IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
REVENUE DIVISION
REVENUE CAUSE NO. 32 OF 2018

BETWEEN

POLYPACK LIMITED ..... 1ST CLAIMANT
AERO PLASTICS ..... 2ND CLAIMANT
ANCHOR INDUSTRIES ..... 3RD CLAIMANT
BNC PACKAGING INDUSTRIES LIMITED ..... 4TH CLAIMANT
OG PLASTICS INDUSTRIES (2008) LIMITED 5THCLAIMANT
EASY PACK LIMITED ..... 6TH CLAIMANT
PHAZI INDUSTRIES ..... 7TH CLAIMANT
PLASTICS PACKAGING INDUSTRIES LIMITED ..... 8TH CLAIMANT
POLYPLASTS ..... 9TH CLAIMANT
OCEAN INDUSTRIES LIMITED .....10TH CLAIAMANT
PLASTICO INDUSTRIES ..... 11TH CLAIMANT
SHORERUBBER INDUSTRIES ..... 12TH CLAIMANT
GM PLASTICS ..... 13TH CLAIMANT
GOLDEN PLASTICS ..... 14TH CLAIMANT
CENTRAL PLASTICS MANUFACTURERS ..... 15TH CLAIMANT
FLEXOPACK PACKAGING ..... 16TH CLAIMANT
POLYPET INDUSTRIES ..... 17TH CLAIMANT
PARKLANE INDUSTRIES ..... 18TH CLAIMANT
STARPLEX ..... 19TH CLAIMANT
RAINBOW PLASTICS ..... 20TH CLAIMANT
MULTIPACK INDUSTRIES ..... 21ST CLAIMANT
ROYAL PRODUCTS ..... 22ND CLAIMANT
GS PLASTICS ..... 23RD CLAIMANT
NT PLASTICS ..... 24TH CLAIMANT

FLOWTECH LIMITED ..... 25TH CLAIMANT
SHARMA PLASTICS ..... 26TH CLAIMANT
DJ PLASTICS ..... 27TH CLAIMANT
AND
MALAWI REVENUE AUTHORITY ..... DEFENDANT

Coram : **HONOURABLE JUSTICE R MBVUNDULA**
Masumbu, Kambale, Counsel for the Claimants
Mwangwela (Mrs), Counsel for the Defendant
Chimang'anga, Official Interpreter

RULING

The parties

The claimants are all manufacturers of plastics and plastic products. It is a notorious fact that the defendant is mandated to collect taxes and duties on behalf of the Malawi Government.

Brief history of the dispute

The dispute between the claimants and the defendant dates some years back. In 2014 under Miscellaneous Cause No. 45 of 2014 (the 2014 application/matter) the claimants obtained permission to commence judicial review proceedings to challenge a decision of the defendant to collect domestic excise tax on plastics and plastic products. The judicial review was never commenced, according to the claimants, on account of their lawyers' failure or neglect to file the requisite motion for judicial review. As a result the order for permission as well as the attendant injunction were vacated by an order dated 25th July 2018.

Later in 2018 the claimants commenced the present action by way of a summons under the provisions of the Courts (High Court) (Civil Procedure) Rules, 2017 (hereinafter "the CPR 2017").

The remedies applied for herein

In the present action the claimants apply for the following remedies:

a) an interim declaration that the defendant's decision demanding excise tax from the claimants as contained in the defendant's various letters to individual

claimants dated 21st September 2018 demanding from the claimants excise tax on plastics and plastic products be stayed;

b) an injunction restraining the defendant from implementing or executing or enforcing domestic excise tax on plastics and plastic products pending the hearing and determination of this matter.

The claimants state that the assessments done by the defendant were done without affording the applicants the right to be heard and without laying down the classification of the products to be taxed and that it is contrary to the rules of natural justice and section 43 of the Constitution and, further, that the said assessment is irregular, unreasonable, oppressive and a violation of their right to economic development enshrined in the Constitution. The applicants further plead that the assessments lack criteria hence are discriminatory in that the claimants were assessed in respect of different periods and, further, that the defendant has charged excise tax on the claimants' products manufactured in Malawi yet similar products imported under industrial rebate are not dutiable.

The present application

The application was brought *ex parte* but heard *inter partes* on the direction of the court. The claimants' application is supported by two affidavits sworn by Vijay Kumar, the Managing Director of Polypack Limited, the 1st claimant. The defendant's case is supported by an affidavit sworn by MacDonald Chambukira, the defendant's employee seized of the matter on behalf of the defendant.

