



REPUBLIC OF MALAWI  
MALAWI JUDICIARY  
IN THE HIGH COURT OF MALAWI  
MZUZU DISTRICT REGISTRY  
CIVIL CAUSE NO. 23 OF 2013

**THE STATE**

-and-

**THE COMMISSIONER GENERAL OF ..... RESPONDENT  
MALAWI REVENUE AUTHORITY**

Ex-parte

**DAVID MWAMPACHI .....1<sup>ST</sup> APPLICANT  
PAUL MKISI.....2<sup>ND</sup> APPLICANT**

**Coram :** **Honorable Mr. Justice D.T.K. Madise**  
Mr. C. Ghambi Counsel for the Applicant  
Mrs. T.P. Muyaya Counsels for the Respondent  
Mr. C. Chawinga Official Interpreter  
Mrs. F. Silavwe Court Reporter

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**Madise, J**

**JUDGMENT**

## **1.0 Introduction**

**1.1** On 24<sup>th</sup> April, 2013 the Applicants herein filed an ex parte summons seeking leave to file motion for judicial review under Order 53 r3 RSC. The same was supported by an affidavit of Mr. Christon Ghambi of Counsel. On the same day I granted leave on condition that the goods (Tiger batteries) which were seized by the Malawi Revenue Authority (hereinafter referred to as the MRA) remain in the custody of MRA until final determination of the matter or upon any other of the Court.

**1.2** Notice of motion for judicial review was taken out on 30<sup>th</sup> May, 2013 and accompanying the notice was form 86A. Affidavits of Paul Mkisi and David Mwampachi the Applicants in this matter were also filed in support of the originating motion. The parties also filed their skeleton argument in support of their positions at law.

## **1.3 FORM 86 A**

We now reproduce the form as filed by the Applicants in his motion for judicial review.

The Applicant	APPLICANTS Name: David Mwampachi C/O Chram & Associates Address: P.O. Box 239, Mzuzu and Paul Mkisi, of P.O. Box 124, Mzuzu Description: Businessmen
Judgment, Order, decision or other proceeding in respect of which relief is sought	Decision of the Respondents to seize the Applicants goods (105 cartons of Tiger batteries)
Relief Sought	<ol style="list-style-type: none"><li>1. A Declaration that the decision of the respondent seizing Applicant's goods is unconstitutional and unreasonable and consequently null and void.</li><li>2. An order similar to certiorari quashing the decision of the respondent to seize the applicants' goods</li><li>3. An order similar to mandamus compelling the</li></ol>

	respondent to release the goods to the applicants.
Name and Address of Applicant's Legal Practitioners.	CHRAM ASSOCIATES P.O. BOX 239 MZUZU

## **2.0 The grounds on which relief is sought**

### **2.1 Factual Background**

**2.1.1** The first Applicant is a citizen of Malawi who conducts his business in the city of Mzuzu and the second Applicant is a citizen of Malawi who conducts his business in Lilongwe. This is proper under the Malawi Democratic Constitution which guarantees every person's right to engage in economic activity.

**2.1.2** The second Applicant was told to produce receipts for the purchase which he did and in company of the police, the MRA officers and the second Applicant they went to wholesale in Lilongwe to verify and it was indeed verified that the goods were bought there. The seized goods have not been released despite the verification exercise and several follow ups. On the seizure notice, the Respondent endorsed the words, "found in possession with goods under Customs Control."

### **2.2 The Respondent has the following Constitutional duties**

(a) *The duty not to act arbitrarily, but lawfully within the constitutional and statutory powers and authority conferred on it by the law- Section 12(ii) and (iv) of the Constitution.*

(b) *The duty not to act in excess of its powers.*

### **2.3 The Respondent's decision is vitiated in law in that-**

a. *It is unreasonable in the Wednesbury sense*

b. It is arbitrary and in excess of its powers.

#### **2.4 Expedition**

The decision of the Respondent has got grave repercussions on the Applicants. The said Tiger batteries have been left in unsafe place. Besides, as a result of the detention or confiscation or seizure of the said goods, the second Applicant has suffered economically and his source of livelihood for the family has been completely affected. The Applicants, accordingly, pray that the hearing of the application for Judicial Review be expedited and that court gives such directions for the further conduct of this matter as justice may require.

#### **2.5 Reliefs Sought**

1. A declaration that the Respondent's decision to detain the goods (105 cartons of Tiger batteries) is unlawful.
2. An Order similar to mandamus directing the Respondent to release the Applicant's goods.
3. An inquiry as to damages under Order 53 rule 7 of the Rules of the Supreme Court.
4. Courts of this action.

