



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
REVENUE DIVISION
REVENUE CAUSE NO. 1 OF 2017**

THE STATE

AND

THE MALAWI REVENUE AUTHORITY RESPONDENT

EX-PARTE:

KASSYM S KIVUYO APPLICANT

CORAM: HON. JUSTICE R. MBVUNDULA
Kamkwasi, Counsel for the Applicant
Chungu, Counsel for the Respondent
Mpasu, Official Interpreter

RULING

Scope of this matter

The applicant filed an application under Order 53 of the Rules of the Supreme Court (RSC) seeking leave to apply for judicial review of a decision by the Malawi Revenue Authority (MRA) not to release a consignment of 1 200 bags of salt imported into the country by the applicant, a like order to mandamus and an injunction requiring and compelling MRA to release the salt, and an order of for costs.

In the application for leave he deposes that he imported the salt from Botswana on a freightliner truck and that the salt was packaged in containers of 50kg each contrary

to the policy of the government of Malawi that all salt imported into the country should be packaged in bags or containers of less than 50kg each. He states that he was charged with conveying salt contrary to section 137 (2) (a) of the Customs and Excise Act. Exhibit "KSK 1" is a copy of the charge.

It is the applicant's assertion that he was assured of the restoration of his goods once he paid the fine. After payment of the fine, however, only the truck, and not the salt, was released to the applicant. It is his case that he has since been following up on the matter without success. He states that he has been pushed from one office to another in his efforts to secure the release of the salt and consequently takes the view that it is only this court which can secure for him the release of the salt. He laments that salt being a perishable product, the longer it is withheld the more likely it might be lost completely, and further that he being a businessman, the more likely he will suffer financially. He considers time to be of the essence.

Order for inter-parte hearing

Upon considering the contents of the applicant's affidavit in support of the application for leave I ordered, pursuant to Practice Note 53/14/55 in the RSC, that the putative respondent, i.e. MRA, be afforded a hearing on the application for leave. The practice note reads "*If, on considering the papers, the Judge cannot tell whether there is, or is not, an arguable case, he should invite the putative respondent to attend the hearing of the leave application and make representations on the question whether leave should be granted ...*"

MRA's case

MRA's case is presented in an affidavit sworn by Mr Skiviner Mlowoka, MRA's Manager, Enforcement, who confirms the importation of salt by the applicant. He too states that there is a government directive as to packaging and that the applicant contravened the same. He states that the seizure was basically enforcement of the directive to the Malawi Bureau of Standards (MBS) which works hand in hand with MRA at the border in the physical examination of packaging of imports.

Mr Mlowoka explains that there is a scientific reason why the manner of packaging aforesaid is required, being that 50kg or higher packaging results in deterioration of the salt quality in that the required levels iodine may diminish, and for that reason the salt imported by the applicant had to be subjected to scientific tests by the MBS to establish whether or not the iodine content was or was not affected, before it may be released back to the applicant, which is why only the truck was released to the

applicant. He states that in regard to the salt, it is expected of the applicant to make the necessary follow up with the MBS, and be part and parcel of any necessary iodization process.

Mr Mlowoka states that the fine which was imposed on the applicant was in respect only of the conveyance, the truck.

It is Mr Mlowoka's position that the conduct of MRA could not be said to be unreasonable or in excess of its powers in whatever way.

Counsel's submissions

For the applicant

Counsel for the applicant submitted that the argument by MRA that it is within the powers of a third party (MBS) to release goods which are in MRA's custody did not hold water. It is counsel's view that having fined the applicant, MRA was under an obligation to release not only the vehicle but also the salt. The big issue, he said, is at what stage was MRA supposed to fine the applicant or at what stage they were supposed to demand a penalty, and the answer according to counsel, is when the reasons for confiscating the salt had been satisfied. Counsel went on to say that if tests were to be done as to the iodine content then the fine should be imposed before the salt is confiscated. It would be unfair, he said, to expect a taxpayer to comply with the penalties imposed and raise new issues. It is expected that MRA should treat the applicant "as a customer with customer care and the fact that the customer should hunt for MBS to measure the iodine content should have been communicated in March not in the affidavit".

Counsel prays therefore that leave be granted.

