



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

JUDICIAL REVIEW CAUSE NUMBER 44 OF 2014

BETWEEN:

THE STATE

AND

THE MALAWI REVENUE AUTHORITY

RESPONDENT

AND

EX PARTE

IMRAN MEMAN t/a KAMLISHA ENTERPRISES

AND OTHERS

APPLICANTS

CORAM: JUSTICE M.A. TEMBO

Mbeta, Counsel for the Applicants

Likomwa, Counsel for the Respondent

Chitatu, Official Court Interpreter

ORDER

This is the fully reasoned order of this Court of 29th July 2014 on the respondent's application for an order discharging leave obtained by the applicants to apply for judicial review in this matter and to vacate an order of stay of the decision the applicants seek to challenge in this matter. The leave had been granted ex parte by



my brother Judge on 27th June 2014. At the same time the Judge granted a stay of the implementation of the decision with respect to which leave to apply for judicial review had been granted. The decision with respect to which leave to apply for judicial review was granted is stated in the applicants' notice of application for leave as being 'the decision of the respondent in seeking to implement the mandatory use of electronic fiscal devices (EFDs) for Value Added Tax (VAT) for VAT operators that are currently using handwritten cash sales and or invoices and till receipts from ordinary cash registers despite knowledge of the so many clear irregularities in the operation of the said EFDs and the resultant derailment and frustration of businesses.

The respondent applied by summons, filed on 2nd July 2014, to set aside the leave granted herein and also the stay order granted herein on the grounds that the two orders were obtained by the applicants by misrepresentation and suppression of facts, irregularity and after inordinate delay. On 4th July 2014, the Applicants filed an application to amend the order granting leave for judicial review so that one of the original four applicants is removed and then further applicants be added and joined in this matter but so that the remaining three original applicants continue these proceedings in a representative capacity on behalf of the rest of the newly joined applicants. My brother Judge ordered that the application to amend be heard inter parte and this Court consequently heard the applicants' application to amend at the same hearing when it heard the respondent's application to vacate the order granting leave and the stay.

Both parties filed several affidavits and skeleton arguments in support of their respective contentions on the two applications before this Court. Deponents of the several affidavits were cross examined in court and re-examined after both the respondent and applicant filed notices to cross-examine the deponents of the affidavits filed in this matter. Thereafter this Court heard oral arguments from both the respondent and the applicants. The applicants opposed the respondent's applications to vacate the order granting leave and staying the decision of the respondent and so too the respondent opposed applicants' application to amend. After conclusion of the hearing this Court arrives at the following conclusion.

On the applicants' application to amend, the applicants made the same under Order 20 rule 5 Rules of the Supreme Court as read with Order 53 rule 9 (1) Rules of the Supreme Court. Order 20 rule 5 Rules of the Supreme Court provides as follows

(1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

In this paragraph "any relevant period of limitation" includes a time limit which applies to the proceedings in question by virtue of the Foreign Limitation Periods Act 1984.

(3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the party intending to sue or, as the case may be, intended to be sued.

(4) An amendment to alter the capacity in which a party sues may be allowed under paragraph (2) if the new capacity is one which that party had at the date of the commencement of the proceedings or has since acquired.

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

Order 53 rule 9 (1) Rules of the Supreme Court provides as follows

(1) On the hearing of any motion or summons under rule 5, any person who desires to be heard in opposition to the motion or summons, and appears to the Court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with notice of the motion or the summons.

The applicants who were originally four in number resolved that they act in a representative capacity for certain specified VAT operators in Blantyre, Limbe, Zomba, Lilongwe and Mzuzu whose names are specified in the attachment containing the said applicants intended to be represented by the four applicants herein. Further, the fourth applicant, Nasser Ahmed t/a Food City Take Away seeks to cease appearing as an applicant but to be part of those applicant to be represented by the remaining three applicants.

The respondent opposed the application to amend herein. The first ground of opposition was that the application to amend and have new parties represented by the original applicants herein comes too late in the day because the original applicants filed their application for leave for judicial review after the prescribed period of ninety days. The respondent also opposed the application to amend on account of the fact that the applicants herein do not represent all VAT operators in the places mentioned of Blantyre, Limbe, Zomba, Lilongwe and Mzuzu.

Further, the respondent lamented that the applicants intended to be joined in representative capacity are not sufficiently identified by way of tax payer identification number and VAT registration details. Hence, it is difficult for the respondent to ascertain the interests of these intended applicants.

