IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
MISCELLANEOUS CIVIL CAUSE NO. 15 OF 2013

BETWEEN:

SIKU TRANSPORT LIMITED.....PLAINTIFF

-AND-

MALAWI REVENUE AUTHORITY.....DEFENDANT

CORAM: HON. JUSTICE M.L. KAMWAMBE
Mr Mapemba of Counsel for the Plaintiff
Mr Likomwa of Counsel for the Defendant
Mr Phwitika, Official Interpreter

RULING

Kamwambe J

This is Plaintiff's application for an order of an interlocutory injunction taken under Order 29 Rule 1 Rules of the Supreme Court.

This application arose after the Defendant garnished against the Plaintiff as a result the account of the Plaintiff at National Bank of Malawi was closed. This has resulted in Plaintiff's workers not being

paid, and Plaintiff's failure to carry out certain contracts with other clients corroding the good will it has built for thirty years.

Let me in the outset mention it that I did not appreciate the way the exhibits were arranged by the Defendant although I understand that they were working hurriedly and against time.

There were prior negotiations from about the end of 2011 until March 2013 when after the garnishee order Plaintiff rushed to this Court for an injunction. The Defendant quantified Plaintiff's duty payable since 2011 at K391,135,567.00m. Plaintiff disputed this figure. A second assessment which was done by the officers of the Defendant who are suspected of corruption and malpractice came to Mk134,905,936.77. This figure which was disowned by the Defendant and was paid by six installments and not three as promised. The total figure minus interest demanded by the Defendant was K388,799,126.22. This gave rise to the Defendant writing Plaintiff under letter signed by one Henry Ngutwa, the Director of Tax Investigation which is exhibited as "HN8" dated 21st February 2013. It is just proper that I bring it up.

MRA/TID-HCN/SIKU/04/13 *21st February 2013*

MMK International
P.O. Box 950
Blantyre
Malawi

Attention: Mr Kharodia

Dear Sir

SIKU TRANSPORT LIMITED – TPIN: 20123882

We refer to the meeting we had this afternoon in our Boardroom in Msonkho House. This followed your Client's request to be given more time within which to produce documents to allow for apportionment of mixed supplies and taxable supplies for purposes of section 32 (2) of the VAT Act.

> *"Your Client has all along failed to produce these documents; right from the audit stage of this case. Even when the matter came up for investigations, your Client was given ample time to produce the same. Our final position, therefore, is that the Notice of Intent to Distrain which was previously suspended will be and is hereby reinstated with immediate effect. Please advise your Client that we will now be levying distress without further recourse to them whatsoever.*
>
> *We would also want to point out that serious allegations of corruption have been made in respect of the way assessment of your Client's VAT liability was reduced from K388,799,126.22 to K134,905,936.77. That is being investigated separately both internally and externally.*
>
> *We reiterate the point that your Client has not appealed against applicability of section 32(2) of the VAT Act. In the circumstances we cannot re-open the assessment process. For that reason, your request that the Commissioner General applies section 32(6) of the VAT Act cannot be granted. In fact doing so would amount to revisiting the assessment and changing the method of calculating input tax allowance when there is no appeal as mentioned above. In any case, the Commissioner General cannot invoke section 32(6) aforementioned when we are in agreement that section 32(2) is the applicable provision. Your only concern, as we see it, is that while applying section 32(2) we should change the viable of the formula there under in your suggested manner. Your contention is that the Commissioner General may effect these changes using his powers under section 32(6). That argument is not correct. Firstly, the formula*

obtaining under section 32(2) is prescribed in the 4th schedule to the VAT Act and it cannot be changed just to suit your Client's interests. Secondly, section 32(6) provides For an alternative method that may be applied if the methods prescribed under section 32 of the VAT Act have proved futile. It is a method of last resort.

Your Client may also be advised further that interest continues to accrue on the assessed amounts. They are better off settling this liability before the said interest is re-assessed.

We trust you will find the above in order.

