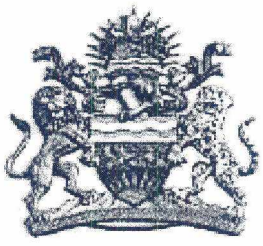

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

JUDICIAL REVIEW CASE NUMBER 5 OF 2017

***Re* THE STATE AND MALAWI REVENUE AUTHORITY *EX PARTE* BLANTYRE PRINTING AND PUBLISHING**

CORAM:

HONOURABLE JUSTICE JOSEPH CHIGONA

MR MPAKA , OF COUNSEL, FOR THE APPLICANT

MRS SAUTI PHIRI AND MR LIKOMWA, OF COUNSEL, FOR THE RESPONDENT

MR KAMCHIPUTU, OFFICIAL COURT INTERPRETER

CHIGONA, J.

ORDER

The applicant, Blantyre Printing and Publishing Company Limited brought ex-parte summons for leave to apply for Judicial Review on 13th day of January 2017, seeking from the court various reliefs as contained in Form 86A. The applicant was also seeking an interlocutory injunction and a stay order against the respondent, Malawi Revenue Authority. Upon reading the documents in support of the application, I allowed the applicant to move for Judicial Review and I also granted an interim order of interlocutory injunction and stay order, valid until 20th day of January 2017 when I was to hear both parties on the application for an interlocutory injunction. Suffice to mention that the inter-partes hearing on the continuation of the interlocutory injunction took place on

the appointed date of 20th January 2017. Let me commend both parties for their rich submissions during the hearing.

FACTS OF THE CASE

The facts of the case are that the respondent, a public body responsible for collecting taxes in the Republic issued a Distraint Certificate against the applicant on 13th January 2017 for Value Added Tax, Corporate Tax, Withholding Tax, Fringe Benefit Tax and Pay As You Earn Tax amounting to MK675, 969, 616. 75. The certificate was exhibited as **BNL 1**. This certificate was as a result of an audit that was concluded on 12th January 2017 following protracted negotiations between them. It is submitted that the parties had previously appeared in the High Court in another Judicial Review Case, ***RE THE STATE AND THE MALAWI REVENUE AUTHORITY EX PARTE BLANTYRE PRINTING AND PUBLISHING***[1]. It is submitted that the case is not concluded pursuant to negotiations between the parties as initiated by the respondent's letter dated 27th January 2016 exhibited as **BNL 2.** It is stated that through **BNL 2**, the respondent agreed that the applicant had a tax credit of K1, 025, 444, 674.80 in the hands of the respondent and that the said credit would be used to offset the applicants tax liability pegged at K1, 320, 665, 551.38 leaving a balance of only K304, 220, 836.58 according to the respondents own calculation. Finally, it was agreed that a consent order would be drawn up and resolve the said judicial review Cause No. 11 of 2013 as alluded above. Pursuant to **BNL 2,** the parties have carried on business as usual while the final details of the status of the tax responsibility was being examined between the parties. It is said that on 6th October 2016 and 12th January 2017, the respondent audited the applicant for income tax, comprising corporate tax, fringe benefits tax, withholding tax and pay as you earn tax, ordinarily payable under the Taxation Act and for value added tax payable under Value Added Tax Act. On 12th January 2017, the respondent submitted to the applicant its revised audit report in which it determined that a total sum of K675, 969, 316.75 as due under different tax regimes dating back to the year 2011as exhibited in **BNL 3.** The applicant submitted that no sooner had the applicant received **BNL 3** than the respondent issued a distraint certificate purporting to enforce recovery of income tax and value added tax as contained and stipulated in the said certificate marked as **BNL 1** above. As stated above, it is the issuance and

[1] Judicial Review case Number 11 of 2013

enforcement of this distraint certificate that forms the subject matter of the present proceedings.

During the hearing of the inter-parte summons for the continuation of the interlocutory injunction and stay order, the respondent made one preliminary application, which I am of the view, needs to be addressed first. I now proceed to deal with that preliminary application.

