



IN THE HIGH COURT OF MALAWI  
MZUZU REGISTRY: CIVIL DIVISION  
MISCELLANEOUS CIVIL CAUSE NO.66 of 2016

Between

Harry Mkandawire .....Plaintiff

-and-

The Commissioner General of Malawi Revenue Authority .....Defendant

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CORAM:

HONOURABLE JUSTICE D.A. DEGABRIELE

Mr. W. Mwafulirwa

Counsel for the Plaintiff

Mrs B. Mwangwela

Counsel for the Defendant

Mr. A. Kanyinji

Official Interpreter

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*DeGabriele, J*

RULING

On hearing of an application to vacate an *ex parte* order of stay, an order of injunction and to strike out the originating summons application

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Introduction

On 23<sup>rd</sup> June 2016 the plaintiff was given a notice of demand for payment of taxes and penalties amounting to MK573,667,247.49. The plaintiff was given an ultimatum to pay the said taxes within 7 days of the notice. The plaintiff then applied for and was granted an *ex parte* stay order and an order of injunction restraining the defendant from the enforcing the decision to collect the said taxes pending an appeal to a Special Arbitrator. The defendant also was given liberty to apply to vary or discharge this order upon giving 48 hours' notice to the plaintiff's counsel. The defendant has now made an application to have the order of stay and injunction vacated, as well as having the originating summons filed by the plaintiff struck out for being irregular.

### **The application**

The defendant claims that the injunctive relief and the stay order obtained by the plaintiff on 5th July 2016, as well as the originating summons are aimed at frustrating the due process of the law and the defendant's efforts in collecting taxes. The defendant filed an affidavit in support and skeleton arguments which were adopted in their entirety in this hearing. Through the affidavit sworn by Jameson Zimbiri, the defendant states that the applicant was indeed owing of additional taxes amounting to MK573,667,247.49, which amount included corporate taxes, value added taxes and penalties. The additional tax was assessed following an investigation that was carried out in September 2014. The defendant sent various demand notices to the plaintiff and no payments were made. The defendant then sent a final notice dated 15<sup>th</sup> July 2016 (**JZ2**) requesting that the plaintiff pay within 7 days.

The defendant alleges that the plaintiff has not done anything to prosecute the appeal since the stay order and order of injunction was granted. The injunction was obtained on the grounds that there was a purported appeal to a special arbitrator, but there was just a notice of intention to appeal without supporting documents that include the grounds of appeal being filed as shown by the document marked as **JZ3**. The defendant further claims that the plaintiff did not follow the procedures for appeal as provided for in Taxation Act and Value Added Tax Act. The defendant therefore submits that it is in the public interest that the said injunction and order of stay be vacated as the balance of convenience supports the same and that the originating summons be struck out with cost.

### **The response**

The plaintiff, adopted and relied on the affidavit he swore in support of the stay of execution and injunction. In that affidavit the applicant was seeking relief against the intention of the defendant to enforce the payment of a bill of MK573,667,247.49. The plaintiff argued that his businesses would suffer irreparable financial harm if the tax payment demand was enforced. The plaintiff stated that he had been paying his taxes and he needed a stay so that the taxes can be re-assessed, and he would pay if the re-assessment brought the same

result. He claims that if the injunction is removed he may end up paying more than he was legally required to pay.

The plaintiff claims that the notice of appeal was filed, and claims further that in any event, most of the process of appeal to the Special Arbitrator is done by the Commissioner himself. He claimed that the prosecution of the case was affected by the handicap of the Court itself and was not intentional. The plaintiff is praying that the court should grant him a short extension of time in which certain things ought to be done, failing which the stay and injunction would be vacated.

