JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

JUDICIAL CAUSE NUMBER 126 0F 2011

BETWEEN:

THE STATE

AND

MALAWI REVENUE AUTHORITY..... RESPONDENT

AND

EX PARTE:

WISELY PHIRI.....APPLICANT

CORAM: THE HONOURABLE JUSTICE H.S.B POTANI

Miss Ngoma, Counsel for the applicant

Mrs. Chimkwezule, Counsel for the respondent

Mr. Kanchiputu, Court Clerk

RULING

Before the court for determination is an *inter partes* application by the applicant for stay of the decision of the respondent to continue detaining his vehicle.

Pursuant to Order 53 of the Rules of the Supreme Court, the applicant, Wisely Phiri, made an *ex parte* application seeking the leave of the court to commence judicial review proceedings for purpose of challenging the decision of the Malawi Revenue Authority [MRA], the respondent, to continue detaining a motor vehicle BMWX5 brought by the applicant from the Republic of South Africa [RSA] after satisfying all requirements and providing a Certificate of Origin[CO] from the Republic of South Africa [RSA]. Attendant to the *ex parte* application for leave, was an application for stay of the decision complained of pending the determination of the substantive judicial review. The Honourable Justice Kalembera before whom the application was placed readily granted the leave sought but he ordered that the stay aspect be heard *inter partes* and as he was proceeding on leave, he directed that such a hearing be placed before any other available judge hence my getting involved in the hearing and determination of the *inter partes* application for stay.

The pertinent facts as can be extracted from the affidavits filed by the parties are that sometime in 2015, the respondent issued a press release in local newspapers advising the general public on certain incentives relating to import duties payable on vehicles purchased in RSA the effect of which being that a vehicle imported from RSA would be exempted from import duties provided that it is accompanied by a Certificate of Origin [CO] produced by South African Revenue Services [SARS]. Motivated by the incentives spelt out in the press release, the applicant purchased a BMWX5 from RSA, followed all relevant steps to enable him procure a CO from SARS and one was duly issued to him but when he presented the CO to the respondent, the respondent refused to release the vehicle saying there was need to verify the authenticity of the CO. According to the applicant the authenticity of the CO was duly confirmed by SARS but the respondent still continued detaining the vehicle prompting the

applicant to seek leave to move for judicial review and stay of the decision to continue detaining the vehicle pending the determination of the judicial review.

As submitted by counsel for the applicant and this is not at all disputed by the respondent, the court has power, upon the grant of leave to move for judicial review, to order stay of the decision complained of until the determination of the judicial review. This power is clearly provided for in Order 53 rule (10) which is as follows:

Where leave to apply for judicial review is granted, then -

(a)

if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;

In the form 86A accompanying the applicant's application for leave for judicial review in item 4 under relief sought, the applicant prays for an order of *certiorari* quashing the respondent's decision to detain his vehicle. The matter therefore falls within the purview of Order 53 rule (10) (a) quoted above which bestows upon the court the power to order stay of the decision complained of.

The gist of the respondent's case in opposition to the order of stay sought by the applicant is that for a vehicle to qualify for the import duties exemption status incentive offered by the respondent, it must fall in category P under the SADC Protocol on Trade [Rules of Origin] which relates to goods wholly produced in RSA as opposed to category S which implies that some parts of goods were

produced somewhere else but assembled in RSA. According to the respondent although the applicant's had a P classification when the information about the vehicle was analysed by the respondent's technical department some queries were raised which made it necessary for the respondent to revert to SARS to enquire the authenticity of the CO presented by the applicant and is response SARS indicated that it could not confirm the originality status of the products pertaining to the vehicle as there was no information provided by the exporter [the applicant] to conduct a post clearance verification of the products. Thus, according to the respondent, the mere production of CO by the applicant was not enough to entitle him to benefit from the incentive as the onus rests on him to give information to SARS for it to confirm originality of the parts of the vehicle and having failed to do so the vehicle fell under customs control until the determination of whether it is duty free or not hence its continued detention by the respondent.

As the court ventures into the determination of the application under consideration, it must be acknowledged that the matter, to a considerable extent, revolves around technical area in the domain of customs practices and procedures. However, it must be remembered that the court at this juncture is not dealing with the substantive judicial review and therefore the focus should be on the question whether or not the decision of the respondent to continue detaining the applicant's vehicle should be stayed pending the determination of

the substantive judicial review. In dealing with this question, the court would particularly wish to note that in arguing its case in opposing to the application under consideration, the respondent has in some respects relied on Annex 1 to the SADC Protocol on Trade which has been exhibited as **LM1** to the affidavit sworn by Louis Mgawi, Tariff and Origin Desk Officer in the Technical Department of the respondent, in opposition to the application. Counsel for the plaintiff has drawn the attention of the court to Rule 9 (4) in that document which reads as follows:

The importing Member State shall not prevent the importer from taking delivery of goods solely on the grounds that it requires further evidence, but may require security for any duty or other charge which may be payable: provided that where goods are subject to any prohibitions, the conditions for delivery under security shall not apply.

It has been argued by counsel for the applicant that in terms of the above Rule, the mere fact that the applicant allegedly did not provided information or evidence to be used to verify the originality of the vehicle does not entitle the respondent to prevent the applicant from taking delivery of the vehicle. The wording of the Rule 9(4) is plain and clear. Considering the facts of the case, if the respondent had considered the provisions of the Rule it could not to have continued to detain the applicant's vehicle. The least it could have done would have been to require and demand security for any duty or other charges which may be payable as provided for under the Rule. It is therefore the inclination of

the court that this is a proper case in which stay of the decision complained of should be granted and therefore it is accordingly ordered that the decision of the respondent to continue detaining the applicant's vehicle despite him producing a Certificate of Origin [CO] be stayed pending the determination of the judicial review proceedings herein or other order of the court and consequently the vehicle should be released to the applicant forthwith.

Costs of this application are awarded to the applicant

Made in Chambers this day of March 9, 2016, at Blantyre in the Republic of Malawi.

H.S.B. POTANI
JUDGE