

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**CIVIL CAUSE NO. 1041 OF 2002**

**BETWEEN:**

**DIMON (MALAWI) LIMITED..... PLAINTIFF**

**-and-**

**MALAWI REVENUE AUTHORITY.....DEFENDANT**

**CORAM: THE HON. MR. JUSTICE F.E. KAPANDA**

Mbendera and Khondiwaof Counsel for the Plaintiff

Kaphale and Chokocho of Counsel for the Defendant

Jere, Court Clerk

Date of hearing: 2<sup>nd</sup> September 2004

Date of judgment: 8<sup>th</sup> October, 2004

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**JUDGMENT**

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**Kapanda, J:**

**Introduction**

This matter has been brought before me for trial of four preliminary issues. The

plaintiff had earlier on wanted to obtain directions from the Registrar on almost similar issues. This appears clearly from the Summons for Directions that was returnable before the said Registrar on 19<sup>th</sup> March 2003. The plaintiff abandoned the said application before the Registrar. It has now taken out the Notice of Motion herein where it wants the four preliminary questions determined as preliminary issues.

### **The Notice of Motion**

As stated earlier, in the Motion before me, the plaintiff is desirous of having a trial of preliminary issues. The plaintiff wants the following four questions determined as preliminary issues of law viz.

(a) The plaintiff having commenced these proceedings for the refund of monies wrongfully withheld by the defendant; and the defendant having now paid all such sums pursuant to the judgment of the Honourable Justice Nyirenda sitting at Lilongwe District Registry in Criminal Case No.242 of 2003, are the defences concerning the propriety of the plaintiff's claim still available to the defendant?

(b) Whether given the developments set out in the preceding paragraph and the Honourable Judge in the criminal case having found that

“the state (thereby referring to the defendant) has been vindictive; ignoring the matter at the same time withholding substantial sums of money from the accused...”

the matter comes within the purview of the provisions of S. 154(2) or S.154(3) and (4) of the Customs & Excise Act (Cap. 42:01 of the Laws of Malawi).

(c) Given the fundamental premises of criminal justice, that there is a presumption of innocence until proven guilty, ought the defendant to be allowed to impose a punishment without the sanction of the court? And given the finding of the Judge in the criminal case as to mala fides of the State (thus the defendant), do these issues bring the matter within S. 154(3) and S. 154(4) of the Act, or do these issues still afford to the defendant the protection under S. 154(2) of the Act?

(d) Should the resolution of the 3 preceding questions be that the matter is removed from s. 154(2) of the Act and brought under s. 154(3) and (4) of the Act, is it not obvious that the plaintiff should recover interest, collection fees and costs from the defendant?

The course of action by the plaintiff, where it wants a preliminary trial of the above-mentioned issues, has been taken out pursuant to Order 33 rule 4 of the Rules of the Supreme Court.

### **Background: A narrative of the facts**

The particulars of this case are to be discerned from the Court Bundle that was filed with this court on 20<sup>th</sup> July 2004. I shall attempt, as far as practicable, to set out the facts in a

chronological order as I find them. The following are the facts:

January/February 2001: criminal proceedings against the plaintiff

On 29<sup>th</sup> January 2001 the state commenced criminal proceedings against the plaintiff. As a matter of fact, on 16<sup>th</sup> February 2001 it is when the state committed the plaintiff for trial in the High Court. The criminal proceedings were registered in the Lilongwe District Registry. The said proceedings were taken out at the instance of the defendant. It was alleged by the state that the plaintiff had committed fraud and evaded duty in the sum of MK 29,229,846.40 in respect of some imported items. Moreover, there is no dispute that after the commencement of the criminal proceedings the defendant withheld some excess “input surtax” refund that was payable to the plaintiff. The defendant advised the plaintiff that the money was being withheld as security for the alleged evaded duty. The sum of MK 39,935,035.12 was the total amount that was withheld as such security.

The plaintiff was eventually discharged from the criminal proceedings.