Yours faithfully

Henry C. Ngutwa
Director of Tax Investigations
FOR: COMMISSIONER GENERAL

CC: *Commissioner General*
Deputy Commissioner General
Commissioner Domestic Taxes
Deputy Commissioner, Domestic Taxes – Technical
Investigations Officer

The above letter has explained satisfactorily why the second tax assessment could not be accepted by the office and Counsel for the Defendant went further to say that the query against the 1st tax of K391,135,567.00m did not go through the Commissioner General to be stamped and to be sent to the right persons to deal with the issue. Instead it was personally given to certain individuals who did not have the mandate of the office to carry out a VAT reassessment. Hence, after the first assessment one cannot say that there was an

effective objection raised to the Commissioner General resulting to the second assessment.

My understanding of Ngutwa's affidavit paragraphs 4.0 to 4.5 is to the effect as above said that although Plaintiff may say that he raised an objection to the first assessment, it was unprocedurally done, hence the 2nd assessment was disowned. Therefore the situation is a good as no objection had been made to the Commissioner General. To be more direct, in paragraph 6.7 Defendant says that exhibit "AMR 6" which is supposed to be Plaintiff's appeal for waiver was hand delivered by the Plaintiff to the officer who did the second review.

The Plaintiff wants this court to believe that there was a third assessment made, thereby confusing the situation by having three tax figures. I wish to agree with the Defendant that the so called assessment of K388,799,126.22 is not really another reassessment but the same initial amount of K391,135,567.00 from which interest was removed bringing it to K388,799,126.22 and from which VAT and withholding tax that Plaintiff paid was subtracted and finally coming to the tax amounting of K308,065,186.61 which is being claimed. This is again satisfactorily explained by the Defendant's affidavit in paragraph 6.15 and 7.0. So there are no inconsistencies in the figures as claimed by the Plaintiff and the Defendant had made its position clear as to what was claimed.

I note that the Plaintiff was moving slowly to settle this issue once and for all and was seemingly interested in delaying the issue or trying to reopen the issue when the Defendant's position was

clearly established and known. This is evident from Defendant's affidavit, paragraphs 7.4 to 7.13. I bring them out as stated.

7.4 ***THAT*** *on page 2 of the "**HN6**" the Applicant further requested to be allowed time to carry out the exercise they were supposed to do. To date the Applicant has not done the needful.*

7.5 ***THAT*** *in January 2013, noting that the Applicant was content to just sit back and not produce the required information for purposes of looking into the objections they raised, the Defendant moved in line with the law and demanded payment and gave notice of intention to Distrain in line with the law unless the assessed K308,065,186.61 was paid. I now produce and exhibit hereto a copy of the said Final Notice which I exhibit hereto marked "**HN7**".*

7.6 ***THAT*** *on 14th January 2013 the Applicant through its auditors responded to the Final Notice herein with a plea for the Defendant's".....**Comments on points raised in our letter of 26th November 2012 to allow our Client to submit the breakdown of input VAT between Taxable Sales, Exempt Sales and Subcontractor Sales.**" This was clearly a show of no seriousness on the part of the Applicant in that instead of producing the documents they had undertaken to propduce in November 2012, they were, in January 2013, still asking for the Defendant's comments on their undertaking. I now produce and exhibit hereto copy of the said letter marked "**HN8**".*

7.7 ***THAT*** *by letter dated 16th January 2013 the Defendant*

*responded to the Applicant's letter of 14th January 2013 advising that negotiations had been done and the defendant position on this matter was made clear to the Applicant. I now produce and exhibit hereto a letter I wrote marked "**HN9**".*

7.8 ***THAT*** *by letter dated 18th January 2013, which I now produce and exhibit hereto marked "**HN10**" the Defendant advised*

*me that they had earlier on the 16th January 2013 met with the Commissioner General and his team regarding the Notice of intent to Distrain and that they had agreed that the same be suspended "**until such time as SIKU Transport produced the workings to apportion the input tax between exempt turnover and taxable turnover.**" On the same day, I advised the Applicant that the Notice had been suspended until further notice. I produce copy of my letter of the same day which I now exhibit hereto marked "**HN11**".*

7.9 ***THAT** noting that the Applicant had to be told that a decision had already been made in respect of the issues they were trying to work on, the Defendant arranged for a meeting for the 6th February 2013. I exhibit hereto a copy of my letter dated 31st January 2013 to that effect marked "**HN11**". The Defendant responded thereto by suggesting that the meeting be held any day after 11th February 2013. See copy of the letter which I now produce and exhibit hereto marked "**HN12**". By letter dated 12th Februarys 2013 which I now produce and exhibit hereto marked "**HN13**" the Defendant rescheduled the meeting to 20th February 2013.*