Authority to determine customs and excise tariffs

In his affidavit of 5th October 2018 Mr Kumar states that around June 2007 the defendant introduced domestic excise tax in respect of various goods including plastic products. He states that upon such introduction the claimants complained to the defendant following which the defendant deferred enforcement, pending review by the Government. According to him, in June 2011, the Customs and Excise tariffs were reviewed resulting in duty being removed in respect of certain products but was maintained in respect of plastics and plastic products. He states that implementation was however further deferred to May 2014. According to him the applicants took the view that maintaining the excise duty on plastics and plastic products amounted to selective application of tax laws and discriminatory and a violation of their rights under the Constitution.

Albeit in a subtle manner, Mr Chambukira, in his affidavit, points to the fact that the decision to introduce the excise tax was not made by the defendant but by the Minister of Finance and it is apparent that between Mr Kumar's position and that taken by Mr Chambukira the latter is the correct one. The following statutory provisions support this position.

Section 171 of the Constitution provides as follows:

> 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.

Sections 82 (d), 83 (1) and 96 of the Customs and Excise Act are also material.

> 82. Subject to the provisions of the customs laws, there shall be charged, levied, collected and paid under this Act—
>
> (d) in respect of imported goods and goods manufactured or produced in Malawi, excise duties in accordance with the provisions of an excise tariff *prescribed by the Minister*;

> 83. Tariffs prescribed
>
> (1) *The Minister may, subject to section 84, by order published in the Gazette, prescribe* a surtax tariff, a dumping duties tariff, a customs tariff and *excise tariff* and an export duties tariff for the purposes of this Act, and may similarly amend any such tariff.

> 96. Suspensions, rebates, remissions and refunds of duty
>
> (1) The Minister may, by regulations made under section 175 and subject to such conditions as he may prescribe—
>
> (a) suspend wholly or in part any of the duties appearing in any tariff;
>
> (b) grant a rebate, remission or refund of the duty otherwise payable, or already paid, on such goods, in such circumstances or to such classes of persons as he may specify, and such suspension, rebate, remission or refund may be granted with retrospective effect.
>
> (2) The Minister may by notice published in the Gazette withdraw any suspension, rebate, remission or refund of duty prescribed in terms of subsection (1):
>
> Provided that such notice shall not be made retrospective.

The functions of defendant are laid out in section 4 of the Malawi Revenue Authority Act as follows:

> 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;

(b) to promote voluntary tax compliance to the highest degree possible;

(c) to take such measures as may be required to improve the standards of service given to taxpayers with a view to improving efficiency and effectiveness and maximizing revenue collection;

(d) to take such measures as may be required to counteract tax fraud and other forms of fiscal evasion;

(e) to advise the Minister on matters of revenue policy and matters relating to the administration and collection of revenue under the laws listed in the Schedule; and

(f) to perform such other functions in relation to revenue as the Minister may direct.

(3) The Minister may, by notice published in the Gazette, amend the Schedule. (emphasis supplied)

Hence the claimants' assertion that it is the defendant who introduced domestic excise tax is less that true since it is clear from the foregoing provisions that the same is the mandate of the Minister and not the defendant. The facts also show that it is actually the Minister and not the defendant who introduced the tariffs. It is therefore clear, in the premises, that the claimants have proceeded under the erroneous assumption that it is the defendant who introduced the domestic excise tax on plastics and plastic products, when it is the Minister of Finance who did so under authority of the Customs and Excise Act. This brings forth the question whether, under these circumstances, an injunction is issuable against the defendant to restrain it from implementing the Minister's decision, it being the defendant's statutory responsibility, under section 4 of the Malawi Revenue Authority Act, to collect and enforce such taxes as are duly determined by the Minister or otherwise.

It is a legal notoriety that an injunction is an order against the commission or continuance of a wrongful or unlawful act or omission. An injunction is never issuable against a lawfully sanctioned act. The defendant's conduct of enforcing the domestic excise tariffs legally created by the Minister pursuant to the Customs and Excise Act is not wrongful or unlawful. It being the statutory duty of the defendant to collect and enforce the tax, an injunction cannot lie against the defendant to restrain its collection or enforcement.

Res judicata and abuse of the process of court

Mr Kumar states that the claimants, being of the view that since they had nowhere to appeal, commenced judicial review of the decision (by way of the 2014 application) against the defendant. In this regard they instructed their lawyers then, Kanyenda Makiyi & Co, to commence the judicial review proceedings and, as already stated, they were granted leave and an injunction stopping the defendant from collecting the domestic excise tax. However, on account of the lawyers' neglect to prosecute the matter by not commencing the judicial review proceedings within the time stipulated by the rules, both the leave and the injunction were vacated. As a result, in February 2018, contrary to their expectations that the judicial review was pending hearing, they received communication from the defendant demanding immediate payment of excise duty on plastic and plastic packaging, and upon making inquiries was when they learnt of their application's fate. As an industry, he states, *they remain aggrieved and still want the so called "defendant's decision" to be reviewed* as they consider it to be selective, discriminatory, unclear, counterproductive and unreasonable.