March 2002: legal action by the plaintiff and, defence and counterclaim by the defendant

The plaintiff, on 20<sup>th</sup> March 2002, took out a legal action against the defendant claiming the following relief from the defendant:

- (a) A refund of the withheld excess “input surtax” in the sum of MK 39,935,035.12
- (b) The sum of MK 55,753,841.94 by way of interest at 3% above base lending rates from time to time applicable from 1<sup>st</sup> October 1999 to 31<sup>st</sup> December 2002
- (c) In the alternative interest at such rate as the court may direct from 1<sup>st</sup> October 1999 to 31<sup>st</sup> December 2002
- (d) Further interest from 1<sup>st</sup> January 2003 until payment
- (e) Collection fees (on the claimed refund and interest)
- (f) Costs of the proceedings it commenced.

The defendant joined issues with the plaintiff on the legal suit the latter commenced. Moreover, the defendant put up a counterclaim.

The plaintiff then eventually caused the matter to be set down for trial. This it did by filing with the court a Bundle of Pleadings. There was trial date fixed for the hearing of the civil action between the plaintiff and the defendant. The trial of the action never took place on the appointed day of 28<sup>th</sup> June 2004. It would appear this was because of some event that happened sometime in March 2004. The plaintiff literally abandoned the civil action and opted to go through the criminal proceedings to get a refund of the withheld excess input surtax. In point of fact, as will be seen shortly, the Lilongwe District Registry ordered a refund of the said withheld surtax on an application for discharge from

the criminal proceedings.

March 2004: the plaintiff is discharged from the criminal proceedings

The plaintiff applied for an order that it be discharged from the charges that were preferred against it and that an acquittal is entered in its favour. The plaintiff contended that the state had failed to take steps to prosecute it speedily. In his ruling of 17<sup>th</sup> March 2004, Nyirenda, J. upheld the application by the plaintiff and discharged it but never entered an acquittal as sought by the plaintiff[1]. Further, the court ordered that the money that was being withheld by the defendant be released to the plaintiff. Arising from this order, the defendant paid the plaintiff the sum of MK31, 000,000. In a letter dated the 8<sup>th</sup> of April 2004 from the defendant to the plaintiff's Legal Practitioners there was a cheque enclosed therein where the defendant described the remittance to the plaintiff as tax refund.

Recovery of costs of criminal proceedings

The plaintiff made yet another application following the one of discharge. This time around it was an application for costs incurred in the criminal proceedings. In its ruling of 24<sup>th</sup> March 2004 for the said order of costs the court observed as follows:

“The accused seeks an order for costs owing to the reprehensive conduct of the state in this action. I observe in the ruling discharging the accused that the State has been vindictive; ignoring the matter at the same time withholding substantial sums of money from the accused.

The accused pleaded with the State to have the matter concluded. The state ignored the appeals. No doubt the accused has been put at expense over the time.

It is only appropriate that I grant the prayer for costs by the accused which I do.”[2]

This court has not had the benefit of reading the record of the proceedings in the District Registry so as to find out and acquaint itself with the facts that were put on record. It will suffice to put it here that in the Ruling of the Court of 17<sup>th</sup> March 2004 the Judge never said anything about the defendant being spiteful. Indeed, this court is ignorant of the arguments that were made by the parties during the application for discharge or the application for costs. Furthermore, the Court Bundle filed herein does not contain any court process that was filed with the District Registry on the application for discharge or costs incurred in the criminal proceedings. It must be pointed out that the absence of the record in the said criminal proceedings has a bearing on one of the issues to be determined in the Motion before me.

June 2004: Motion for trial of preliminary issues

I must observe that although the plaintiff got a refund of the said withheld excess input surtax it did not amend its pleadings. Instead, the plaintiff now wants some four questions to be tried as preliminary issues of law. I have already set out the said questions. For this reason, I will not repeat them here, but I will proceed to consider the questions raised in the Notice of Motion.

### **Consideration of the Issues raised in the Notice of Motion**

I will now turn to deal with the said four preliminary issues in the Notice of Motion. However, I do not propose to set out the said questions as they are put in the Notice of Motion. In its place, this court will paraphrase and shorten the said questions. I will then proceed to determine the said shortened questions trusting that my findings on each of those questions will cover what the parties want determined.