#### **3.0 Affidavit in support of the motion**

**3.1** In support of the motion for Judicial Review the second Applicant filed an affidavit which we reproduce as follows:

I **PAUL MKISI** of, Box 124, Mzuzu, MAKE OATH and STATE as follows:-

1. I am of full age and the Applicant in this matter and therefore competent to swear this affidavit.
2. I do operate small scale business in the city of Lilongwe and Mzuzu in form of groceries.

3. On the 20<sup>th</sup> February, 2013 I bought 105 cartons of Tiger Head Batteries from the wholesale of Right Star Shop in Lilongwe. **See the copy of receipt marked PM1.**
4. I had a customer in Mzuzu and as such I sent them to Mzuzu through my friend Mr. David Mwamphachi.
5. On the 5<sup>th</sup> March, 2013 while the goods were at Mr. David Mwampachi, the MRA officers came and seized the property without any reason. **See the copy of seizure marked PM2.**
6. I followed the goods to their office and I was asked to produce the receipts for purchasing the said goods.
7. I gave them the receipts, however, they asked that we should go to the wholesale to verify.
8. In the company of MRA officers, Police officers and I went to the wholesale where it was verified that indeed the goods were purchased at the said wholesale.
9. Upon several follow ups, the MRA officers asked me to write a letter to the Commissioner of MRA in Blantyre, which I did but the goods have not yet been released. **See the copy of letter marked PM3.**
10. The goods are deteriorating and losing economic value.

**Wherefore**, it is my prayer that the court orders as follows:-

- a. That my goods be returned.
- b. The Respondent should pay damages.

#### **4.0 Affidavit verifying facts**

**4.1** Mr. David Mwampachi of Chibanja, Mzuzu who received the consignment of batteries from the second Applicant filed an affidavit which we reproduce as filed:-

I **David Mwampachi** of, C/O Chram Associates, Box 239, Mzuzu MAKE OATH AND STATE as follows:-

1. I am of full age and the Applicant in this matter and therefore competent to swear this affidavit.
2. On the 20<sup>th</sup> February, 2013 Mr. Paul Mkisi asked me to temporarily keep his goods (105 cartons of Tiger Head Batteries) which he bought from Lilongwe.
3. As he was in Lilongwe then, I kept the said goods in my house on the sitting room pending his coming.
4. On the 5<sup>th</sup> March, 2013 while the goods were at my house, the MRA officers came and seized the goods in my absence. **See the copy of seizure marked PM2 in the affidavit of Paul Mkisi.**
5. I informed Mr. Mkisi who, in my company, followed for his goods at MRA offices to find out on reasons for seizure.
6. Having followed the goods to their office and we were asked to produce the receipts for purchasing the said goods.
7. Mr. Paul Mkisi gave them the receipts, however, they asked that we should go to the wholesale to verify.
8. In company of MRA officers, Police officers and Paul Mkisi they went to the wholesale where it was verified that indeed the goods were purchased at the said wholesale.
9. Several follow ups to the MRA offices to find out on reasons for their seizure have proved futile and the goods have not yet been released.
10. The goods are deteriorating and losing economic value.

**Wherefore,** It is my prayer that the court orders as follows:-

1. The goods of Mkisi be released to the owner.
2. That the Respondents should pay damages for their action.

## **5.0 Affidavit in opposition**

**5.1** Mr. Christina Mkandawire, Team Leader of Flexible Anti smuggling Team (North) filed an affidavit in opposition to the affidavit in support of the motion which we reproduce as filed.

I **CHRISTINA MKANDAWIRE**, Team Leader of Flexible Anti – Smuggling Team (North) in the employment of the Respondent, Malawi Revenue Authority, P.O. Box 247, Mzuzu, DO HEREBY MAKE OATH and STATE as follows;

1. THAT I am of full age.
2. THAT I am seized with the conduct of the background matters giving rise to this application in the Respondent's office as such I am dully authorized to swear this affidavit.
3. THAT I depose to all matters of fact which have come to my knowledge by virtue of the conduct of the background matters giving rise to this application the truth of which I verily believe.
4. THAT on 5<sup>th</sup> March, 2013, acting on a tip received by the Flexible Anti-Smuggling Team (FAST) in Mzuzu, we intercepted 104 cartons of Tiger Head Batteries from Mr. David Mwampachi, the first Applicant, of Mzuzu Chibanja on suspicion of non-payment of duty. A seizure notice number **046297** was issued in respect of the batteries. The seizure notice is attached and marked as exhibit "**CM 1**"
5. THAT it was later discovered that the oWner of the goods was Mr. Paul Mkisi, the second Applicant and that the first applicant was keeping the goods on his behalf.
6. THAT we demanded for clearance details of the Goods, and the 2<sup>nd</sup> Applicant produced a cash sale from Right Star Shop in Lilongwe.
7. THAT further steps were taken to verify the payment of duty of the goods from Right Star Shop in Lilongwe and it was found that Right Star Shop did not have any details pertaining to payment of duty of the said goods.

