



**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**REVENUE DIVISION**  
**CIVIL APPEAL NUMBER 2 OF 2022**

**BETWEEN:**

THE COMMISSIONER GENERAL OF  
MALAWI REVENUE AUTHORITY  
AND

APPELLANT

IBRAHIM NATHANIE t/a MWAIPHARMA

RESPONDENT

**CORAM: HONOURABLE JUSTICE JOSEPH CHIGONA**

MR. ANTHONY CHUNGU, OF COUNSEL FOR THE APPELLANT

MRS. LONESS MICHONGWE, OF COUNSEL FOR THE APPELLANT

MR. MAJAWA, OF COUNSEL FOR THE RESPONDENT

MR. FELIX KAMCHIPUTU COURT CLERK

**ORDER**

**INTRODUCTION**

[1] The Appellant, in exercise of his powers, under section 110 of the Customs and Excise Act classified conjex cough and throat tablets as a sweet/confectionary under Heading 17.04. of Harmonized System of classification of Goods. Being aggrieved of that determination, the Respondent lodged an appeal with the Special Referee pursuant to section 121 of the Customs and Excise Act. The Special Referee, through a determination dated 8<sup>th</sup> December 2021, reversed the determination of the Appellant. Being aggrieved of the decision by the Special Referee, the Appellant lodged an appeal before this court. Before the determination of the appeal by this court,

the Respondent filed an application to dismiss the appeal. This is the court's order following that application.

### **THE RESPONDENT'S CASE**

[2] The application to dismiss the appeal is supported by a sworn statement by Lozindaba Mbvundula and skeleton arguments. Counsel adopted both the sworn statement and the skeleton arguments herein. The deponent avers that the appeal that was lodged by the Appellant was made by way of notice under Order XXXIII r.1(1) of the Subordinate Court Rules. The deponent avers that the appeal is couched as though it is an appeal against the decision of a magistrate and makes several references to the special referee as the court below. It is the submission of the deponent that the court (Special Referee) was not sitting as a magistrate court. The deponent avers that the Special Referee was only exercising his statutory power under section 121 (1) of the Customs and Excise Act and as per the Courts appointment under the Customs and Excise (Tariffs) Order-Appointment of Special Referee.

[3] The deponent avers that the court was exercising a special power and not its general judicial powers so as to warrant lodging of an appeal. The deponent avers that the only available avenue for the Appellant is through Judicial Review. The deponent therefore prayed for dismissal of the appeal for being unprocedural and abuse of the court process.

[4] I also had an opportunity to hear the oral submission by the Respondent. Counsel for the Respondent submitted that since the magistrate was exercising a statutory power as a Special Referee under section 121 the Customs and Excise Act, the only avenue for review of his decision ought to emanate from the same statute or in the absence of such review powers in the statute, the High Court under section 108 of the Constitution may review the decision as read with Order 19 rule 20 of the Courts (High Court)(Civil Procedure) Rules, 2017 ( to be referred herein as Civil Procedure Rules). In other words, counsel for the Respondent submitted that the proper avenue was judicial review and not an appeal. Counsel submitted that lodging an appeal is an abuse of the court process. He cited the case of **MULUZI v MALAWI ELECTORAL COMMISSION**<sup>1</sup> where the court dismissed the application for being an abuse of the court process.

### **APPELLANT'S CASE**

[5] The Appellant is objecting to the application. The Appellant filed a sworn statement in opposition and skeleton arguments in support of their position. The deponent, Loness Michongwe, avers that the Special Referee's determination was on both facts and law. She submits that the Special Referee determined among others that conjex is a medicament and that Malawi Revenue Authority acted arbitrary and in contravention of the objective of the conversion which is trade facilitation. The Special Referee, the deponent avers, made a determination that the body to decide on whether conjex is a medicament is Pharmacy, Medicines and Poisons Board. The Order of the Special Referee is exhibited and marked **LM2**.

---

<sup>1</sup> Constitutional Case Number 1 of 2009

[6] The Appellant avers that the issues determined by the Special Referee were on merits and facts which are outside the realm of judicial review. The deponent therefore avers that the proper mode of proceeding is the appeal and not judicial review.