For MRA

Counsel for MRA referred this court to section 145 of the Customs and Excise Act and stated that even the conveyance used to import the prohibited item is liable for forfeiture or seizure. Further section 21 of the Act empowers an officer of MRA to be enforcement agents for seizure of prohibited goods. He stated that section 146 provides for seizure in general, hence a conveyance and prohibited goods in general can be seized. In the present case, he said, salt is required to be imported in less than 50kg packaging to avoid detrimental effects to its iodine content which may endanger the health of consumers, hence the action which MRA took was reasonable in the circumstances.

It is MRA's argument, through counsel, that the seizure was in respect of the salt, and as regards the vehicle, that section 162 of the Act allows a taxpayer to make an application for the restitution of the conveyance or the goods and indeed the conveyance was restored to the applicant, which was a reasonable step. That it is evident from paragraph 13 of Mr Mlowoka's affidavit that the fine was paid in respect of the conveyance.

Applicant's reply

In reply counsel for the applicant submitted that salt is not a prohibited item. What is prohibited is the packaging. Further that salt is a duty free commodity. That no law or policy was cited which restricts to 50kg packaging.

Counsel further submitted that the fact that there was no fine for the salt is because the fine can only be imposed by MBS or MOH. It is not reasonable for MRA to communicate to the applicant in affidavit after 3 months. It is up to MRA to invite MBS and not for the applicant. MRA is the one keeping the salt.

The scope of judicial review under Order 53 RSC

The remedy of judicial review is there to protect a person against abuse by authorities exercising judicial, quasi-judicial or administrative powers. It is concerned with reviewing the decision making process, or, put differently, the manner in which the decision was made, and generally not concerned with the merits of the decision in respect of which an application is made. The courts can interfere with the decision reached by a public body performing public functions only in cases where the decision reached is such as no reasonable person or body properly constituted could have reached.

Leave to move for judicial review should be granted, if on the material before the court, it appears to the court that, without going into the matter in depth, there is an arguable case for granting the relief claimed by the applicant. The requirement that leave must be obtained is to enable the court sieve out what might turn out to be frivolous or misconceived claims against persons exercising any of the aforementioned functions. If, on considering the papers, the Judge cannot tell whether there is, or is not, an arguable case, he should invite the putative respondent to attend the hearing of the leave application and make representations on the question whether leave should be granted.

As earlier on alluded, to this hearing is not a judicial review hearing, but rather an examination of the question whether or not this is a case in which leave ought to be granted, one which calls for the further investigation of the conduct complained of by the applicant.

Issue

The issue for consideration in this hearing is whether or not the material before the court discloses a case for further investigation by way of a judicial review process.

Relevant statutory provisions

Section 3 of the *Iodization of Salt Act* (Cap. 52:02 of the Laws of Malawi) requires salt to be iodized before it is sold or distributed to the public or used in the manufacture or processing of food for human or animal consumption to such specification as the Minister may, by Order published in the Gazette, prescribe.

In regulation 19 (1) of the *Iodization of Salt Regulations* it is provided that any salt that is imported into Malawi that does not meet *legal requirements that pertain to iodine level and packaging* shall be delivered by the importer at a registered iodization plant within two days of *his being informed of the salt by an authorized officer* (emphasis supplied). An authorized officer is defined under regulation 2 as including a customs officer. A customs officer is therefore be entitled to enforce the provisions of the *Iodization of Salt Act* and the subsidiary legislation made thereunder. This position is buttressed by the provisions of section 21 (1) of the *Customs and Excise Act* which states:

“(1) Subject to subsection (2) no goods shall be imported contrary to the provisions of *any written law prohibiting or restricting the importation of such goods.*” (emphasis supplied).

The exceptions under subsection (2) are irrelevant to the issues at hand.

Order 5 (2) of the *Iodization of Salt (Specification) Order* stipulates that the total mass of an iodized salt package shall not exceed 20 kg. The requirement to package the salt in that particular manner is not, therefore, just a matter of policy, but a legislative requirement. Under section 21 (1) of the Customs and Excise Act a customs officer, being an authorized officer, may, therefore, intercept salt not packaged in accordance with Order 5 (2) of the *Iodization of Salt (Specification) Order*, it answering to the description of “goods imported contrary to the provisions of any written law prohibiting or restricting the importation of such goods” under

section 21 (1) of the *Customs and Excise Act*, for being packaged contrary to the provisions of the Order.

I did not consider the provisions 145 and 146 of the *Customs and Excise Act* cited by counsel for MRA to be relevant here as they relate to goods liable for forfeiture on account of violation of customs laws generally.