### **Payment of the claimed refund: does it mean that the defences raised by the defendant concerning the propriety of the plaintiff's claim are still available?**

The plaintiff is of the view that having obtained the refund of the said money that was being withheld by the defendant then the only issue that remains to be determined is whether damages (by way of interest), collection charges and costs are payable to it. As I see it, the first question in the Notice of Motion requires this court to consider the effect of the order, of Nyirenda J. requiring the defendant to refund the money that was withheld by the defendant, on the civil proceedings in this Principal Registry. Put in another way the plaintiff wants this court to determine whether, the defendant having paid all the monies it was withholding, the defences raised by the defendant in this civil action are still available to it.

As regards the essence of the defence by the defendant the following is observed: it is the contention of the defendant that the plaintiff did not suffer any loss or damage. The defendant further avers that the plaintiff is only entitled to a refund without interest or damages. The defendant moreover contends that, in terms of Section 154(2) of the Customs and Excise Act, the plaintiff is not entitled to any costs. The said Section 154(2) of the Customs and Excise Act provides as follows:

“ Where any proceedings are brought against the Controller (Commissioner General) under the Customs laws and judgment is given against the Controller (Commissioner General[3]) then, if the court before which such proceedings are heard is satisfied that there were reasonable grounds for the action giving rise to the institution of the

proceedings, the plaintiff shall be entitled to recover anything seized, or the value thereof, but shall not be otherwise be entitled to any damages, and costs shall be awarded to either party.

Provided that this section shall not apply to any action brought in accordance with Sections 20 and 174.” (emphasis supplied by me)

My understanding of this section is that it will only apply where there are proceedings taken against the Commissioner General and judgment is given against him. In the instant case there were neither such proceedings nor judgment given against the Commissioner General or for that matter the defendant. Assuming for the moment that the matter before Nyirenda J. were such proceedings then one must still proceed to determine whether the order by Judge Nyirenda would entitle the plaintiff to recover damages or costs. The reading of the abovementioned subsection suggests to me that such damages or costs will only be awarded if the matter comes within the provisions of Section 20 and Section 174 of the Customs and Excise Act. What then does Sections 20 and 174 of the said Customs and Excise Act stipulate?

Section 20 of the Customs and Excise Act states, inter alia, that damages will only be payable if there is physical damage to property, goods or person or premises resulting from the exercise of powers by a customs officer and/or an agent of the Commissioner General. In respect of such property, goods, person or premises. The facts of this case, in my opinion, do not come anywhere near the stipulation of the said Section 20 of the Act. The complaint by the plaintiff is not about damage to its property or goods or premises.

Further, the said Section 174 stipulates, inter alia, that an action shall lie against the Commissioner General (then called the Controller of Customs and Excise) for damages to goods or additional expenses caused by the gross negligence or willful misconduct of a customs officer in the handling, storage and transportation of goods for the purposes of the customs laws. If the action is successful damages or costs will be awarded, if there is loss or damage to goods or additional expenses caused by the gross negligence or willful misconduct of an officer acting or purporting to act in his official capacity. Put simply, damages or costs are only payable for loss or damage to goods if a customs officer is negligent or has committed an act of willful misconduct in the performance of his/her duties. The action by the plaintiff is not premised on negligence or willful misconduct on the part of an officer of the Malawi Revenue Authority. Thus, the provisions of S. 174 of the said Customs and Excise cannot be called in aid by any of the parties. Even if it were to be assumed that there was such negligence or misconduct it must be said that there is no evidence of damage suffered by the plaintiff by reason of the withholding of the refund so as to entitle it to damages by way of interest.[4]

Moreover, a reading of Section 154(2) clearly shows that the condition precedent to the application of this provision is that there must be a judgment against the Commissioner General. There is no such judgment in the civil action herein. It follows,

therefore, that the issue of damages (by way of interest) and costs cannot arise at this stage of these proceedings.

Furthermore, as I understand it, no damages and/or costs may be awarded where one obtains judgment against the Commissioner General. As already seen the question of damages or costs only comes in if a matter is within the provisions of Sections 20 and 174 of the Act. This court has already found that this matter is not one that comes within what is stipulated in the said Sections 20 and 174 of the said Customs and Excise Act.