8. THAT as a result of the lack of evidence that duty on the batteries was paid, it was decided that the batteries will remain in the custody of the Respondent until duty on the said batteries was cleared.
9. THAT the second Applicant through a letter dated 26<sup>th</sup> March, 2013 wrote the Respondent requesting the release of his goods and this was followed by a letter dated 28<sup>th</sup> March, 2013 from the client's legal practitioner. The letters are attached and marked as exhibit '**CM 2**' and '**CM 3**' respectively.
10. THAT the Respondent on the basis of Section 162 and 163 of the Custom and Excise Act (cap 42:01) made a decision, dated 9<sup>th</sup> April, 2013, to the effect that the Applicants had been found to have committed the offence of smuggling goods in contravention to Section 134 as read with Section 142 of the Custom and Excise Act. The goods were valued at Mk1, 255,759.00 and the duty payable was assessed to be Mk1, 216,642.11. The Applicants were notified that the goods would only be released upon payment of the full amount of duty and a penalty amounting to Mk300, 000.00. A copy of the settlement notice is attached and marked as exhibit '**CM 4**'.
11. THAT I refer to paragraph 9 of the Affidavit verifying Facts of the first Applicant and state that a valid reason for the seizure of goods was provided and the Applicants were reliably informed that the goods were suspected as not having been cleared of duty. A fact which was contained in the seizure notice marked as exhibit '**CM 1**' and exhibit '**CM 4**'. Additionally further investigations at Right Star Shop, actually confirmed the fact that the goods were smuggled into the country, as duty was not paid for the goods.
12. THAT I refer to paragraph 4 of the second Applicant's affidavit in support of Reapplication and state that the second Applicant did not inform us nor show us the particular customer he had bought the batteries for.

13. THAT according to Section 156(b) (i) of the Custom and Excise Act the burden lies on the Applicants to prove that the duty on the batteries was paid, and such a burden has not been discharged by the Applicants.

14. THAT section 146 of the Custom and Excise Act, an officer to seize any goods which he reasonably suspects to be liable to forfeiture.

15. THAT contrary to the Applicants' assertions, considering the issues raised above it clearly shows;

(i) THAT the Respondent's conduct is reasonable and constitutional and the seizure of the goods was not arbitrary since the decision was made based on available evidence and within the Respondent's legal mandate per the Customs law.

(ii) THAT neither is the Respondent's conduct unlawful as smuggling of goods under customs control is illegal under Section 134 as read with Section 142 of the Custom and Excise Act (cap 42:01)

**WHEREFORE** we pray that the reliefs as prayed by the Applicant be dismissed in their entirety for lack of merit.

## **6.0 Law and Evidence**

### **6.1 Burden and Standard of Proof**

In civil matters there are two principles to be followed. Who is duty bound to adduce evidence on a particular point and what is the *quantum* of evidence that must be adduced to satisfy the court on that point? The law is that he who alleges must prove. The standard required by the civil law is on a balance of probabilities. Where at the end of the trial the probabilities are evenly balanced, then the party bearing the burden of proof has failed to discharge his duty. Whichever story is more probable than the other must carry the day.

**6.1.1** Suffice to say that section 156 (a) Customs and Excise Act provides that

In any proceedings under the customs laws

(a) It shall not, unless it is expressly so provided, be necessary to prove guilty knowledge;

(b) the burden of proving-

(i) the place of origin of any goods;

(ii) the payment of the proper duties;

(iii) lawful permission or authority; or

(iii) the lawful importation, exportation, carriage coastwise or in transit, loading, unloading, removal, possession, disposal, use or conveyance of goods,

shall be on the person prosecuted or on the claimant of any goods seized under the customs laws;

The law places the burden of proving that duty has been paid on the claimant. Whether this provision is constitutional or not, is not part of the pleadings and therefore not a matter for litigation in this case.

## **6.2** What is Judicial Review?

**6.2.1** Judicial Review is the most effective means by which courts control administrative actions by public bodies. (Including inferior courts and tribunals.)