PRELIMINARY APPLICATION BY THE RESPONDENT

During the hearing, counsel for the applicant sought an order to amend Form 86A. This was granted as the respondents did not object to the same being granted. However, the respondent submitted to this court that through the applicant's amended Form 86A, the applicant is disputing the assessment of the tax by the Commissioner General. As a result, Counsel submitted that where an applicant for Judicial Review has not exhausted alternative remedies, the court will not in those circumstances if proved not grant leave for Judicial Review. If granted, counsel argues that the leave ought to be discharged, as in the present case. In other words, the respondent applied to this court to discharge leave for Judicial Review on the main reason that the applicant did not exhaust all available legal remedies. Counsel for the respondent cited the case of ***SIKU TRANSPORT-V-MALAWI REVENUE AUTHORITY***[2] and provisions of Section 98 of the Taxation Act.

Addressing the court on the argument on alternative remedy, counsel for the applicant disputed that the applicant is questioning the assessment by the Commissioner General. He submitted that the applicant is not at this point disputing the assessment, but rather the manner how its enforcement was carried out through the Distraint Certificate. In precision, the applicant argues that the distraint certificate combined sums of money under the Taxation Act as income tax and sums of money as value added tax under the Value Added Tax Act. He argues that this combination is not allowed under Section 40 of the Taxation Act as that provision is so specific as to the form to be used. In other words, he submitted that the respondent is not by law supposed to combine the two. During the oral submissions which this court also benefited from, applicant also argues that there was no reasonable notice given to the applicant. In response, the respondent submitted that notice was given to the applicants. In

[2] Commercial Case Number 112 of 2013

these circumstances, the applicant argues that there is no alternative remedy to these issues as they do not relate to the assessment as such.

THE LAW

I have looked at the law as contained in the Taxation Act. Section 98 of the Taxation Act stipulates that a tax payer aggrieved by a decision by the Commissioner General under Section 97 may appeal in the prescribed manner to a Special Arbitrator appointed either generally or specifically for that purpose. In the **SIKU CASE** (supra), the High Court discharged leave for Judicial Review after it was proved that the applicant did not exhaust all remedies as applicable under the Taxation Act. Citing the ***SIKU CASE,*** the Court also discharged leave for Judicial Review for the same reason in the case of ***THE STATE-V-MALAWI REVENUE AUTHORITY, EX-PARTE MIKE APPEL AND GATTO LIMITED***[3]**.** It is therefore not in dispute that a court has power to discharge leave for judicial leave where the same is necessary. However, I am of the considered view that the issues in the **SIKU CASE** are different to the issues in the present case.

ANALYSIS OF THE LAW AND EVIDENCE

I have gone through the amended Form 86A with the aim of discovering if the applicant is disputing the assessment by the Commissioner General. Suffice to state that the applicant in the Amended Form 86A is not disputing the assessment at all. This fact is also contained in their skeletal arguments that were adopted herein, that their claim is not on the assessment but rather, if I may, the mode and procedure of enforcement as alluded to above. This fact is also stated by the respondent in the affidavit in opposition sworn by Evelyt Manda in paragraph 20. The deponent expressly states that the applicant is not disputing the assessment, a fact that the applicant totally agrees. I therefore hold that the applicant indeed is not disputing the assessment as to avail itself to the remedies under the applicable law. I strongly believe that the law under Section 98 of the Taxation Act talks of an assessment and not otherwise.

It has to be mentioned also that this issue of alternative remedies was also extensively dealt with by the Court in ***RE THE STATE AND THE MALAWI REVENUE AUTHORITY EX PARTE BLANTYRE PRINTING AND PUBLISHING(supra).*** The court stated the following:

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[3] Judicial Review Case Number 65 of 2015

> " This means that the Revenue Authorities insistence that judicial review proceedings do not lie because BPP did not exhaust the steps prescribed by the Acts is untenable. Section 97 to 98 of the Taxation Act, Counsel for the Revenue Authority refers, concern assessment of tax. The procedure does not apply to where, like here, other decisions, not related to assessment of taxes, are impugned..."