Mr Chambukira confirms the fact that implementation of excise tax on plastic products was revived on 1st July 2014 after suspension of the waiver of implementation relating to such products was lifted by the Minister of Finance. This, he says, meant that by law the 10% excise tax on plastic products was chargeable and payable from that date by all qualifying plastic products manufacturers in Malawi. He states that immediately thereafter the defendant communicated to the claimants that they were required to submit their first excise returns but instead of complying they obtained an order of injunction restraining the defendant from implementing the requirement pending judicial review. Mr Chambukira takes the view that in light of the fact that the claimants did not pursue the judicial review under the 2014 matter leading to the orders thereunder being vacated, the present matter is *res judicata* and an abuse of the process of court as this application seeks to attack the very same decision which was the subject of the aborted 2014 application.

The meaning of *res judicata* was considered in *Nthara v ADMARC* [1995] 1 MLR 177 (HC). In that case the plaintiff had filed a suit against the defendant concerning matters arising from transactions that had given rise to an earlier suit. The court having observed following:

a) that the parties to the two actions were exactly the same,

b) that the two matters originated from the same incident,
c) that when the plaintiff brought the first suit against the defendant all the points which he raised in the second suit by his pleadings were available to him,
d) that no material evidence affecting the matter had come to light after the first suit, and, consequently
e) that the cause of action in the second suit was available to the plaintiff when he first took the defendant to court in the first suit,
held that the matter was *res judicata*.

The court cited the case of *Lockyer v Ferryman* (1877) 2 App Cas 519 where Lord Blackburn stated that

> ... the object of the rule of *res judicata* is always put on two grounds, the one public policy, that it is the interest of the State that there should be an end of litigation, and the other, the hardship on the individual, that he should be vexed twice for the same cause.

The 2014 matter and the attendant order of injunction, strictly speaking, were not vacated as the claimants would want this court to believe. What transpired is that following the granting of leave and the injunction by the claimants, the defendant, in July 2014, filed a Notice of Hearing of Originating Motion on the mistaken belief that the Originating Motion had been filed. After it transpired on the date scheduled for the hearing that the Originating Motion had not in fact been filed, this court, on 6th February 2014, made a finding that the notice of hearing was ill-premised as there were no pending judicial review proceedings in existence.

Thereafter on 9th March 2018 the applicants brought an application for extension of time "within which to file notice of motion for judicial review" in relation to the same issues for which they were granted leave in 2014. The application was brought under Order 3 rule 5 of the CPR 2017. The claimants, as they do in the present application, informed the court in that application, that they *were still aggrieved by the decision of the respondent to implement domestic excise duty on plastics and plastic packaging*, which, they said, had greatly affected their operations, and sought the court's indulgence to allow them to resuscitate their cause, i.e. the 2014 matter. They asked this court to take into account the fact that they were innocent victims of their previous counsel's negligence, and to invoke the overall objective of the CPR 2017, which is to deal with proceedings justly by, *inter alia*, bearing in mind the importance of the proceedings. It was the view of the claimants that it would be in the interests of justice for the court to extend time. Following the Supreme Court of Appeal decision in *Lilongwe Water Board v. Minister of Agriculture and Water*

Development and 3 others, ex parte Malawi Law Society MSCA Civil Appeal No 69 of 2017 (which this court was bound to follow) this court held, by an order dated 25th July 2014, that since the leave had already expired or lapsed when the summons to extend time was filed, the proper approach should have been to make a fresh application for leave and not to apply for extension of time. The application was accordingly dismissed.

On 8th October 2020 the claimants commenced the present action by way of a summons pursuant to the CPR 2017. The accompanying Statement of Case narrates the history of the matter from when the excise tariffs were first introduced in June 2007. After several developments in between which in effect did not turn in their facviour was when they filed the 2014 application which fell off in 2018. It was thereafter that in September 2018 the claimants received the defendant's demand letters for domestic excise tax which they now challenge herein.

