

of legitimate or reasonable expectation as defined in the case authorities cited above. I therefore find for the claimant on this ground.

Whether the said decision violates the claimant's right to property and to freely engage in economic activity

I am of the view that whichever way this issue may be determined would not affect the final outcome of this judicial review application and therefore refrain from considering it.

Whether the 1st defendant has acted unlawfully, procedurally unfairly, unjustifiably and in bad faith in coming up with his decision; and whether, generally speaking, the 1st defendant, in making the decision, has failed to appreciate and discharge his public, constitutional and administrative law duties.

A public authority's decision not grounded in law is, obviously, unlawful. It is in substance unfair and unjustifiable. As to whether the decision was in bad faith or not, it seems to me that the 1st defendant, in its own admission, having previously allowed duty free, not only one, but several of such vehicles, it should be difficult to take the current decision as having been made in good faith particularly taking into account the absence of a law supporting the decision. I would thus be persuaded that the same was made in bad faith. To the extent that relevant legal considerations were not fully appreciated and taken into account, the decision of the 1st defendant herein fell outside relevant constitutional and administrative standards. This, briefly, should resolve this issue.

Orders and declarations

I make the following orders and declarations stemming from the findings herein and as prayed for by the claimant:

1. A declaration and order that the decision of the 1st defendant is unlawful and *ultra vires* the 1st defendant's powers;
2. A declaration and order that the said decision is arbitrary, *Wednesbury* unreasonable, discriminatory and made in bad faith;

3. A declaration that the decision violates the claimant's legitimate expectation that he will continue to dispose of motor vehicles imported by him duty free without a demand and payment of duty;
4. An order quashing and setting aside the 1st defendant's decision;
5. An order requiring the 1st defendant to transfer or facilitate the duty free transfer ownership of the motor vehicle subject of this matter, namely, a Mercedes Benz registration number MZ 15;
6. An order of judgement against the 2nd defendant who entered no response to the application;
7. An order for costs in favour of the claimant.

Delivered this 7th day of June, 2022.



R Mbvundula

JUDGE