[7] During the hearing of the application, counsel Michongwe submitted that decisions of public bodies are not always the ambit of judicial review and that each case has to be decided on its own facts. Counsel asked this court to consider the scope of judicial review and determine whether the Appellant was procedurally correct to file an appeal. Counsel cited the case of **O'REILY v MACKMAN & OTHERS**<sup>2</sup> where the court held that for judicial review, the court has to consider whether the applicant is asking the court to exercise supervisory duties and asserts a private cause of action.

[8] Counsel submitted that Order 19 rule 20 of the Civil Procedure Rules provides for grounds for judicial review. Counsel, relying on the case of **MPINGANJIRA AND OTHERS v COUNCIL OF UNIVERSITY OF MALAWI**<sup>3</sup>, submitted that judicial review is not concerned with merits of the decision but rather is concerned with the decision-making process. Counsel also cited the cases of **JAMADAR v ATTORNEY GENERAL**<sup>4</sup> and **COMMISSIONER GENERAL OF UGANDA REVENUE AUTHORITY v ZAIN INTERNATIONAL BV**<sup>5</sup>.

[9] Counsel submitted that the issues raised in the grounds of appeal are not fit for judicial review. Counsel submitted that issues like classification of conjex, body responsible for the classification of conjex, whether conjex is therapeutic and registration of conjex as a medicine are issues that were decided by the Special Referee on merits. Counsel submitted that in **MULUZI v MALAWI ELECTORAL COMMISSION**<sup>6</sup>, the court had to dismiss the application since the Constitution specifically gives jurisdiction to the High Court.

[10] Counsel submitted that in the event that this court agrees with Respondent that the correct procedure was to commence judicial review proceedings and not appeal, the court should allow the Appellant to commence judicial review proceedings as there is no prejudice on the part of the Respondent.

[11] Counsel Chungu submitted that the decision whether the correct procedure is an appeal or judicial review is based on case-by-case basis. He submitted that the determination by the Special Referee was on merits and not on decision-making process. He submitted that in case where the court makes a finding that judicial review was appropriate avenue, the court should order commencement of the proceedings since the Appellant was within the limitation period of 3 months when they lodged the appeal.

[12] In reply, counsel for the Respondent submitted that decision whether judicial review or appeal is on case-by-case basis. He submitted that section 108 of the Constitution gives power to the High Court to review and that section 20 of the Courts Act talks of a final judgment of a subordinate

---

<sup>2</sup> [1983] 2 AC 237

<sup>3</sup> [1994] MLR 209 (HC)

<sup>4</sup> [2000-2001] MLR 175 (HC)

<sup>5</sup> Civil Appeal Number 0011 of 2012, Court of Appeal, Uganda.

<sup>6</sup> *supra*

court. He submitted that a Special Referee is not a magistrate court to warrant an appeal before this court. He submitted that the only remedy available is judicial review. Counsel also submitted that the grounds for judicial review touch on the review of the law and that the grounds of appeal herein are on law and facts hence amenable to judicial review and not appeal. Counsel submitted that skipping an appropriate procedure, as in the present case, amounts to abuse of court process.

### **THE DISPOSAL OF THE APPLICATION**

[13] Let me take this opportunity to express my gratitude to counsel for their industrious research regarding the present application. I assure you that I had an opportunity to go through all your submissions and case authorities cited herein. I will only make reference to relevant sections of your submissions as I resolve the issues before me hereunder.

[14] The issue that I have to resolve is whether the correct procedure was an appeal or judicial review. The starting point is section 121 (1) of the Customs and Excise Act which provides as follows:

“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.”

[15] There is no dispute between the parties that the Special Referee, who is a Resident Magistrate<sup>7</sup>, is the adjudicator of disputes with regard to duty payable between the owner of goods (taxpayer) and the Commissioner General. It is also clear to me that the parties are in agreement that the Special Referee does not discharge a judicial function (not discharging duties of a magistrate). It is also clear to me that there is no dispute between the parties that the Act does not provide an appellate avenue against determinations of the Special Referee. This is in sharp contrast with what is provided for in other customs laws. For instance, the Taxation Act under section 101 provides that a party aggrieved by a determination of the Special Arbitrator may appeal in the prescribed manner to the High Court on a point of law. Section 44 of the Value Added Tax Act provides that any person dissatisfied with the decision of the Commissioner General may lodge an appeal with any court of a Resident Magistrate. What this means is that any person aggrieved by the decision of the Resident Magistrate is at liberty to lodge an appeal with the High Court. As alluded to above, the scheme of things under the Customs and Excise Act is different.