Section 108 (1) and (2) of the Constitution is the lead provision.

*(1) There shall be a High Court for the Republic which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.*

*(2) The High Court shall have original jurisdiction to review any law and any action or decision by government for conformity with this constitution save as otherwise provided by this constitution and shall have such other jurisdiction and powers as may be conferred on it by this constitution or any other law.*

**6.2.2** Judicial review is a supervisory jurisdiction which reviews administrative action rather being an appellate jurisdiction. For judicial review proceedings to be entertained by courts the following preliminary issues must be satisfied.

### **6.3 Public Law**

**6.3.1** Only decisions or actions which are made in a constitutional or public law context are amenable to judicial review. This therefore means that even if a body is susceptible to judicial review not every decision will be reviewable if it is outside the ambit of public law. A clearer example will be matters of employment which are generally regulated by contract within the ambit of private law. On the issue of public law and judicial review Lord Diplock stated in O'Reilly vs. Mackman [1983] 2 AC 237.

*It would in my view as a general rule be contrary to public policy and as such an abuse of process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions (governing judicial review) for the protection of such authority.*

## 6.4 The Parties

**6.4.1** Judicial review can and must not be brought by or at the instance of the government. In general, judicial review lies against anybody charged with the performance of a public duty.

## 6.5 Locus Standi

**6.5.1** An Applicant in a judicial review proceeding must have "*sufficient interest*" in the matter. The purpose is to exclude the so called busy bodies. There must be a direct or personal interest. Whether a general interest qualifies within the meaning of *locus standi* is a question of law and fact. However courts have in recent times adopted a much broader and more flexible approach. The more important the issue and the stronger the merits, the more readily will a court grant permission notwithstanding the limited personal involvement of the Applicant.

## 6.6 The Grounds

**6.6.1** Judicial review proceedings must not issue merely because the decision maker has made a mistake. The Applicant must show that there has been a departure from accepted norms. That the decision making process has been characterized by illegality, procedural impropriety and irrationality. This is called the tripartite distinction. Based on the above this Court is convinced that this is suitable case for judicial review.

**6.7** The concept of Judicial Review is enshrined in section 43 of the Constitution of Malawi which is another lead provision in this case. The section provides as follows:

*Every person shall have the right to:*

- a) *Lawful and procedurally fair administrative action, which is justifiable In relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and*
- b) *Be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests are affected or threatened if those interests are known.*

**6.7.1** Section 35 Customs and Excise Act provides as follows:

*Without prejudice to the liability of the importer of goods to cause entry to be effected in accordance with section 32(1), goods which have been imported by conveyance shall also remain the responsibility of the owner of the importing conveyance, and such owner shall be responsible for the compliance with the Customs laws and liable for the duty on all such goods until such goods have been entered and otherwise accounted for to the satisfaction of the Controller.*

**6.7.2** I'm mindful of the provisions of section 134 of Customs and Excise Act which provides that any person who-

*(a) imports, exports, carries coastwise or in transit, loads, unloads, removes, possesses or conveys goods contrary to the provisions of the customs laws;*

*(b) imports or exports any goods in pursuance of any document or computer records and other electronic data in which a false declaration has been made;*

*(c) except in accordance with the customs laws, buys, receives harbours, offers for sale or deals in, or has in his possession any goods subject to customs control;*

*(d) except in accordance with the customs law, conceals, moves, alters, damages, destroys, removes, disposes of or in any way interferes or tampers with goods subject to customs control;*

*(e) offers for sale or deals in or possesses any goods under the pretence that they are smuggled goods whether or not they are in fact smuggled goods, shall be guilty of an offence.*

## **7.0 Determination**

**7.2** The affidavit evidence before this Court is straight forward. The second Applicant in this matter bought 105 cartons of Tiger batteries from Right Star Shop in Lilongwe on 20<sup>th</sup> February 2013. A receipt to this effect **PM1** has been presented to this Court. The value of the batteries on the receipt is Mk1, 575,000.00. He did not import these batteries into the country. He identified a customer in Mzuzu and he sent the consignment through a friend Mr. David Mwampachi the first Applicant.

**7.3** On 5<sup>th</sup> March, 2013 MRA officers went to Mwampachi's house and seized the batteries on allegation that duty was not paid. A notice of seizure No. 046297

was issued dated 5<sup>th</sup> March, 2013. The reason for the seizure was being found in possession with goods under customs control.