Further, I wish to observe that despite the payment of the withheld excess input surtax the plaintiff has not amended its claim for refund of the said input surtax. In the premises, I wonder whether the plaintiff has properly abandoned its claim for the refund of the said excess in put surtax. Further, I must agree with Counsel for the defendant that the refund, which was made in the criminal action, does not in any way affect the issues in the civil claim herein. The plaintiff's claim, in the absence of a certificate to that effect, has not been extinguished or abated.[5] Indeed, the view of this court is that it cannot be properly be said that, after the said refund, the only issue that remains to be determined is the issue of damages, interest and costs. As a matter fact the submission that the plaintiff proposes to discontinue its claim or that its claim has purportedly been satisfied does not mean that the only issues before the court are the ones preliminary issues set out in the Notice of Motion. There is still outstanding the question whether the withholding of the refund was proper, and also the matters raised in the counter claim. Moreover, the defendant's counter claim has not been discontinued or stayed. The defendant's intimation, by word of mouth, is not enough to discontinue its counter claim. Furthermore, since there is no judgment on the plaintiff's claim it cannot be said that the counter claim is no longer there for the counter claim is for all intents and purposes an independent action. The counter claim has to be dealt with together with the claim by the plaintiff. In addition, it is well to remember that the discharge of the plaintiff did not have the effect of determining the rights of the plaintiff and the defendant in the civil proceedings herein. The same is true with the order requiring the defendant to refund the withheld excess input surtax.

Consequently, the questions whether the plaintiff owes the defendant surtax and whether the defendant was entitled to withhold, the money the subject of the claim by the plaintiff, are still in issue. Furthermore, notwithstanding the refund the defences raised by the defendant are still available to the said defendant. Indeed, whether the plaintiff should get interest by way of damages is dependent on finding whether the withholding of the refund was wrongful or not. In my judgment, no court has determined the question whether or not the refund was properly withheld. It will have to be decided at the trial of this action.

**Are damages and costs recoverable in view of Nyirenda's observation that the defendant was vindictive?**

As mentioned earlier, the observation of Nyirenda, J. in his Ruling of 24<sup>th</sup> March 2004 that the defendant was vindictive raises some interesting observations. Firstly, this court observed that there was no such finding of vindictiveness, in the Ruling of 17<sup>th</sup> March 2004, on the part of the defendant. In the absence of the record of the proceedings before the judge can it be said that the court found as a fact that there was vindictiveness on the part of the defendant? I am inclined to agree with Counsel for the defendant that there is no evidence of the defendant's so called vindictiveness or mala fides. Further, this court accepts the contention by the defendant that the question whether or not the state had been vindictive was not tried. Thus, the comment by Nyirenda J. that the State (the defendant) had been vindictive, or that it acted in bad faith was indeed made Obiter dictum. In saying this I am alive to the fact that the Ruling of Justice Nyirenda, as observed above, never tackled the issue of vindictiveness on the part of the defendant. Further, and in any event, I thought the court actually imposed a sanction for the alleged vindictive behaviour on the part of the defendant. Actually, the court ordered the defendant to pay costs for such behaviour in the criminal proceedings before it. For this reason, the plaintiff cannot be allowed to obtain compensation twice for the alleged spiteful conduct on the part of the defendant. If anything, the defendant should be made to pay for the alleged vindictive behaviour once it is so found by the court in the civil proceedings herein. But that can only happen after full trial.

Moreover, I wish to repeat the court's earlier observation as follows: There is no judgment against the defendant in this matter which would require awarding damages or costs to the plaintiff as they are commonly understood or as envisaged by the provisions of Section 154 of the Customs and Excise Act. Further, the order of refund of surtax where the court made a passing remark on the conduct of the defendant cannot be a ground for awarding damages or costs in the civil suit before this court. Such damages or costs may only be awarded if a trial court finds as a fact that same are warranted and allowed under the customs laws or any other law.