[16] I am of the considered view that for an appeal to lie against a decision of an adjudicator, the statute shall always be clear of that fact. An appeal emanates from an enabling statute<sup>8</sup> as we have seen above. I am of the view that where a statute does not provide for the appeal procedure against

---

<sup>7</sup> Customs and Excise (Tariff) Order-Appointment of Special Referee that appointed the Senior Resident Magistrate at Blantyre as a Special Referee for the purpose of hearing and determining appeals under section 121 of the Customs and Excise Act.

<sup>8</sup> [http://www.idac.org.nz>assets, Appeals and Review, pg. 130](http://www.idac.org.nz/assets, Appeals and Review, pg. 130)

a decision or determination of a public body, definitely any aggrieved party cannot lodge an appeal against the decision of that public body.

[17] In those circumstances, I am of the view that the only remedy available to the aggrieved party is judicial review. This is so because the public body or authority is discharging a statutory duty that should always be amenable to judicial review<sup>9</sup>. I am of the view that where a statute provides for appeal avenue against a decision of a public body or authority, any aggrieved party is at liberty to either commence appeal proceedings or judicial review proceedings depending on the remedies being sought. The exercise of analyzing the evidence to determine whether it should be an appeal or judicial review will happen only in circumstances where appeal procedure is provided. Where a statute does not provide appeal avenue against a decision of the public body or authority, I am of the view that the correct procedure is to commence judicial review proceedings<sup>10</sup>.

[18] Reverting to the present case and based on the foregoing, I am of the view that the correct procedure was to commence judicial review proceedings against the determination of the Special Referee who was discharging his statutory duties. Appeal proceedings, in my view, were applicable only if the Customs and Excise Act provided for the same. In the absence of such a provision in the Act, judicial review is the correct procedure. I am fortified in my decision by the legal proposition that in tax matters, we follow strict interpretation of tax statutes<sup>11</sup>. Following this principle, I do not think that we can impute appeal procedure in the Customs and Excise Act where none is provided.

[19] It is therefore my finding that the appeal that the Appellants lodged against the determination of the Special Referee cannot stand. I dismiss it in its entirety.

[20] During the hearing of the application, the Appellants argued that in case the court's finding is that the appeal procedure was not amenable at law, they be allowed to proceed as if the proceedings were commenced as judicial review. In the alternative, the Appellants prayed to this court to allow them commence judicial review proceedings against the determination of the Special Referee.

[22] I have to mention at this juncture that appeal proceedings and judicial review proceedings are totally different. In judicial review proceedings, there are certain safeguards that the law has put in place before commencement of judicial review proceedings, notable ones being the permission stage<sup>12</sup> and 3 months' limitation period<sup>13</sup>. For me to convert the present appeal proceedings into judicial review proceedings is inappropriate<sup>14</sup>. For judicial review proceedings, the Appellant has

---

<sup>9</sup> Columbia Commonwealth University Ltd V National Council for Higher Education, Civil Cause Number 122 of 2016, HC (Unreported).

<sup>10</sup> R-V-Brighton Justices, ex parte Robinson [1973] 1 WLR 69; R-V-Chief Constable of the Merseyside Police ex parte Calveley and Others [1986] 1 ALL ER 257 at 263.

<sup>11</sup> A-v-Commissioner of Taxes (MSC) (1968-70) ALR (Mal) 286

<sup>12</sup> Order 19 rule 20 (3) of the Courts (High Court) (Civil Procedure) Rules, 2017.

<sup>13</sup> Order 19 rule 20 (5) of the Courts (High Court) (Civil Procedure) Rules, 2017

<sup>14</sup> Dr. Bakili Muluzi AND United Democratic Front (UDF) V The Malawi Electoral Commission, Constitutional Cause Number 1 of 2009 where the Court declined to convert an Originating Summons matter to a Judicial Review Matter since the two procedures are fundamentally different.

to first make an application for permission which has its own legal requirements. I therefore decline the prayer of the Appellant.

[23] I condemn the Appellants to pay costs of the present application.

**MADE IN OPEN COURT THIS 28<sup>TH</sup> DAY OF JULY 2022 AT REVENUE DIVISION,  
PRINCIPAL REGISTRY, BLANTYRE.**

  
JOSEPH CHIGONA

JUDGE