The respondent also opposed the withdrawal of the fourth applicant to be represented by the remaining three original applicants after the fourth applicant obtained an adverse stay order against the respondent.

The respondent alleged that there was impropriety in securing the other applicants to be represented in this matter. There is however no proof to that effect.

The view of this Court is that the applicants can sue in a representative capacity. The applicants have not cited the relevant rules of procedure under which their application is made. The rules cited above deal with amendment of a writ of summons under Order 20 rule 5 Rules of the Supreme Court and the hearing of those opposing an application for judicial review under Order 53 rule 9 (1) Rules of the Supreme Court. None of the rules cited by the applicants is relevant to the instant application. However, there appears to be no prejudice to the respondent arising from the applicants' and intended applicants' failure to cite accurate procedural rules under which the applicants seek to proceed in a representative

capacity. This is the case because it is clear from the papers filed by the applicants that the respondent was made fully aware of the intended relief sought on the application to amend. The proper rule is found in Order 53 rule 3 (6) & (7) Rules of the Supreme Court which provides that

(6) Without prejudice to its powers under Order 20, rule 8, the Court hearing an application for leave may allow the applicant's statement to be amended, whether by specifying different or additional grounds or relief or otherwise, on such terms, if any, as it thinks fit.

(7) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

Order 20 rule 8 grants this Court power to amend any document. It provides that

For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

This Court is always interested to determine the real question between the parties before it. To do so, in the present matter, the amendment sought ought to be granted so that the grievances of the intended applicants are heard and resolved as between the applicants and the respondent. The applicants and intended applicants have filed their relevant tax payer details showing that they have an interest in the matter under review herein. The applicants are therefore entitled to join this matter and to be parties thereto in a represented capacity with respect to the three applicants. The issue of whether the intended applicants are within time with their application for review herein shall be determined at the time this Court considers the respondent's application to discharge leave later on in this decision. The change of capacity of the fourth applicant does not appear to be as drastic as is represented by the respondent given that the fourth respondent still remains a party to this review process. The amendment sought is therefore allowed.

This Court now deals with the application to discharge leave for judicial review. The first issue on that aspect relates to the contention as to what is the decision to

be reviewed and whether the applicants acted promptly to seek the review herein within the relevant time as per the Rules.

The applicants insist that the decision they sought to be reviewed is that taken by the respondent on 26th June 2014 *insisting to implement the mandatory use of electronic fiscal devices (EFDs) for Value Added Tax (VAT) for VAT operators that are currently using handwritten cash sales and or invoices and till receipts from ordinary cash registers*. That decision as alleged by the applicants was said to have been taken at a meeting called by the Consumer Association of Malawi held at Victoria Hotel where the Consumer Association was campaigning for rights of consumers to demand VAT receipts. It was by the way at the said meeting that some VAT operators requested the respondent's representative to consider postponing the implementation of the mandatory use of Electronic Fiscal Devices for relevant VAT operators. The respondent contends that no decision was taken on 26th June 2014 but rather the decision was taken by the respondent on 6th March 2014 *to implement the mandatory use of electronic fiscal devices (EFDs) for Value Added Tax (VAT) for VAT operators that are currently using handwritten cash sales and or invoices and till receipts from ordinary cash registers*.

This Court is not persuaded by the applicants that the decision they seek to be reviewed by this Court for being unreasonable in the *Wednesbury* sense is the respondent's decision of 26th June 2014. The view of this Court after hearing the parties and considering their papers is that no decision was taken on the date of 26th June 2014. On the contrary to what the applicants led my brother Judge to believe on the application for leave, the decision of the respondent in seeking to implement the mandatory use of electronic fiscal devices (EFDs) for Value Added Tax (VAT) for VAT operators that are currently using handwritten cash sales and or invoices and till receipts from ordinary cash registers was actually taken on 6th March 2014. That decision was therefore made three months or ninety days before the applicants applied for leave to apply for judicial review. Some of the representative applicants even took part in the piloting of the electronic fiscal devices (EFDs) for Value Added Tax (VAT) for VAT operators between January and March 2014 and did nothing to challenge the decision to have mandatory implementation of the electronic fiscal devices (EFDs) for Value Added Tax (VAT) for VAT operators by 1st July 2014. Any issues that the applicants had on the mandatory implementation of the electronic fiscal devices (EFDs) for Value Added Tax