This point was also well settled by The Supreme Court of Appeal in the case of ***THE STATE-V-THE COMMMISSIONER GENERAL OF THE MALAWI REVENUE AUTHORITY EX-PARTE AIRTEL MALAWI LIMITED,*** where Justice Mwaungulu, SC had this to say:

> " First, in respect of the Taxation Act this requires the consideration whether, based on the Taxation Act itself and other general considerations, the matter is amenable to appeal procedure. The appeal procedure is only available to where there was assessment of tax and relates therefore to the assessment. The appeal procedure does not apply to the question, like the one presently before this court, whether certain tax is payable or the tax payer is the one to pay it. That is not an assessment question and is not covered by the assessment procedure coveted here. Consequently, even if the matter was amenable to the appeal procedure, the Commissioner General and the special arbitrator, who can only deal with tax assessments, were either the wrong forum or could not properly or adequately handle the matter the basis of the judicial review."

Reverting to the present case, it is very clear that the issues are not to do with assessment as counsel for the respondent would like this court to believe. The issues are whether the respondent had given reasonable notice to the applicant before issuance of the distraint certificate, the issue of combination of different tax regimes and the form used as not conforming to the prescribed procedure under the law. The issue is not about assessment as to invoke provisions of Section 98 of the Taxation Act.

I agree that in those circumstances, it is just and fair that the applicant be allowed to proceed with the judicial review proceedings so that decisions of the respondent are reviewed. Having said that, I therefore dismiss the preliminary

application to discharge leave for Judicial Review. I now proceed to address the issue of the continuation of the interlocutory injunction.

THE LAW

The law has been settled and is very clear in applications for interlocutory injunctions as pronounced in the landmark case of ***The American Cynamide Company Vs Ethicon***[4]. The usual purpose of an interlocutory injunction is to preserve the ***status quo*** until the rights of the parties have been determined in the action. See Order 29/1/2 of the Rules of the Supreme Court. As was stated in the case of ***Mangulama and Four Others Vs Dematt***[5], by Tambala J, as he then was had this to say:

> "Applications for an interlocutory injunctions are not an occasion for demonstrating that the parties are clearly wrong or have no credible evidence...The usual purpose of an order of interim injunction is to preserve the ***status quo*** of the parties until their rights have been determined".

Lord Diplock in the ***American Cynamide Case*** laid down very important principles to be satisfied before granting an interlocutory injunction. The first principle is that the plaintiff must show that he has a good arguable claim to the right that he seeks to protect. Secondly, the court must not attempt to decide the claim on affidavit, it is enough if the plaintiff shows that there is a serious question to be tried. Thirdly, if the plaintiff satisfies these tests, the grant or refusal of an injunction is for the exercise of the court's discretion on a balance of convenience. The court must consider whether damages would be a sufficient remedy, if so an injunction ought not be granted. In the ***American Cynamide Case*** the court held that there was no rule of law that the court was precluded from considering whether on a balance of convenience, an interlocutory injunction should be granted unless the plaintiff succeed in establishing a ***prima facie*** case or a probability that he would be successful at the trial of the action. The court should be satisfied that the claim was not frivolous or vexatious i.e. that there was a serious question to be tried.

It has to be appreciated that Courts in Malawi have also applied the above principles in many cases before them. One such case is that of ***Amina Hamid***

[4] **[1975] AC 393**
[5] **Civil Cause Number 893 of 1999**

Daudi t/a Amis Enterprises Vs Sucoma[6] Mwaungulu J outlined the following principles:

I. A court will not grant an injunction unless there is a matter to go for trial.
II. Once there is matter that should go to trial, the court has to consider whether damages are an adequate remedy.

The learned judge had this to say on page 4 of his judgment

> "First, a court will not grant an injunction unless there is a matter to go for trial. This obviously filters cases not deserving the equitable relief that by its nature prevents exercise of rights before a court finally determines the matter...
>
> Secondly, once there is a matter that should go for trial, the court has to consider whether damages are an adequate remedy. This consideration requires answers to two sequel questions. First from the perspective of the defendant, even if damages are an adequate remedy, the court will refuse the injunction if the plaintiff cannot pay them...Secondly from the perspective of the plaintiff, if damages are an adequate remedy and the defendant can pay them the court will refuse an injunction. The court may therefore allow the injunction, where damages are an adequate remedy and the defendant can pay them."

