



IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL DIVISION

JUDICIAL REVIEW CAUSE NO:15 OF 2021

BETWEEN

THE STATE (ON APPLICATION OF

PHINDU TOBACCO GROWERS ASSOCIATION) .....1<sup>ST</sup> CLAIMANT

FARM PRODUCE AND MARKETTING ASSOCIATION.....2<sup>ND</sup> CLAIMANT

MCHIKUMBE SMALLHOLDER FARMERS ASSOCIATION.....3<sup>RD</sup> CLAIMANT

AND

TOBACCO COMMISSION... .....RESPONDENT

CORUM: JUSTICE R.M CHINANGWA

Kita Counsel for the Claimant

Chapo Counsel for the Respondent

Chitao Court Clerk

**RULING ON APPLICATION FOR JUDICIAL REVIEW AND AN ORDER OF  
INTERLOCUTORY INJUNCTION**

**1. Introduction**

The claimants seek leave for judicial review and an interlocutory injunction. In the first application the applicants seek permission to apply for judicial review on the decision of the

respondent of directing that tobacco deliveries to the auction floors for the 2021 marketing season will be done by buyers on contracted tobacco and by grower's associations on non-contracted tobacco.

Regarding the interlocutory injunction, the claimants made no separate application strictly speaking but have raised the matter within the application for judicial review.

The Defendants opposed both applications. The applications were heard inter partes both parties having filed sworn statements. For brevity of this ruling the facts as obtained from both affidavits are summarized below.

## **2. Facts Obtained from Sworn Statements**

The claimants are Tobacco Growers Associations, with over 5000 farmers operating under them. One of their function is to arrange for the transportation of tobacco belonging to its members from the clubs to the auction floors. During the last tobacco season the respondent agreed with all stakeholders that delivery quota will be allocated to the buyer and grower. This meant the claimants arrange transportation of tobacco of growers in their clubs and buyers would arrange for transportation of growers in estates. Contrary to this agreement, the respondent decided to have buyers transport contracted tobacco and the claimants to transport non-contracted tobacco. It is argued that the decision breaches the agreement between the parties and is illegal.

The respondents argue that the claimants have no authority to transport tobacco; the claimants can hire transporters to transport non-contract tobacco; buyers are responsible in hiring of transporters for contract tobacco. In addition, it is argued there was no agreement for the claimants to transport contract tobacco, if made it would be illegal being contrary to law. It was noted that the claimants arrange single transportation for contract and non-contract tobacco. This means there is need to sort the tobacco on delivery and this creates delays and congestion at the floors. The respondent observes that the claimants sought to seek an audience with the respondents and they were granted the same to get a clear understanding of the respondent's communication but the claimants did not avail themselves for further discussions. Regarding the injunction the respondents observed that granting an injunction would disrupt the commencement of the tobacco market which involves a lot of stakeholders.

## **3. Issue for Determination**

This court has to determine whether or not to grant

- a) leave for judicial review
- b) an interlocutory injunction.

These will be dealt with in turn.

#### 4. Analysis of Law and Evidence

On judicial review the court is guided by, **Order 19 rule 20 of the Courts High Court Civil Procedure Rules 2017**. Under this rule the court has to consider the following:

- i. *There must be a law, an action or a decision of the Government or a public officer for conformity with the Constitution where a right, freedom, interests or legitimate expectation of the Claimant is affected or threatened, or*
- ii. *A decision, action or failure to act in relation to the exercise of a public function in order to determine its lawfulness; its procedural fairness; its justification of the reasons provided, if any; or bad faith, if any, where a right, freedom, interests or legitimate expectation of the Claimant is affected or threatened.*
- iii. *A person making an application for judicial review should have sufficient interest in the matter to which the application relates.*
- iv. *an application for judicial review should be filed promptly and shall be made not later than 3 months of the decision.*

In this case it is not in dispute that the respondent is a public institution managing the affairs in the tobacco industry. In addition, it is not in dispute that a communication was made on 23<sup>rd</sup> March 2021 through which as argued by the claimants a decision on how to transport tobacco was agreed. Further it is not in dispute that the application for judicial review has been made within 3 months and that the claimants have sufficient interest. What is in dispute is the interpretation of the contents of the communication made on 23<sup>rd</sup> March 2021 and whether the claimants.

Regarding the contents of the communication made on 23<sup>rd</sup> March 2021, the claimants argue that there was an agreement that they transport all tobacco further to an ongoing practice on the same. It is argued that the decision as agreed has been changed unilaterally and so too has

the practice of transporting tobacco. The respondents argue that there was no such decision made as they are simply applying the law. The court notes in clause 6 at page 4 of the communication made on 23<sup>rd</sup> March 2021 that it is recorded that, 'the commission guided that the 2021 tobacco deliveries will be conducted the same way they were done during the 2020 season.' This is the claimant's argument in essence. The mode of transportation in 2020 is not the same as that engaged in 2021 hence the change of the decision unilaterally.

It is this court's view that a decision has been made regarding the transportation of tobacco and it is subject to judicial review. In the skeletal arguments made Counsel have dwelt on explaining the merits of the decision in line with the various provisions in the Tobacco Act. The same is appreciated. However, it should be noted that judicial review is a type of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body. In other words, judicial reviews are a challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached. It is not really concerned with the conclusions of that process and whether those were 'right', as long as the right procedures have been followed. The court will not substitute what it thinks is the 'correct' decision. This may mean that the public body will be able to make the same decision again, so long as it does so in a lawful way' (source <https://www.judiciary.uk/you-and-the-judiciary/judicial-review/>). This being the case, the decision having been made the same is amenable to judicial review because the court has to determine its lawfulness; its procedural fairness; its justification of the reasons provided. It is on this premise that leave for judicial review is granted.

The respondents have argued that there is an alternative remedy considering that they were open to further consultations. It is this court's view that the term alternative remedy would be one which is available as provided within the law. A further consultative process is a first step in dispute resolution, where parties are resolved to engage in the same. However, parties cannot be forced to subject themselves to the same unless directed by law. This court finds that there is no alternative remedy but through judicial review.

### **On the injunction**

The claimants made an 'application' for an injunction against the decision made by the respondent. It should be noted that a separate application supported by an affidavit should have been filed. In this case it means procedurally there is no application for an injunction as such the court cannot make a decision where there is no application or dispute before it: **The State**

(On application of Francis Bisika) and the Malawi Communications Regulatory Authority Judicial Review Case Number 71 of 2017.

**5. Finding**

The application for judicial review is granted against the respondent. The application for an interlocutory injunction is dismissed. The applicants are to serve the application on the defendant by 28<sup>th</sup> May 2021. The defendant to file defence with a sworn statement by 11<sup>th</sup> June 2021. A scheduling conference will be held on 16<sup>th</sup> June 2021 at 8am.

**Pronounced this 21<sup>st</sup> May 2021 at LILONGWE**



**R.M CHIANNNGWA**

**JUDGE**