Counsel for the claimants, in addressing the defendant's assertion that the matter is *res judicata*, submits that the claimants could not have litigated earlier on the defendant's demand of September 2018 as it is only then that the claimants learnt how the defendant had calculated the duty, so that the issue of estoppel cannot arise. It is worth noting however that earlier on in his submissions counsel told the court that the claimants were not disputing the "leviability and collectability" of the duty but were challenging the manner in which the defendant had sought to enforce the same, their prayer being that until these matters are clarified there be an injunction. Counsel also argues that the matter cannot be *res judicata* on the ground that the decision itself was not reviewed as the matter was not heard on the merits. Impliedly, in my understanding, counsel acknowledges that the decision challenged under the 2014 application is the one the claimants still seek to be reviewed, hence the present matter.

Defendant's counsel counters the submission by claimants' counsel by arguing that much as the present application raises issues about the assessments made after September 2018 demands, the issues that have always been in contention are the same as those in the present application. In counsel's view the claimants seek to protract the resolution of the issues by seeking the aid of the court.

A reminder need be made that the leave granted to the claimants in the 2014 was for them to move for judicial review of the respondent's decision *implementing domestic excise tax on plastic and plastic packaging*. In the present application Mr Kumar, after narrating the history of the matter states, in paragraph 13 of his affidavit

of 5th October 2020, that as an industry they are *still aggrieved by the decision ... and still want it reviewed.* A similar statement was made in the claimants' application of 9th March 2014. They stated that the claimants were *still aggrieved by the decision of the respondent to implement domestic excise tax on plastic and plastic packaging and that they sought the court's indulgence to resuscitate the case.* There can be no doubt, therefore, that the grievance which triggered the 2014 matter is the very same one now before this court and, in my view, it is disingenuous for one to claim that the present application is merely about the claimants' grievances arising from the defendant's September 2018 demand letters to the claimants. To my mind had the claimants pursued the 2014 matter to its finality the finding of the court in that matter as to whether the defendant's decision to implement the tax was in order or otherwise would have, subject to appeal, resolved the matter to its finality and any fresh litigation thereon would qualify as an abuse of the court process.

Spencer-Wilkinson CJ in *Inspector of Taxes v Sacranie* (1923-60) ALR (Mal) 615 in a case where the plaintiff wanted to assert further claims against the defendant in subsequent proceedings had this to say:

> I have already expressed the opinion that this is a case of *res judicata* and that the plaintiff is now estopped from going behind the judgment of the bankruptcy court which had, in my opinion, full jurisdiction to deal with the matter, even though its decision may have been wrong. If, however, I am wrong in thinking that this is strictly speaking a matter of *res judicata*, then I am of the opinion that *the plaintiff ought not to be allowed in these subsequent proceedings to raise a point which was open to him in the other proceedings.* (emphasis supplied).

The principle applicable here is that it having been open for the claimants to pursue, in the 2014 matter, their challenge against the defendant's decision to implement or enforce domestic excise tax, which opportunity was lost, the claimants are precluded from re-opening the matter as doing so amounts to vexing the defendant more than once for the same cause. The present cause is in effect a further attempt by the claimants to resuscitate that still-born cause of 2014 after their efforts in the applications of 9th March 2014 and 3rd July 2014 under the 2014 matter failed to yield that result. On authority, that is not in the public interest. I will therefore follow the position taken in *Inspector of Taxes v Sacranie* that if not *res judicata* the claimants ought not to be allowed in these subsequent proceedings to raise a point which was open to them in the 2014 proceedings. In this regard I find myself in agreement with the position expressed in Mr Chambukira's affidavit that the present action amounts to an abuse of process.

Assessment for excise tax and alleged violation of the right to be heard

Mr Kumar states that on 4th September 2018 the claimants wrote the Ministry of Finance summarizing their perceived discrepancies of the excise tariffs and requested for a meeting which has not yet materialized. The letter is exhibited and marked "VJ5"

He also states that despite the issues they raised in that letter to the Ministry, on 21st September 2018 they received letters from the defendant informing them that their domestic excise taxes had been assessed based on value for duty purposes for inputs into plastic products and were given 21 days to pay. He claims that in violation of rules of natural justice the said assessments were done without affording the claimants the right to be heard and without laying down the classifications for the products to be taxed.

That the classifications were not laid down is untrue because in paragraph 2 of the said "VJ5" the claimants state:

> 2. Malawi revenue authority has informed us the tariff order no. 3917.23.00, 3920.10.00, 3920.20.00, 3921.13.00, 3923.21.10, 3923.30.10, and 3923.50.00 attracts excise tax at the rate of 10%. (sic)

In this regard counsel for the defendant pointed out that what the claimants were communicating in "VJ5" was what the defendant had communicated to them in its letter dated 1st July 2014 (exhibit "VJ3") that the tax was payable by law by all plastic manufacturers in Malawi. Counsel specifically further pointed out that "VJ5" was dated 4th September 2018, 4 years after "VJ3". Counsel also pointed out that the latter of 25th February 2014 (VJ3") advised the claimants of the proper classification to use before the effective date of 1st July 2014 and were also advised to register for domestic excise tax immediately, which they never complied with, and further that by "VJ4" they were advised to comply with the law but never complied. That instead they sought an injunction in July 2014.