Further it must be appreciated that damages will be an inadequate remedy where the plaintiff's or defendant's losses are difficult to compute. See ***ICL (Malawi) Limited Vs Lilongwe Water Board***[7].

In ***NOEL FOLE-V-MALAWI HOOUSING CORPORATION***,[8] commenting on the issue of damages and balance of convenience, Kamwambe J had the following to say:

> " an application for an order for an interlocutory injunction is determined on affidavit evidence because

[6] **Civil Cause Number 3191 of 2003**
[7] **Civil Cause Number 64 of 1998**
[8] **Civil Cause Number 48 of 2015**

> it is enough that the applicant has shown that there is a triable issue and that damages would not be adequate compensation. If damages turn out to be adequate compensation the court is better not to grant the request. At times even if damages may be adequate or not the court is called to consider the principle of the least injustice or inconvenience. The court will lean in favour of the least injustice outcome between granting and refusing to grant the injunction".

In a nutshell, the above is the law on the granting of interlocutory injunctions.

ANALYIS OF THE EVIDENCE

The first issue that I have to decide is whether on the facts of the present case, there is/are triable issue(s). At this point, it is imperative for me to state verbatim what issues the applicant bring before this court. From the amended Form 86A, the applicant is challenging the following decisions made by the respondent:

> *1) The respondent's decision contained in the Distraint Certificate dated 13th January 2017 to distrain for the compounded sum of K675, 969, 616. 75 allegedly comprising Value Added Tax, Corporate Tax, Withholding Tax, Fringe Benefit Tax and Paye As You Earn Tax due and owing to the Malawi Revenue Authority.*
>
> *2) The respondent's decision contained in the Distraint Certificate dated 13th January 2017 to combine and distrain for sums of money that may be due under the Taxation Act as income tax and sums of money that may be due as value added tax under the Value Added Tax Act.*
>
> *3) The respondent's decision contained in the Distraint Certificate dated 13th January 2013 to distrain for sums of money that may be due under the Taxation Act as income tax and sums of money that may be due as value added tax under the Value Added Tax*

Act without complying with the prescribed statutory procedure and forms for issuing distress under the Value Added Tax Act.

4) The respondent's decision contained in the Distraint Certificate dated 13th January 2017 to issue distress for alleged taxes due without notice in terms of the Value Added Tax Act and without providing for reasonable time for compliance in terms of the Value Added Tax Act and the Taxation Act.

5) The respondent's decision contained in its audit report dated 12th January 2017 and the Distraint Notice dated 13th January 2017 to include sums not due and payable in its current claim and distress for taxes on the compounded sum of K675, 969, 616. 75 inclusive of sums for the period between January 2011-June 2012 notwithstanding the findings of the Court concerning an earlier demand by the respondent for the sum of K1, 329, 665, 511.38 and the status of the proceedings on the said demand in Judicial Review Cause No. 11 of 2013.

Suffice to say that during the hearing, counsel for the applicant explained in detail the above decisions that he thinks require judicial review. On failure to give notice as submitted by counsel for the applicant, counsel for the respondent argued that the applicant was given notice as demanded by law. On combination of the different tax regimes and the forms used, counsel for the respondent argues that what matters most is the content and not the form. In other words, counsel for the respondent submitted that there are no any triable issues warranting continuation of the injunction herein. Having analyzed arguments from both parties, I am of the considered view that the issue of notice, combination of different tax regimes and use of statutory forms are all triable issues requiring full trial and I so hold.