**7.4** Both the second Applicant and his legal representative Mr. Christon Ghambi wrote letters **PM 2** and **PM 3** to MRA explaining that the batteries were bought from a wholesaler in Lilongwe answering to the name Right Star Shop. They demanded the release of the batteries. Seeing that MRA was not releasing the batteries they sought the aid of the court. Section 46(2) (a) of the Constitution reads as follows:

*Any person who claims that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to make application to a competent court to enforce or protect a right or freedom.*

**7.5** When the MRA officers, the second Applicant and the Police went to Right Star Shop they met the owner who admitted selling the batteries to the Applicant. When he was asked to produce customs receipt as evidence that duty was paid the owner apparently stated that he had bought the batteries from street vendors. MRA claims that this meant that duty was not paid.

**7.6** In the affidavit in opposition Christina Mkandawire does not deny the existence of Right Star Shop. She does not deny that the owner of the shop was approached and he admitted selling the second Applicant the batteries. Why then were the Applicants' goods seized? It is my considered view that at the time when the batteries were being seized at Chibanja in Mzuzu without papers showing that duty was paid, MRA officers were perfectly entitled to seize the goods. When the second Applicant arrived to claim the goods without customs clearance certificate MRA officers were entitled to detain the goods.

**7.6.1** I'm mindful of the provisions of section 145 as read with section 146 (1) Customs and Excise Act which provides that any goods in respect of which an offence has been committed under the customs laws shall be liable to forfeiture. An officer of MRA or Police can effect such a seizure.

**7.7** However, after the verification exercise was conducted that indeed the goods were bought at Right Star Shop, MRA could have released the consignment of batteries to the Applicants and claim what ever duty was payable from the owner of Right Star Shop. According to section 35 Customs and Excise Act the Applicants did not import these batteries into Malawi. The owner of Right Star Shop was the only person who could have explained how he came to offer those batteries for sale in his shop. Whether the story that he bought them from street vendors holds any water, is not a matter for ligation in this matter.

## **8.0 Conclusion**

**8.1** The second Applicant was a bona fide purchaser who had no knowledge of any legal encumbrances involving those batteries. According to section 134 (c) Customs and Excise Act the Applicant did not have any knowledge that the batteries were subject to customs control *to wit* that duty had not been paid. MRA officers who went to the shop could have seized any other items in the shop belonging to the owner in lieu of the payment of duty on the batteries.

**8.1** The decision to continue to detain the Applicants batteries after it was discovered that it was the owner of Right Stat Shop who did not pay duty was unreasonable in the Wednesbury sense. No reasonable body discharging a public function could have made that decision.

**8.2** In Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1947] All ER 680, Lord Green MR stated as follows

*Decisions of persons or bodies performing public duties or function will be liable to be quashed or otherwise dealt with by an appropriate order in Judicial Review proceedings where the court concludes that the decision is such that not such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision.*

**8.2.1** A court when reviewing a decision making process will not simply quash a decision because it does not agree with it, but that it was unreasonable regard being had to the circumstances of the case and the dictates of administrative law. Once the decision is adjudged to be unreasonable it must be declared null and void within the Wednesbury test.

**8.3** I therefore issue a like order to certiorari quashing the decision of MRA to detain those goods. Ordinary people who go about their lives buying items in various shops cannot be made to account for duty as if they were importers. Allowing that to happen would be unreasonable in all sense.

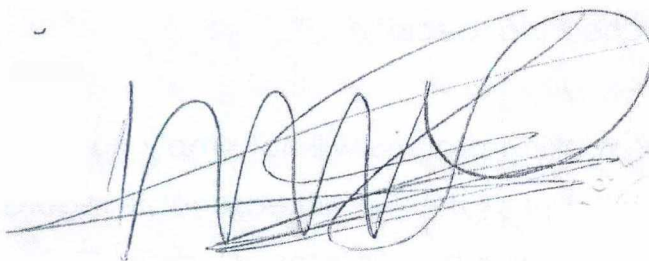
**8.4** I further issue a like order to mandamus ordering MRA to release the said batteries or proceeds of the sale of such batteries to the second Applicant within 7 days. If the MRA are desirous of pursuing this matter further they must sue the owner of Right Star Shop in order to claim duty on the Applicant's batteries. I make no further order.

**9.0 Costs**

**9.1** Costs are awarded at the discretion of the Court. I ward them to the Applicants.

It is so ordered.

**Pronounced** in Open Court at Mzuzu in the Republic this 29<sup>th</sup> April 2014.

A handwritten signature in blue ink, appearing to be 'D.T.K. Madise', written in a cursive style with several loops and a long horizontal stroke at the end.

D.T.K. Madise  
**JUDGE**