**Should the defendant be allowed to impose punishment without the sanction of the court in light of the provisions of Section 42(2)(f)(iii) of the Constitution that provides for the right to be presumed innocent until proven guilty?**

This question calls upon this court to apply and/or interpret the provisions of the Constitution as it relates to some provisions of the Customs and Excise Act. In my opinion this court, as presently constituted, is not the right forum to determine such a question. A proper forum would, in my view, be a court consisting of three judges of the High Court.[6] The position at law, as I understand it, is that any matter arising out of or relating to or concerning the interpretation or application of the provisions of the Constitution must be dealt with a panel of not less than three judges of the High Court. Further, such a question would require that the State to be allowed to lead evidence on[7] the question set out in the motion.

In the event I am found to have been wrong in thinking that this question would



require the court to be reconstituted, and that the State should be allowed to lead evidence, I will still proceed to give my opinion on the question.

I must point out that it is not correct that the powers exercised by the defendant when enforcing revenue laws have the effect of imposing a punishment without the sanction of the court. Indeed, the powers of seizure, detention, embargo, forfeiture, imposition of a fine on settlement of cases and a demand for payment of security, that the Commissioner General, or his officers, exercises under the Act are not punishments as such[8]. The exercise of powers of seizure, detention, embargo and imposition of a fine of settlement of cases and the requirement of payment of security of duty evaded is intended to secure the whole interest of the public and to protect revenue that would otherwise be lost if such powers are not given to the defendant. In exercising these powers it does not mean that the defendant or the Commissioner General is imposing a punishment without the sanction of the court.

**finding of malafides : Is the defendant still protected by the provision of Section 154(2) of the Act?**

For staters, let it be repeated here that there was no finding of fact by Nyirenda, J that the defendant acted in bad faith. Further, this court fails to see any mala fides on the part of the defendant. Actually, as already observed, the plaintiff has not specifically pleaded mala fides in the civil proceedings before this court.

Further, and in any event, this court has demonstrated the statutory framework of the whole of Section 154 of the said Customs and Excise Act. For purposes of emphasis, if it is found by the court the defendant would be protected by the provisions of Section 154 (2) of the Act. The defendant would only be liable to pay costs if there is an action against it where the claimant is successful in action in negligence or where the claim is that the defendant's officer and/or agents willfully misconducted themselves in the performance of their duties. Further, such costs would be awarded in a claim for damage to goods, property or person or premises.

The same principle applies in respect of damages. Further more, and as already found above, an award of costs or damages can only be made where there is a judgment entered against the Commissioner General after the court finds that there were reasonable grounds for bringing an action against the Commissioner General. Therefore, I wish to point out that the framing of question 3 was not properly done in so far as the plaintiff wanted this court to determine if the provision of Section 154(4) of the Customs and Excise Act is applicable to the present case. Indeed, section 154(4) of the Act is not applicable to the instant case. It would be prudent, for a better understanding of what this subsection states, to quote it in extensio. The said Section 154(4) provides as follows:

“where under the provisions of the Customs laws any proceedings are brought by or against the controller (Commissioner General) and

(a) any sums or costs are recovered by the Controller (the Commissioner General), such sums or costs shall be credited to the revenue.

(b) Any damages or costs are ordered to be paid by the (the Commissioner General) Controller, such damages or costs shall be paid out of the moneys appropriated for the administration of the Department (the MRA) and the Controller (the Commissioner General) shall not be personally liable therefor”

It must be realized that the damages or costs being referred to in the above subsection are the ones that are only to be awarded where a matter falls under the provisions of sections 20 and Section 174 of the Customs and Excise Act. As discussed above, the occasions on which award of such damages or costs would be made are limited. In the instant case there is no claim for damages for damage to premises or goods or property. Further, there is no claim for damages for negligence or willful misconduct on the part of the officers and or agents of the Malawi Revenue Authority or the Commissioner General himself. This is the case notwithstanding the alleged finding of mala fides in the order of the court in the criminal action that was filed with the Lilongwe District Registry. In any event, even if there was such proper finding of mala fides, my understanding of the law is that acting in bad faith is not the same as being negligent or committing an act of wilful misconduct. Further, I wish to agree with the argument of the defendant that the comments of the court in the criminal proceeding to the effect that the State was vindictive were made obiter. Moreover, it is to be remembered that the plaintiff’s action is not premised on mala fides or vindictiveness on the part of the defendant. As rightly pointed out by the defendant the issue of mala fides ought to have been specifically pleaded and particularized. Further, it is a common fact that the plaintiff was basically claiming a refund of money and interest on the said withheld amounts of surtax. Since the issue of mala fides was not so specifically pleaded or particularized this court cannot be called upon to make a determination on payment of damages by way of interest for the so called bad faith or vindictiveness on the part of the defendant. This court must be guided by the pleadings of the parties even in cases of trial of preliminary issues of law.