The plaintiff then filed originating summons seeking the following reliefs;

- a. A declaration that that the applicant being entitled to appeal to the special arbitrator in terms of section 98 of the Taxation Act is in the circumstances entitled to interim relief granted by the High Court pending the determination of the appeal
- b. An order that the decision of the respondent dated 23<sup>rd</sup> June 2016 requiring the applicant to within seven days from that date pay tax amounting to the total value of MK573,667,247.49 be stayed and the respondent be restrained from taking any actions, steps or measures to recover or collect or enforce the collection or recovery of the said tax demanded until the determination of the appeal to be filed with the Special Arbitrator.
- c. An order for costs of the action be for the plaintiff.

### **Analysis**

In his affidavit, the plaintiff states that he had commenced judicial review proceedings but was advised by the Judge hearing the application for leave to commence judicial review that he had an alternative remedy available, which was to appeal to a Special Arbitrator under section 98 of the Taxation Act. At this point I find that there was no need for the plaintiff to seek declarative reliefs in the manner of paragraph (a) of the originating summons as the law already gives him the entitlement to appeal. The originating summons is therefore irregular.

In seeking the stay order and the order of injunction through an application filed on 5<sup>th</sup> July 2016, the plaintiff undertook to file the grounds of appeal against the

decision made by the defendant within 2 days (HMM1). By his own commitment, the applicant was supposed to file the grounds of appeal by the 8<sup>th</sup> of July 2016. This was not done.

The plaintiff states that the defendant was demanding a payment of taxes; being income tax, value added tax and some penalties amounting to MK573,667,247.49 as shown by a letter dated 23<sup>rd</sup> June 2016 (HMM1). A perusal of this letter shows that there were communications to the applicant in August 2014 on his taxes, there was an investigation done in September 2014, there was a meeting in February 2015 with the accountant for the plaintiff, the plaintiff had written a letter to the defendant dated 12<sup>th</sup> May 2015 but there were no payments made. The plaintiff had also been issued with an Income tax assessment for the sum of MK549,320,917.40 on 16<sup>th</sup> April 2015, and a VAT assessment notice issues on 21<sup>st</sup> July 2015 in the sum of MK24,346,330.09. These two notices were not honoured and they represented a total tax liability of MK MK573,667,247.49. The plaintiff wrote a letter to the defendant on 12<sup>th</sup> May 2015 through his legal representative (HMM2), showing his intention to appeal the income tax assessment on two grounds; a) that there were no valid grounds to do additional tax assessment as the plaintiff had already fully paid taxes for the relevant years and had also received tax refunds, and b) that the alleged understated and overstated categories of taxable income were arrived at arbitrarily without hearing the plaintiff or ascertaining his circumstances and evidence of earnings. The evidence before me shows that there was continuous communication between the plaintiff, his accountant on one hand and the defendant on the other hand. I do not therefore find any arbitrariness on the part of the defendant, in particular that the plaintiff was not heard. In this letter the plaintiff further seeks to be present at the appeal together with his financial and legal representatives and I am of the view that this was a legal right of the applicant to be so present and so represented.

In accordance to the letter marked as HMM2 the plaintiff sought to be allowed to submit comprehensive grounds of appeal within 7 days of this particular letter and before the appeal is heard. This was an intention to appeal and the plaintiff had committed to provide comprehensive grounds of appeal of appeal but there is nothing on file to show that the appeal was filed. I do not see the need to seek

permission from the Commissioner General to submit comprehensive grounds of appeal as the appeal process was the legal right of the plaintiff which right is conferred upon him by the law under section 97 and 98 of the Taxation Act. Section 97 reads as follows;

*“(1) A taxpayer who is aggrieved by –*

- (a) any assessment made upon him by the Commissioner under this Act;*
- (b) any decision of the Commissioner in relationship to an assessment; or*
- (c) the determination of a reduction of tax under section 123 or section 124,*  
*may appeal to the Commissioner against such an assessment, decision, or*  
*determination in the prescribed manner.*

*(2) where an appeal is made to the commissioner under subsection (1) he*

- (a) may amend the assessment, decision or determination or disallow the appeal;*
- (b) shall send to the applicant written notice of his decision;*
- (c) shall record any amendment of the assessment in the assessment register”*