Now let me deal with the issue of adequacy of damages. Counsel for the applicant has argued that damages in the circumstances will not be an adequate remedy. He argued that as per Section 107 of the Taxation Act, assets seized are to be disposed of within 5 days and under Section 40 of the Value

Added Tax Act, assets are to be disposed within 14 days. He said assuming that the applicant is successful, it will very difficult to bring back those assets. He submitted that if the respondent is successful at trial, distress will still take place and that the respondent will not suffer any damages at all. In response, counsel for the respondent argues that damages are adequate in this case. She submitted that it will be very easy to calculate the damages as costs of the vehicles seized and sold is known, and hence its easy to calculate.

Having considered the issues at hand, I am inclined to conclude that damages will not be an adequate remedy. It seems that the respondent is only looking at the value of the seized chattels/items and not what those items mean to the applicant as a media group. I do not think that only money can compensate the applicant. In the ***re THE STATE AND MALAWI REVENUE AUTHORITY EXPARTE BLANTYRE PRINTING AND PUBLISHING(supra),*** Justice Mwaungulu (as he was then) had the following to say on damages, which I am more than compelled to adopt:

> " The first consideration is whether damages, on the claimant's undertaking to pay damages, would be an adequate remedy for the claimant or defendant or another interested party. Where the allegation is that a public officer has exceeded his powers, acted unlawfully, without authority or unfairness, as damages generally would be an inadequate remedy. If money was the only consideration, there would be unwholesome licence to public official to act out of colour at the prospect of monetary reward to citizens. Granted government resources and ability to pay, it will always be that government will be able to pay or bail out its public officials in circumstances where the citizen could be put to much difficulty to afford compensating even an errant public authority or power. The availability of damages as a remedy may not, therefore, determine the matter. The matter, therefore will turn on the balance of convenience or justice and whether there is an issue to be tried."

I therefore hold that damages will be inadequate looking at the circumstances obtaining herein. Having decided that damages will not be an adequate compensation, I now deal with the balance of convenience.

In dealing with balance of convenience, I have to assess who between the parties will suffer least injustice if I grant or refuse the injunction herein. The applicant is a business entity that has as of now operated in this country for many years. Indeed, it has contributed positively to the development of this country through payment of taxes and continues to do so. It is the belief of this court that allowing the applicant to continue operating its business is the best course of action to take in these circumstances. I am of the view that refusing to allow the injunction to continue will cause more injustice to the applicant than the respondent, who, in my opinion, may still distress on the applicant as long as the applicant is in business. I am very well aware that the respondent, as a tax collector, is under statutory duty to execute its duties that are in the best interest of our beloved nation as argued by the respondent. However, that duty does not exist in a vacuum. Justice Mwaungulu (as he then was) had the following to say in ***re THE STATE AND MALAWI REVENUE AUTHORITY EXPARTE BLANTYRE PRINTING AND PUBLISHING(supra)***:

> " We are now greatly enjoined to consider the public interest when considering granting injunctions generally and against or its official in particular. That does not mean that we must not grant injunctions against public officials because of the public interest. It means that we must regard that interest as part of the general considerations. For indeed, there will be cases where granting an injunction, all considered, despite or in spite of the public interest, will be the right thing to do. That will be the case where the public interest consideration may impinge unfairly or exorbitantly on the rights of a citizen, more especially to the citizen's liberty or right to property."

I am of the considered view that in the present case, it is fair that the applicant be granted the relief he is seeking despite the public interest principle advanced by the respondent. The duty to collect taxes need to be undertaken in a fair and reasonable manner. This means that in certain circumstances, as the law allows, the actions of the respondent will be subjected to scrutiny to make sure that the law is respected. It is therefore my finding that balance of convenience tilts towards continuation of the injunction and stay order so as preserve the status quo until the issues herein are resolved.

CONCLUSION

In the circumstances as explained above, I allow the continuation of the injunction and stay order that I granted until all matters are resolved. However, looking at the issues herein, I order that the trial be expedited.

COSTS

Costs follow the event. However, courts have discretion whether to award or not or to make any order with respect to costs. The issues being raised in the present case are beneficial to both parties . I therefore exercise my discretion and order that each party should bear its own costs.

Pronounced in Chambers on 7th day of February 2017 in the Republic of Malawi.

Joseph Chigona

JUDGE