In sum, the provisions of Section 154(2) of the said Customs and Excise Act would still protect the defendant. Of course that protection can only be said with certainty if there is trial of the whole action herein and the court so finds that the facts of this matter come within the stipulation in Section 154(2) of the Act.

**Is it obvious that the plaintiff should recover interest collection fees and costs from the defendant?**

It will have been observed that the first three questions set out in the Notice of Motion

have been answered in the negative. Consequently, it is not obvious that the plaintiff should recover interest, collection fees and costs from the defendant. As regards the issue of collection charges I wish to make the following observations:

The court would like to point out that the prayer for collection fees has no basis in law. Why do I say so? Firstly, the plaintiff commenced this action on 20<sup>th</sup> March 2002. This was after the Legal Practitioners (Scale and Minimum charges) (Amendment) Rules[9] were promulgated. My understanding of the law is that, in terms of these regulations governing collection fees, with effect from 13<sup>th</sup> March 2002 legal collection charges are payable by the collecting party and not the paying party[10]. Consequently, the collection fees ought to be paid by the plaintiff to its legal practitioners and not the Defendant. Further, it is my understanding of the said recent amendment that where proceedings are commenced, like in the instant case, a Legal Practitioner may only charge solicitor and own client charges in addition to party and party costs. Thus, since the plaintiff commenced a legal action to collect withheld moneys the only costs that would be payable by the Defendant would be party and party costs and not legal collection charges. Such costs would be taxed if they were found to be payable pursuant to the aforementioned relevant sections of the Customs and Excise Act.

#### Conclusion

The notice of motion for trial of Preliminary issues is no successful and it is dismissed. It is dismissed with costs. The matter must proceed to full trial on a date to be fixed by the court.

**Pronounced** in Chambers this 8<sup>th</sup> day of October 2004 at the Principal Registry, Blantyre.

F. E. Kapanda

**JUDGE**

[1] The Republic vs. Dimon (Malawi) Limited Criminal Case No. 242 of 2003 High Court, District Registry. [unreported]

[2] per Nyirenda, J. in Criminal Case No. 242 of 2003-Rep. Vs. Dimon (Malawi) Limited [unreported]

[3] see Section 28(a) of the Malawi Revenue Act (Act No. 9 of 1998) which states, inter alia, that all reference to the Controller of Customs and Excise in the Customs and Excise Act (Cap 42:01) shall be construed as reference to the commissioner General

[4] See Liquidator, Import and Export (Malawi) Limited vs. J.L. Kankhwangwa and others Civil Appeal No. 52 of 2003 [High Court] decision of 22<sup>nd</sup> December 2003. unreported.

[5] In terms of Order 34/9 of the RSC the plaintiff ought to have certified the abatement of its action.

[6] Rep vs Dennis Spax John Kambalame Criminal Case No. 108 of 2002 [High Court] unreported decision of 13<sup>th</sup> August 2004

[7] Ibid

[8] see parts 18 and 20 of the Customs and Excise Act which generally provides for the said powers of seizure, embargo, detention, forfeiture, imposition of fine on settlement of cases and the requirement for payment of security for duty evaded.

[9] The rules came into force on 13<sup>th</sup> March 2002

[10] Liquidator, Import and Export (Malawi) Limited vs. J.L. Kankhwangwa and Others Civil Appeal No. 52 of 2003. [High Court] decision of 22<sup>nd</sup> December 2003.