Under the law, the plaintiff has a remedy which is an appeal to the Special Arbitrator. Section 98 (1) reads as follows;

*“A taxpayer aggrieved by a decision of the Commissioner under section 97 may appeal in the prescribed manner to a Special Arbitrator appointed either generally or specifically for the purpose by the President”*

The law under section 95 of Taxation Act puts the burden of proof on the person who is seeking to appeal. Consequently, such a person ought to act with diligence in prosecuting the appeal. The appeal ought to be done in the prescribed manner and in compliance with the provisions as stipulated in the Eighth Schedule to Part X of the Taxation Act. In this matter, the applicant was about to be compelled to pay a huge sum of MKMK573,667,247.49. He acted very quickly in getting a stay order and an injunction bearing in mind the consequences of an enforcement of that sum by the defendant. However, I find that the plaintiff then fell short of following through with the appeal in the prescribed manner as the law requires.

The letter of intention (**HMM2**) ought to have been followed up by a statement to the Commissioner with the clear grounds of appeal. It is this statement and the reply of the Commissioner that has to be sent by the Commissioner to the Special Arbitrator. It is wrong for counsel of the plaintiff to state that the process of engaging the Special Arbitrator is done mostly by the Commissioner. I find that the plaintiff did not lodge the statement with the grounds of appeal to the Commissioner. His notice of intention was just one step in the process. The Commissioner would not be able to engage a Special Arbitrator without clear grounds of appeal as required under the Eight Schedule to Part X of the Taxation Act. It was incumbent on the plaintiff, and as of his right, to so provide these comprehensive grounds within the 7 days he had undertaken to do so. Without filing the grounds of appeal, there will be no appeal and the plaintiff's request for an audience at the appeal would not be honoured.

The plaintiff claims that he received another demand notice dated 21<sup>st</sup> July 2015 on VAT assessment (**HMM3**). This notice was about Value Added Tax of MK24,346,330.09 for the period 2009 to June 2015. The plaintiff was given a maximum of 14 days to respond, and failure to so respond would lead to the assumption that the finding were due and payable and instant payment would be enforced. There is nothing on file to show that the plaintiff vehemently protested this particular VAT assessment. Section 43 and 44 of the Value Added Tax provide that a person who is dissatisfied with any decision of an officer of the Authority other than the Commissioner General, may lodge an appeal with the Commissioner General within 30 days after decision notice has been served on him or her upon his or her becoming aware of the decision. The Commissioner General would have to make a decision within 30 days after interviewing the tax payer. If the tax payer is not happy with the decision on appeal to the Commissioner General, section 44 provides that the tax payer can lodge an appeal with any Court of a Resident Magistrate, after all the value added tax as assessed or due is paid in full. The court will, for good cause waive the payment of the taxes in full before hearing the appeal. Finally the law provides that any person who is over taxed can be refunded with interest. Looking at the law as well as the evidence before me,

the plaintiff did not follow any of the procedures as prescribed by the law as regards an appeal against a duly assessed bill for VAT payment.

As submitted by the defendant section 105 of the Taxation Act provided that any tax due must be paid on the date it becomes due, notwithstanding that an appeal against an assessment had been made under section 97, unless the Commissioner General otherwise directs. The direction by the Commissioner General included a waiver. Here the law puts a mandatory process of paying taxes, but, bearing in mind that in some cases payment of such taxes can negatively affect business, gives the Commissioner General discretion to waive the payment of taxes until an appeal is determined. Therefore, a waiver is a remedy available to any tax payer on application to the Commissioner General. The plaintiff herein, having registered his intention to appeal, did not follow the process in a subscribed manner, nor did he apply for a waiver as provided for by the law. The document exhibited as **JZ3** dated 8<sup>th</sup> July 2016 is a notice of intention to appeal in accordance with section 98 of the Taxation Act. There is no evidence on the document itself showing that it was indeed filed with the Court. Based on the evidence before me I find that the plaintiff did not pursue the procedures for appeal in a prescribed manner both under the Taxation Act and the Value Added Tax. It is an abuse of the court process and legal entitlements when a person who has been conferred rights under the law, and whose interests are greatly under risk, fails to follow the simple procedures put in place by the law to protect himself or enforce his rights. The court would be hard pressed to find a way to help such a person who is bent on not aiding himself. The only conclusion supported by the evidence is that the plaintiff engaged the court in order to delay and frustrate the functions of the defendant in collecting taxes that are due.