In the last paragraph of the defendant's latter of 25th February 2014 ("VJ3) the defendant implores:

> In this regard, you are therefore being reminded of your noble obligation to comply with the requirement of the law by registering for Domestic Excise Tax immediately.

The claim by Mr Kumar that the claimants were only invited to register for domestic excise tax in September 2018 is, therefore, a blatant lie, the truth being that this was

communicated to the claimants as far back as February 2014. Whatever the case, however, one does not have to wait to be informed of their obligations under the law. One must investigate what the law governing their enterprise is. The saying that ignorance of the law is not a defence comes into play in the instant case.

Mr Kumar further states that the defendant is well aware that excise tax is a consumer tax which the claimants collect from consumers and remit to the defendant. In this case, he states, all the claimants were not even registered for excise tax and were not collecting it between 2014 and 2018 because of their belief that a court order was in place restraining the defendant from collecting the said tax. He alleges that in fact the claimants were only given the requisite registration form in September 2018. In this regard he has exhibited a specimen blank form: exhibit "VJ7".

In his submissions counsel Masumbu, for the claimants, started by pointing out that the present application surrounded the manner in which the defendant had taken steps to enforce the collection of domestic excise duty. He submitted, correctly, that in facilitating the collection of taxes the defendant must be dictated by principles of fairness and the dictates of administrative justice according to section 43 of the Constitution as well as sections 20 against discrimination, section 29 on the right to economic activity and section 30 on the right to development. In his opinion the facts show that defendant failed miserably to satisfy these basic tenets of the Constitution. Applications challenging procedural fairness by public officers are required to be brought by way of judicial review under Order 20 of the CPR and not by way of a summons as the claimants have done in this case. I say nothing further on the point, however, considering that the defendant said nothing on it.

In this regard he stated that none of the claimants were even registered for excise tax as was evidenced by exhibit "VJ7" to the affidavit of Mr Kumar. Exhibit "VJ7" is a blank form which Mr Kumar claims was only given to the claimants by the defendant in September 2018 for them to register for excise duty. An examination of the form does not however support Mr Kumar's allegation as exhibit "VJ7" is a copy of a form prescribed under section 66 of the Customs and Excise Act following compliance with section 65 (2). Section 65 (2) provides:

> (2) No excise licence shall be issued in respect of any premises until an appropriate entry of premises has been made.

Section 66 provides:

> 66. Entry of premises, etc.

> (1) Every applicant for an excise licence shall deliver to the Controller an entry of premises in the prescribed form containing such information and accompanied by such plans as the Controller may require concerning the goods to be manufactured and the processes, premises and plant to be used.

In short exhibit "VJ7" is not an application form for excise tax as alleged by Mr Kumar. Mr Kumar has also not exhibited any letter under cover of which, if true, the defendant dispatched the alleged application form to the claimants.

Further to this, however, in so far as registration for an excise licence under the Act is concerned, section 65 of the Act places the obligation to register with the manufacturer and not with the defendant to invite applications. It is provided under section 65 (1) as follows:

> 65. Licences, issue, conditions, etc.
> (1) Every applicant for an excise licence *shall make application in writing* to the Controller and shall provide such information in respect of the application as the Controller may require, and the Controller may issue such licence or may refuse to issue such licence at his discretion. (Emphasis supplied).

Section 64 (1) is also material in so far as the claimants' position that they are not even registered for excise duty. It reads, in part:

> 64. Excise licences
> (1) Except as otherwise provided in the customs laws no person shall manufacture any excisable goods either in whole or in part unless authorized by, and in accordance with the conditions of, a valid excise licence issued by the Controller:
> ...

That the applicants have been manufacturing their products without valid excise licences, as confessed by themselves, renders their manufacturing a breach of sections 65 (1) of the Customs and Excise Act. As such the court's hands would be tied in so far as granting them the equitable reliefs they seek. The principles that equity follows the law and that he who comes to equity must come with clean hands apply against the claimants.

Counsel for the defendant reiterated the fact that the waiver against payment of domestic excise tax on plastic and plastic products was lifted by the Minister with effect from 1st July 2014 which meant that the excise tax became payable as from that date.