7.10 ***THAT** at the said meeting, the Applicant instead of producing the workings they said they were now able to start re-opening the arguments with regard to the assessment. I hereby produce a copy of the letter by the Applicant's auditor which I exhibit hereto marked "**HN14**". The Defendant advised the Applicant that they could not have an open ended time within which to produce the workings. As such the final decision was that enforcement would ensue. I now produce a copy of the letter I wrote to that effect soon after the meeting which I exhibit hereto marked "**HN15**". As such paragraph 7 of the Applicants supplementary affidavit is a clear mis-representation of fact. In any case the Applicant was mis-informed by its auditors that the Defendant had undertaken to a re-assessment.*

7.11 **THAT** I refer to paragraph 8 and 9 of the Applicant's supplementary affidavit and state that the Defendant's enforcement action herein is in line with the tax laws as mentioned herein above and if there was any mis-representation with regard to re-assessment herein the same was caused by its auditors and not, the Defendant in the wake of exhibit "**HN15**" herein.

7.12 **THAT** I have read paragraph 10 of the Applicant's supplementary affidavit and my response is one of complete shock at the Applicant attempt to misinform the Court. First, there is no evidence that the Applicant had paid K45 million in provisional tax for 2013 year. But even if the same is true, the claim herein is about **VAT** and not income tax. Therefore the provision tax whether paid or not has no bearing whatsoever in this regard. Second the Defendant does not owe the Applicant K157 million in Withholding Tax from2013 which is offsettable or refundable. If anything on "**AMRS3**" does not show the Defendant anywhere. The parties on "**AMRS3**" owe the Applicant Withholding Tax which they have to remit on the Applicant's behalf to the Defendant. Again, as with provisional tax above, Withholding tax is about income tax and even if it were correct that the Defendant owes the Applicant the said sums in Withholding tax the same would have no bearing on the VAT claim herein. Third, there is no evidence before the Court that the Applicant pays over K75 million as PAYE and other takes every month. Whether the Applicant's tax obligations are up to date can only be verified by an income tax audit by the Defendant which has not been done.

7.13 **THAT** I have read paragraph 11 to 17 of the Applicant's supplementary affidavit and I am short of words regarding the misconception raised thereby. By enforcing payment of assessed taxes the Defendant is just enforcing the law.

Garnishee is an enforcement mechanism allowed by the law and they are effected all the time on taxpayers. The Applicant is not the only one. In fact as I am deposing to this fact herein there are several taxpayers who have been garnisheed eg. ***Delamere properties***, ***Transglobe***, ***BP&P***. *We have issued a Final Notice to* ***Banja la Mtsongolo*** *and many others including individuals.*

Further, to show that Plaintiff was dilly-dallying in dealing with this matter, let me refer you to exhibits HN8, quoted before and HN9, quoted below,

"HN9"

MRA/TID-HCN/SIKU/04/13 *16th January 2013*

MMK International
P.O. Box 950
Blantyre
Malawi

Dear Sir

SIKU TRANSPORT LIMITED – TPIN: 20123882 – NOTICE OF INTENT TO DISTRAIN

We refer to your letter dated 14th January 2013 on the above.

We would like to advise that the issues you are seeking clarification on were already discussed and disposed of at various meetings with your client. You may wish to note that to date your client has not even appealed against the findings of our investigations.

We view your letters as a veiled attempt to re-open discussions that have already been concluded thereby delaying collection of taxes.

Please be advised that we cannot suspend the Notice of Intent to Distrain served on your client and we will proceed accordingly in that regard.

Yours faithfully

Henry C Ngutwa

Director of Tax Investigations

FOR: COMMISSIONER GENERAL

In my view these letters amongst many, show that the Defendant had tried to make known its stand but the Defendant was bent to move in circles. Even Messrs ER Tax Consultants, came to understand eventually what the Defendant had done and was saying and in exhibit HN17 the consultants give an admission to the effect that the Defendant have all along been right. Unfortunately this letter too requested yet again for more time within which the Plaintiff should revisit their workings. I bring out as well exhibit "HN17" (old) dated 3rd April 2013.