(VAT) for VAT operators had been alive and were discussed by the applicants with the respondent since the piloting of the devices started in January 2014 until it ended in March 2014 and a decision was taken on 6th March 2014 that mandatory use of the electronic fiscal devices (EFDs) for Value Added Tax (VAT) for VAT operators would commence on 1st July 2014. No application for judicial review was made during all that time. The applicants actually had three months that is up to 6th June 2014 to apply for judicial review. But the applicants waited until 27th June 2014, after the three months period and on the eve of the commencement of the mandatory implementation of the electronic fiscal devices (EFDs) for Value Added Tax (VAT) for VAT operators and then applied for leave to apply for judicial review. The applicants seem to attempt to hide behind the fact that the decision they sought to have reviewed is that of 26th June 2014 so that their lack of promptness is concealed. The meeting of 26th June 2014 was called by the Consumer Association of Malawi to discuss matters of a consumer's rights to a VAT receipt. It appears that the concerns of the applicants on the implementation of the EFDs were raised by the applicants and dealt with by the way and the respondent emphasized that it was going through with its decision of 6th March 2014 to require mandatory implementation of the devices by 1st July 2014. The applicants now attempted to use this emphasis as a new decision to review the decision of 6th March 2014. That is untenable. In any event the applicants in their application for leave clearly stated that the decision sought to be reviewed is not that of the respondent *insisting to implement the decision of 6th March 2014*, as has been portrayed in the argument or indicated in the order granted by my brother Judge but rather *'the decision of the respondent in seeking to implement the mandatory use of electronic fiscal devices (EFDs) for Value Added Tax (VAT) for VAT operators that are currently using handwritten cash sales and or invoices and till receipts from ordinary cash registers'*. That decision was made on 6th March 2014. In these circumstances, this Court is not convinced that the applicants acted promptly in seeking to challenge the respondent's decision.

If the issues the applicants are raising on the application for judicial review were indeed genuine they would have proceeded to challenge the respondent's decision promptly instead of waiting until the eve of the implementation of the respondent's decision on 27th June 2014 when the applicants made the application sought to be discharged now. The conduct of the applicants convinces this Court that they are

just trying to stifle the efforts of the respondent who went through a thorough process of implementation of the mandatory use of electronic fiscal devices (EFDs) for Value Added Tax (VAT) for VAT operators by studying comparative systems and adapting the same to the Malawian situation, piloting the system that was specifically designed for Malawi between January and March 2014 and also providing a grace period of three months between March and June 2014 to all relevant VAT operators before the implementation of the mandatory use of electronic fiscal devices (EFDs) for Value Added Tax (VAT) for VAT operators by 1st July 2014.

It is sometimes thought that an applicant for judicial review is always allowed three months in which to make his application for leave, and provided that he lodges it within that period leave cannot be refused on the grounds of delay. That is not so. The primary requirement laid down by the rules namely Order 53 r.4 (1) Rules of Supreme Court is that the application must be made "promptly," followed by the secondary provision " ... and in any event within three months ... " Thus, there can be cases where, even though the application for leave was made within the three-month period, leave might be refused because, on the facts, the application had not been made promptly. For an example of such a case see: *R. v. Independent Television Commission, ex p. TV NI Ltd* (1991) *The Times*, December 30, CA.

On the other hand, the court has power to extend time for applying for leave to move for judicial review, but only if it considers that there is "good reason" for doing so. see Order 53 r.4 (1) Rules of Supreme Court. Where an application to extend the time is made under r.4 notice thereof must be given to the person who will be respondent to the motion . see *R. v. Ashford, Kent JJ., ex p. Rickley* [1955] 1 W.L.R. 562; [1955] 2 All E.R. 327n. The court will consider whether the grant of an extension of time for applying for judicial review will be likely to cause substantial hardship or prejudice, not only to the instant parties, but to a wider public or may be detrimental to good administration.

The applicants had a duty to apply for leave promptly and in any event not later than three months after the decision being challenged. The applicants failed to do so. The applicants did not even seek an extension of time within which to apply, very likely, to avoid raising issues of their want of promptness in applying for

leave. Even if the applicants had applied for an extension of time within which to apply this Court is of the firm view that such an application would be unlikely to succeed given that it would be detrimental to good administration to allow such an extension which would have been made on the eve of the implementation of the mandatory use of electronic fiscal devices (EFDs) for Value Added Tax (VAT) for VAT operators.