Counsel for the defendant did confirm that the claimants were not registered for excise tax but said that this was because the claimants from the word go never intended to comply with the law, yet continued to manufacture goods in breach of the same law, namely section 64 of the Customs and Excise Act. Counsel found it disheartening on the part of the defendant that even though the claimants had committed a breach of the law they sought an order suspending the excise that was chargeable from as far back as 1st July 2014. In counsel's view this court had no power to suspend or nullify the enforcement of the law and that the claimants' prayer was totally unfounded. I totally agree with counsel for the defendant in this regard.

Mr Chambukira, pointing out that following the dismissal of the claimants' 2014 application, the defendant wrote the claimants requesting that they carry out a self-assessment of their liability for excise tax that was due and payable which they have neglected to do even after being served with reminders, advances the view that it is unfair on the part of the claimants to argue breach of rules of natural justice on the part of the defendant when they turned down the request to self-assess. Exhibited to his affidavit in this connection are two letters marked "MC1" and "MC2" respectively.

"MC1" is a set identical letters all dated 12th February 2018 addressed to the claimants separately, by which, *inter alia*, the defendant, with reference to the High Court ruling vacating the injunction, advised the claimants to do a self-assessment of their accumulated excise tax liability from the date the injunction granted in July 2014 and to pay the same.

The full text of "MC2" (also a set of letters addressed to individual claimants) dated 28th May 2018, reads as follows:

> "As you are aware, on 6th February 2018, the High Court vacated an injunction on 4th July, 2014 against payment of Domestic Excise. You will recall that following that development Malawi Revenue Authority (MRA) wrote you on 15th February, 2018 asking that you self-assess the amount of Domestic Excise Taxes payable from July 2014 to date and pay the same by 30th June, 2018.
>
> We have noted, with regret, that up to now, you have not self-assessed yourself and have not paid anything towards settlement of the same. We, therefore, would like to advise that you submit the self-assessment of the afore-mentioned tax and pay it together with all current taxes by 30th June 2018.
>
> Kindly note that failing to comply with the contents of this letter will lead Malawi Revenue Authority to escalate revenue collection measures including closure of your business premises in accordance with section 145 of the Customs and Excise Act."

In this regard Mr Chambukira asserts that granted that the claimants were given a chance to self-assess they cannot justifiably allege that there were not afforded the right to be heard.

My finding id that Mr Kumar's statement that the defendant did not afford the claimants an opportunity to be heard is not true in view of the fact that the claimants were called upon to self-assess their respective tax liability as far back as February 2018, and that in May 2018 the defendant reminded the claimants to self-assess their respective tax liability and that the defendants, in concert, declined to comply. The claimants would seem to have deliberately withheld this information from the court to paint the picture that the defendant had treated the claimants unreasonably by just waking up one morning and giving them just 21 days, in September 2018, to settle their respective tax liability, dating back some years, yet they had had since February 2018 to self-assess and pay. It is my undoubted opinion that the request to self-assess was an opportunity for the claimants to state their tax position and constituted an opportunity to be heard on their part.

In exhibit "VJ5" to Mr Kumar's affidavit (a letter from the claimants to the Secretary to the Treasury dated 4th September 2018) the claimants expressly state that the defendant had "written to all manufacturers to do a self-assessment of excise duty payable from 2014". Mr Kumar has therefore not been candid in presenting the claimants' case to this court. Rather than the defendant, it is the claimants who have behaved unreasonably by collectively refusing to comply with the requirements of the law.

In approaching this court for the remedy of stay or an injunction the claimants are under a duty to candidly disclose to the court all material facts. Anything less than full disclosure of such material facts disentitles them to the grant of that remedy. The following case authorities are on point.

In *State and another, Ex Parte Bakili Muluzi and John ZU Tembo* [2007] MLR 304 it was stated as follows:

> As regards the alleged suppression or non-disclosure of material facts, the first point to be noted is that the stay and injunction orders the respondent seeks to be discharged were obtained by way of an *ex parte* application. The case of *R v Kensington Income Tax Commissioners* (1917) KB 486 is authority for the proposition that a party seeking to move the Court *ex parte* must lay all material facts before the Court and nothing material should be suppressed. This requirement is there as the other party has no opportunity to be heard on an *ex parte* application. With regard to an injunction obtained *ex parte*, perhaps the most instructive and illuminating case is *Boyce v Gill* (1891) 64 LT 824 whose holding is that

> failure to lay all material facts to the Court would lead to the discharge of an *ex parte* injunction without regard to the merits of the case. It appears the reasoning behind such a holding is that an injunction being an equitable relief, a party seeking such a relief must act in utmost good faith.
>
> ...
>
> The relevant remarks of Reading CJ in the *Kensington Income Tax Commissioners* with regard to the requirement to make full disclosure on an *ex parte* application are as follows:
>
> > "Where an *ex parte* application has been made to this Court for a rule *nisi* or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and prevent abuse of its process, to refuse to proceed further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the Court that it has been deceived."