3rd April, 2013

The Commissioner General

Malawi Revenue Authority

Private Bag 247

BLANTYRE

Dear Sir

RE: SIKU TRANSPORT LIMITED TPIN: 20123882

We make reference to numerous pieces of correspondence between yourselves, the taxpayer and MMK International. We also make reference to the meeting that took place between Mr. Ngutwa, Director of Investigation and that the undersigned during which the whole point of dispute between the taxpayer and yourselves was clearly explained to us. We are grateful for the explanation. It is now clear even to the taxpayer that due to mixture of the business operations section 32(2) has to be used o come up with an estimated way of determining the tax liability of the taxpayer. As you had explained, it would distort the picture of sales if what is referred to as subcontractor sales were deducted from sales. However as it is noted to produce these total subcontractors sales, an expenditure was incurred by the taxpayer to produce the total sales. We are therefore requesting for little time to rework the taxable sales for purposes of use of section 32(2). As you are aware, part of the payments relate to exempt purchases while part of the amount of purchases relate to taxable purchases. We are very much aware how long this case has taken and the urgency with which you would like to come to a closure. We will therefore speedily submit our calculations which we think will reflect the correct tax position of the taxpayer. We are aware that this is what you would like to see happen.

On a separate note we are aware of the appointments of agents that has been made. It is our humble request on behalf of the taxpayer that the action taken be reversed so that the taxpayer is allowed to settle his proper tax liability that will be determined after use of section 32(2). When you consider the mere fact that because of this very issue the taxpayer has not been issued with a Withholding Tax Exemption Certificate and part of this tax was paid based on old assessment, in our view, the fears of revenue loss which drive you to take enforcement action can be put on hold. The taxpayer as it is will have overpaid his tax.

support that you give to taxpayers in the country.

Yours truly

E. Kaluluma

For: EK Tax Consultants

CC: *The Managing Director – Siku Transport*

MMK International Public Accounts

The law of injunctions is well appreciated by both Counsel. The court has to exercise its discretion whether to grant the injunction or not. In the case of **Ian Kanyuka suing on his own behalf and on behalf of the members of the National Democratic Alliance (NDA) vs Chiumia**, Civil Cause No. 58 of 2003 (unreported(), ***Tembo J***, as he then was said:-

> *"Order 29 of the Rules of the Supreme Court makes provision for general principles respecting the grant or refusal of an application for an interlocutory injunction. The usual purpose of an interlocutory injunction is to preserve the **Status quo** until the rights of the parties have been determined in an action. The order is negative in form, thus, to restrain the defendant from doing some act. The principle to be applied in application for interlocutory ijunctions have been authoritatively explained by Lord Diplock in **American Cynamid Company vs Ethicon Limited (supra)**. The Applicant must establish that he has a good arguable claim to the rights he seeks to protect. The court must not decide the claim on affidavits before it; it is enough if the Applicant shows that there is a serious question to be tried. If the Applicant satisfied these tests, the grant or refusal of an injunction is a matter for the court's discretion on a balance of convenience. Thus the court ought to consider whether damages would be a sufficient remedy. If so an injunction ought not be*

granted. Damages may not be a sufficient remedy if the wrong in question is irreparable or outside the scope of pecuniary compensation or if damages would be difficult to assess. It will be in general material for the court to consider whether more harm will be done by granting or by refusing an injunction....."

It is now common knowledge that a court will not grant an injunction unless there is a matter to go for trial. Secondly, if damages are an adequate remedy then an injunction can be granted unless they cannot pay them. Sometimes damages may be difficult to quantify, the court then would refuse to grant bail.

This court has found as a fact that the Defendant was not legally wrong to issue a notice of intent to distrain on the Applicant, and that it was not wrong to freeze the Applicant's Bank Accounts. It did all this in pursuance to its lawful duties. Further, the Applicant is misconceived to think that the Defendant kept on changing the tax figures against the Applicant. As such, I do not see that the Applicant has a matter to bring to court for trial. Settlement of this matter is well overdue so much so that any more negotiations will not yield anything valuable and in any case discussions may still continue after tax remittance. Consequently, this court refuses to grant the interlocutory injunction sought by the Plaintiff, with costs.

Made in Chambers this 19th day of November, 2013 at Chichiri, Blantyre.

M.L. Kamwambe
JUDGE