On the whole of the circumstances in this matter, this Court is not convinced that the applicants applied promptly to review the decision of the respondent of 6th March 2014 and they did not in any event apply for the review within three months as required by the Rules. The respondent has made out its claim that the applicants were guilty of inordinate delay in making their application for leave to apply for judicial review. For this reason alone the leave to apply for judicial review granted to the applicants on 27th June 2014 is vacated and so too the accompanying order staying the decision of the respondent sought to be reviewed.

Even if the applicants were found to have filed the application for leave for judicial review in time, there are various serious misrepresentations of fact that gave the applicants an advantage on the application for leave. For instance, the applicants misrepresented that the VAT operators would not be allowed to transact if there is no electricity to power the electronic fiscal devices. This is a gross misrepresentation that puts the efficacy of the devices into serious question and must have heavily weighed on the Judge's mind ultimately misleading him to decide in favour of the applicants on the ex parte application for leave. The truth of the matter is that the electronic fiscal device operates on a rechargeable battery that lasts 4800 transactions and the battery will be recharged after such transactions. Again, the applicants stated that the till rolls on the electronic fiscal devices are one ply thereby leaving the VAT operators without any records for their business transactions once an electronic fiscal device receipt has been issued to the consumers. That is another gross misrepresentation that puts the efficacy of the devices into serious question and must have heavily weighed on the Judge's mind ultimately misleading him to decide in favour of the applicants on the ex parte application for leave. The truth of the matter is that the electronic fiscal device keeps an electronic memory of all transactions and these can be printed out at any point in time.

These gross misrepresentations by the applicants fly in the face of the duty of the applicants to make a full and frank disclosure of the facts on ex parte applications for leave to apply for judicial review. The applicant for leave must show *uberrima fides*, and if leave is obtained on false statements or a suppression of material facts in the affidavit, the court may refuse an order on this ground alone. See *R. v. Kensington Commissioners, ex p. Polignac* [1917] 1 K.B. 486, CA and *R. v. Barnes, ex p. Vernon* (1910) 102 L.T. 860). In *R. v. Jockey Club Licensing Committee, ex p. Wright* [1991] C.O.D. 306, Q.B.D. the grant of leave to move for judicial review was set aside on the grounds of material non-disclosure on the part of the applicant.

The gross misrepresentations by the applicants in this matter are of such a nature that they convince this Court that in the circumstances the leave obtained by the applicants was not merited. In fact, one of the applicants who took part in the piloting of the electronic fiscal devices (EFDs) for Value Added Tax (VAT) for VAT operators indicated in clear terms that he never had any of the problems that the other applicants alleged were matters that the respondent has to look into before rolling out the mandatory use of the devices in issue herein. His only issue was that the till roll would now cost more since the one used with the devices in issue herein is a special security protected till roll which is more expensive. That clearly shows that the issues raised by the applicants with regard to the alleged problems with regard to operation of the devices in issue herein were really mere speculation and gross misrepresentation on the part of the applicants.

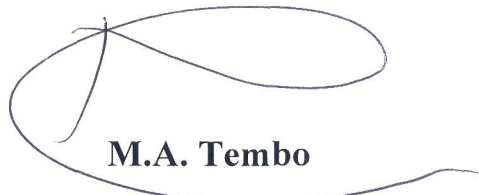
For the reason of gross misrepresentations, the order granting leave to move for judicial review and the accompanying order staying implementation of the decision of the respondent herein would also vacated.

The applicants also argued that the implementation of the devices in issue herein would cause a substantial increase in operational costs of the applicants thereby causing their businesses to suffer by profit reduction. For instance, the applicants alleged that the devices herein are too expensive compared to manufacturers cost. The respondent countered that the devices require to meet certain specifications hence that determines the sale price. Further, that in any event, the applicants would get a tax deduction equivalent to the price of the device. With regard to the effect of the operational costs that come with the use of devices in issue herein on

the applicant's profits this Court does not see how such would be a decision for the review of this Court. Parliament clearly has expressed its intention to implement the use of the devices herein to meet certain ends. As a matter of principle this Court has no mandate to dictate the cost of such devices as the price is arrived at upon consideration of specifications and other matters as clearly indicated by the respondent. Such matters would be beyond the purview of this Court's mandate in judicial review. The applicants may have to adjust their prices to cater for the cost of doing business arising from the implementation of the devices herein in the usual scheme of things in business.

This Court had reserved its decision on the issue of costs. Such costs normally follow the event and therefore in the foregoing circumstances the same are awarded to the respondent.

Made in chambers at Blantyre this 29th July 2014.



M.A. Tembo
JUDGE