In *Vitsitsi v Vitsitsi* [2002-2003] MLR @423-424 (SCA) it was stated:

> As for the applicable law, it is a perfectly and long settled principle of law that a person who makes an *ex parte* application to the court is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not do so he will not be allowed any advantage gained by means of an order which will have been so obtained – and if authority is needed for this it is *R v Kensington Income Tax Commissioners, Princess Edmond de Polianac* [1917] 1 KB 486, ... And it seems to us that the principle makes a lot of sense considering that such applications will almost invariably be for a discretionary remedy and, therefore, a person who seeks such relief in the absence of the other (that is to say, who will be affected by the relief) is obliged to disclose to the court all the material facts within his knowledge, and especially those facts which may offer a reasonable explanation in opposition to the relief sought, in order to enable the court to exercise its discretion properly and prevent an abuse of its process.

Earlier on mention was made that the present application was brought *ex parte* and was only heard *inter partes* at the direction of the court. Had the *ex parte* application proceeded, this court would not have had the benefit of the facts supplied by the defendant and could have been deceived into believing the false account presented by the claimants as gospel truth. On account of the failure by the claimants to be candid and present a fully true account of the material facts but rather presenting to the court an account that is deceptive and untrue the equitable remedy of an injunction cannot and will not avail the complainants.

Alleged discriminatory conduct

Mr Kumar argues that the assessments by the defendant were discriminatory as some of the claimants were assessed from 2014 to 2018, others from 2014 to 2015 and others up to 2016 without any reasons given for what he considers selectiveness.

In response Mr Chambukira states that following the claimants' non-compliance with the defendant's request for them to self-assess their respective liability, the defendant invoked the law that empowers it to make estimated assessments. He states that the said estimates were based on information available in the defendant's system but some claimants' information for certain years was not available such that the fact that some of the claimants received assessments for different periods of time does not mean that the defendant was discriminatory. He further states that in fact some manufacturers did not receive any assessments because they did not manufacture qualifying goods. Further still he states that the process of making the said assessments was ongoing and that all qualifying manufacturers would get their full assessment with liberty on their part to challenge the same if not in agreement therewith. These assertions by Mr Chambukira were not countered and I accept them as representing the factual position.

Mr Chambukira states further that each manufacturer is treated according to their particular circumstances and tax information and that there is no basis for discrimination. In addition, he states, each taxpayer has to argue its own case under the procedures laid down under the Customs and Excise Act and not as a group as the claimants purport to do in this case; that the approach taken by the claimants in the present case is not only irregular but simply demonstrates the claimants' continued desire to defeat the due process of law rendering the application a frivolous, vexatious and a blatant abuse of the court process. In his view the history of this matter simply demonstrates the unwillingness of the claimants to comply with the law. Mr Chambukira further laments the length of time it has taken the defendant to enforce the law such that, as he states, the defendant is exposed to the risk of injustice. He states the position that payment of excise tax is by operation of law and not by the design of the defendant and that the claimants cannot attribute their failure to comply with the law to the defendant. He thus argues that the basis for the claimants' application herein is unfounded and an abuse of process and ought not to be granted.

In his supplementary affidavit Mr Kumar informs the court that on 10th October 2018 all the claimants had a meeting where they all confirmed their willingness to collect

domestic excise tax in respect of various goods including plastic products on behalf of the defendant. However, so he states, they reiterated their concerns about the notices by the defendant demanding excise tax from 2014 when no such taxes were actually collected by the applicants in view of the court proceedings which they believed were on-going till 2018 and in the absence of their registration for excise tax collection.

I form the view that the claimants' expressed "willingness" to start collecting and remitting the tax to the defendant suggests that previously the claimants were just unwilling to comply with their legal obligation and agreed to gang up against the defendant well cognizant of the lawfulness of the defendant's actions. Compliance with the law, however, should not have depended on the claimants' willingness to comply. Compliance with and observance of the law is and has always been obligatory and mandatory. Their previous unwillingness was tantamount to a blatant disobedience of the law on their part which cannot be condoned in the court of law or equity. It is not unfair to state that their previous unwillingness to obey the law was at their own peril, individually as well as collectively. Equity does not come to the aid of persons who conduct themselves in such a manner for equity follows the law. On this ground, again the equitable remedy of an injunction or a stay the claimants seek from this court will not avail them.