Resolution

The applicant expressly concedes in paragraph 4 of his affidavit in support that the salt which he imported exceeded the statutory mass of 20kg per package as it was packaged in bags of 50kg each. Though mistaken that this was contrary to government policy (as opposed to the law) he nonetheless violated the law, and as should be known, ignorance of the law affords the wrongdoer no defence or protection.

That packaging of salt in packages exceeding 20kg may affect the quality of the salt and may result in detrimental health effects on consumers is not disputed. The law has been cited that such salt must be delivered at a registered iodization plant, and the obligation to do so is upon the importer. It is not argued that the salt was delivered at a place other an iodization plant. In light of the facts disclosed this far, and the law, it appears that there is no justification for further examining the conduct of MRA, at a judicial review. Put differently, in light of the facts and the law disclosed this far a court of law in judicial review proceedings, properly directing its mind at the law and the facts, is not likely to grant the reliefs sought by the applicant.

To start with, the fact that the applicant himself contravened the law, by importing illegally packaged goods, disentitles him from the remedy of mandatory injunction he seeks, or indeed any other equitable remedy. He is caught by the maxim “he who comes to equity must come with clean hands”. Additionally, by its nature, a mandatory injunction is a very exceptional form of relief which will be granted only when the court is satisfied that the applicant has “an unusually strong or sharp and clear case”, and feels a high degree of assurance that at the trial a similar injunction will probably be granted, and that the plaintiff would be able to establish his right: *Council of the University of Malawi and others v Kabwila-Kapasula and others* [2011] MLR 28. In view of the conceded breach of the law by the applicant it is most improbable that the applicant would secure, in a judicial review, the orders he now seeks here.

Related to the above is the principle that the court will not grant an injunction unless there is satisfactory evidence that the defendant's conduct is something he is not entitled to do. (*Draper v British Optical Association* [1938] 1 All ER 114; *The Registered Trustees of Church of Pentecost v Malawi Revenue Authority* Civil Cause No. 668 of 2013). It having been shown here that customs officers, being "authorized officers" under the *Iodization of Salt Regulations*, may require salt imported contrary to packaging requirements to be delivered at an iodization plant, an injunction would not, in the circumstances, issue against the very conduct customs officers are legally obliged to undertake.

Further still, it not being disputed that by reason of the wrongful packaging, the quality of the salt might be compromised and be detrimental to human health, it must go without saying that this court would be failing in its duty to protect the public from potential injury if it were to order that a potentially dangerous substance be released for public consumption. If it were to proceed in accordance with the desires of the applicant herein, the court would, in effect, be aiding and abetting, and further advancing, the applicant's breach of the law. The court would be allowing its machinery and process to be put to an improper use, which is open to neither the court itself nor the applicant to do.

A judicial review process would not, therefore, amount to anything for the plaintiff. This case calls for one approach, namely that the iodine levels of the salt imported by the applicant be examined, and if found wanting, be duly corrected, before the salt may be released to the public.

Regarding the applicant's argument that he was entitled to the release of the salt by reason of the release note, a reading of exhibit "KSK 1" will show that the applicant was charged an amount of K500 000.00 "being penalty in addition to the full duty due" in respect of "1 unit used truck" and makes no mention whatsoever of any salt. Similarly exhibit "KSK 2", the release note, refers only to "1 unit used truck" and also makes no mention of any salt. The applicant's argument that the salt ought to be reinstated to him by reason of the release note is not supported by the documents he himself has placed before this court.

I have considered the argument by counsel for the applicant that MRA be faulted for not having informed the applicant that the salt was required to be taken for testing, and if need be, re-iodized; that it is improper that the applicant was only informed about it in MRA's affidavit before the court. I am of the view that this argument is incorrect because, if nothing else, the applicant himself alluded to wrongful

packaging in his own affidavit, which suggests that when he instituted this action he was already aware that the packaging of the salt did not meet the necessary requirements.

Conclusion

In my assessment of all the facts and the law applicable I come to the conclusion that this is not a case where leave should be granted, as, in my view, the reliefs sought by the applicant could not be attained at a judicial review for reasons contained herein. I accordingly refuse to grant the leave sought to review the decision complained of.

Since under regulation 19(1) of the *Iodization of Salt Regulations* the duty lies upon the importer to deliver the salt to the iodization plant. It must follow, in my view, that the duty is his, if he be minded so to do, to follow through the process.

The applicant shall bear costs.

Made in chambers at Blantyre this 18th day of September 2017.


R Mbyandula
JUDGE