I now turn to the prayers of the defendants. The defendant is seeking to have the order of injunction obtained by the plaintiff restraining the defendant from enforcing the payments of taxes as assessed and due, payable by the plaintiff vacated. The main question is whether the order of injunction can be sustained in the present circumstances. The principles which ought to be taken into account when considering the granting of an injunction, and by extension, when considering the

sustaining of an order of injunction were outlined in the celebrated case of *American Cyanamid v Ethicon Ltd*[1975]AC 397, which I discuss in part below.

The first principle is that the plaintiff must establish that he has a good arguable claim to the right he seeks to protect. The plaintiff herein was owing taxes which were assessed after an investigation was carried out and there was dialogue between the plaintiff's accountant and the defendant. The plaintiff has valid remedies under the law to deal with his claim under both the Taxation Act and the Value Added Tax Act which he has not fully utilised. I find that there was no right that the plaintiff was seeking to protect here by an injunctive order. What I see here is that the plaintiff was rightly granted a stay for a limited time of 7 days from 5<sup>th</sup> July 2016, which stay was meant to help the plaintiff seek the alternative remedies in the prescribed manner and not a permanent remedy. There is no evidence that the plaintiff followed on seeking his remedies in the prescribed manner and he is therefore presumed to have sat on his own rights. Therefore, there being no right the applicant seeks to protect, the injunction and stay order obtained *ex parte* cannot be sustained. In fact the plaintiff is under a statutory duty to pay his taxes as they fall due.

The second principle is that the Courts must not attempt to decide this claim on the affidavits; it is enough if the plaintiff shows that there is a serious question to be tried. The evidence before me shows that there is no triable issue before this court. The originating summons only shows that the plaintiff was seeking a reprieve for a period of time so he can pursue the alternative remedies he has at law. In his submission the plaintiff does not deny that he owes taxes, but that he wishes the taxes to be reassessed.

#### Orders

Having discussed the matter thus and in exercising my discretion, I make the following orders

- 1 The order of stay as granted to the plaintiff on 5<sup>th</sup> July 2016 BE and IS  
HEREBY set aside
- 2 The order of injunction as granted to the plaintiff on 5<sup>th</sup> July 2016 BE and IS  
HEREBY vacated

3. The originating summons as filed by the plaintiff on 5<sup>th</sup> July 2016 BE and IS HEREBY struck out for lacking merit and being an abuse of court process
4. The defendant herein was also given liberty in the order of stay and order of injunction to apply to court to have the orders discharged or varied within the 7 days from 5<sup>th</sup> July 2016. I note that the defendant has only filed documents with this Court on 27<sup>th</sup> January 2017. This means that the defendant was not diligent in seeking relief from the court, and has partly contributed to the frustrated process of tax collection. It is for this reason that I grant the plaintiff a period of 7 days from this date to ensure that the processes as prescribed by the law as regards appeals are done. Failing which the defendant is at liberty to enforce the payment of overdue assessed taxes amounting to MK573,667,247,49 without recourse from the Courts
5. The plaintiff is hereby ordered to indemnify the defendant's loss as undertaken in the order of injunction
6. The plaintiff is condemned in costs.

Made in Chambers at Mzuzu Registry this 2<sup>nd</sup> day of June 2017



D.A. DeGriele

JUDGE