Mr Kumar expresses the fear that if the defendant proceeds to enforce the payment of the excise tax most of the claimants will close their businesses because they will have nowhere to collect the money. He goes on to state that the claimants employ about 6 000 permanent employees and 28 000 temporary employees and that they pay other forms of taxes and their closure will have a great negative impact on the economy and harm economic growth. It is the claimants' submission that the defendant should assess them for the future only and that they be forgiven their past liability.

In arguing that damages would not be an adequate remedy in the event an order of injunction is not granted, counsel for the claimants also alluded to the fact that the amounts being demanded are enormous and the amounts being a consumer tax have not been collected by the claimants. He said in the case of one of the claimants the amount demanded is in region of K1 billion which would result in the closure of the business. It would seem that the claimants wish is that this court should, on that ground grant an order for non-payment of their tax arrears. Counsel for the defendant

countered the claimants' submission by reference to section 96 of the Customs and Excise Act which provides in sub-sections (1) and (2) as follows:

> 96. Suspensions, rebates, remissions and refunds of duty
> (1) The Minister may, by regulations made under section 175 and subject to such as he may prescribe—
> (a) suspend wholly or in part any of the duties appearing in any tariff;
> (b) grant a rebate, remission or refund of the duty otherwise payable, or already paid, on such goods, in such circumstances or to such classes of persons as he may specify, and such suspension, rebate, remission or refund may be granted with retrospective effect.
> (2) The Minister may by notice published in the Gazette withdraw any suspension, rebate, remission or refund of duty prescribed in terms of subsection (1):
> Provided that such notice shall not be made retrospective.

Counsel then submitted that under section 96 it is only the Minister who has the power to waive the taxes but that even then he is precluded from doing so retrospectively so that even if the waiver was to be effected it would apply only for the future which point alone demonstrates that damages would not be an adequate remedy. Counsel also submitted that since a waiver can only be granted by the Minister and no such waiver has been granted the claimants are liable for the tax.

Counsel further submitted that the issues being raised by the claimants are purely hardship issues and that the amounts of excise may look enormous now but they have expanded over the years, and that since the claimants are manufacturers producing large quantities of goods everyday, it cannot be expected that the amounts will be small. Counsel submitted that the hardship the claimants complain about is of their own design. Counsel's submission here simply echoes what I stated a short while ago that the claimants' previous unwillingness to comply with lawful the demand to pay their respective tax liabilities was at their own peril. The claimants' chickens come home to roost.

My reading of section 96 does confirm the position advanced here by counsel for the defendant that it is the Minister, and not the court, who may grant the waiver of tax the claimants are asking for. It is also clear, however, that the Minister's powers may not be exercised retrospectively.

Summary and conclusion

1. The claimants application for an interim declaration that the defendant's decision demanding excise tax from the claimants as contained in the defendant's various letters to individual claimants dated 21st September 2018

demanding from the claimants excise tax on plastics and plastic products be stayed is denied on the basis that it is the defendant's statutory responsibility and duty under section 4 of the Malawi Revenue Authority to do collect and enforce such taxes once the tax has been determined by the Minister under the Customs and Excise Act. The remedies of stay and injunction do not avail against lawful conduct such as the due collection of taxes once lawfully prescribed.

2. The claimants' application for an injunction restraining the defendant from implementing or executing or enforcing domestic excise tax on plastics and plastic products pending the hearing and determination of this matter is also dismissed with costs on the following grounds:
   a) The defendant's conduct of collecting and enforcing excise tax is not wrongful; injunctions issue against the commission or continuance of a wrongful action or omission, the defendant's demand not being unlawful;
   b) The matter is *res judicata* and an abuse of the process of court granted that the grievance raised in the present matter is the same that was before the court in Miscellaneous Cause No 45 of 2014 *The State and Malawi Revenue Authority ex parte Polypack Limited and 21 others*; and that the defendant is being vexed for the second time over issues which were open to the claimants in that matter;
   c) The claimants, through the affidavit evidence of Mr Kumar have not been candid in alleging that they were not given a chance to be heard when the truth is that before the most recent demand for payment they had been called upon to self-assess and collectively neglected to do so;
   d) The claimants have, contrary to sections 64 and 65 of the Customs and Excise Act collectively refused to register for domestic excise tax and illegally continued to manufacturer without valid excise licences;
   e) The claimants have not substantiated their claim of discriminatory conduct as the defendant has ably demonstrated that the claimants were assessed for different periods is on account of the available information in the defendant's system, the claimants having refused to provide information in their custody and possession.

Made in chambers this 14th day of September, 2021.

R Mbvundula

JUDGE