HIGH COURT
REGISTRY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

JUDICIAL REVIEW CAUSE NO. 5 OF 2017

BETWEEN

THE STATE

AND

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

EX-PARTE

BLANTYRE PRINTING AND PUBLISHING COMPANY LIMITED..... APPLICANT

CORAM: THE HONOURABLE JUSTICE JOSEPH CHIGONA

MR PATRICK MPAKA,OF COUNSEL FOR THE APPLICANT

MRS LYDIA SAUTI-PHIRI, OF COUNSEL FOR THE RESPONDENT

MR FELIX KAMCHIPUTU, OFFICIAL COURT INTERPRETER

ORDER

This is an application brought by Blantyre Printing and Publishing Company Limited (herein after referred to as the Applicant) for judicial review of the decision of the Commissioner General of Malawi Revenue Authority (hereinafter referred to as the Respondent) to distrain on the applicant for tax liabilities. The applicant is challenging the following decisions made by the respondent, as contained in Amended Form 86A:

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.

The applicants are now seeking the following declarations:

1) A declaration that on the true construction of the respondent's letter dated 27th January 2017 and in the context of the parties' previous dealings on the subject matter as evidenced in the respondent's letter dated 26th March 2008 as read with Sections 107 of the Taxation Act, 40(2) of the Value Added Tax Act and 43 of the Constitution and status of the negotiations between the applicants and the respondent as to manner for conclusion of Judicial Review Cause No 11 of 2013 following the interim findings of the Court therein and in the context of the Applicants current relations with state authorities in the performance of its functions as media group of companies, the respondent has acted contrary to the Applicant's reasonable and legitimate expectations concerning recovery of taxes if any is due and taken into account irrelevant considerations in reaching the decisions reflected in his Distraint Certificate dated 13th January 2017 in purporting to distress for taxes against the Applicant under the taxation laws.
2) A declaration that it is unreasonable in the wednesbury sense for the respondent as a statutory body charged with specific public law functions to lump together alleged taxes due under different tax regimes and purport to enforce the same under a Distraint Notice, non compliant with mandatory statutory forms and to ignore the judicial findings in Judicial Review Cause No 11 of 2013 and the status of its negotiations with the Applicant therein after the said judicial findings and proceed to issue distress for taxes which at least in part falls the same subject of the said previous proceedings.
3) A declaration that it is unreasonable in the wednesbury sense for the respondent as a statutory body charged with public law functions to lump together sums of money allegedly assessed due or alleged due under the Taxation Act and the Value Added Tax Act for the gross sum claimed under different legal regimes and to conflate and distress such sums without complying with the requirements for notice and for use of the forms prescribed by statute.
4) A declaration that it is unreasonable in the wednesbury sense for the respondent as a statutory body charged with public law functions to act in the manner in breach of the Applicant's legitimate expectations and to take into account irrelevant considerations contrary to its own statutory dictates and practice in the purported performance of his function through distress process.
5) An order akin to certiorari quashing each of the decisions and nullifying the Respondent's Distraint Notice dated 13th January 2017.
6) An order akin to mandamus directing the Respondent to take appropriate lawful steps as the declaration hereinbefore shall determine prior to proceeding with the implementation with any recovery of taxes by way of distress against the Applicant if at all.

However, it has to be put on record that during oral submissions, the Applicant concentrated on the following:

1) *Combination and form*; 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.
2) *Notice*; to issue distress for alleged taxes due without notice in terms of the Value Tax Act and without providing for reasonable time for compliance in terms of the Value Added Tax Act and the Taxation Act.
3) *Legitimate expectation*; the Respondent's decision contained in its audit report dated 12th January 2017 and the Distraint Notice dated 13th January 2017 to include its current claim and distress for taxes the compounded sum of K675,969,616.75 inclusive 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.

Allow me at this point to express my gratitude to both counsel for their industrious and enriching oral submissions that will assist me in making this order.

FACTS OF THE CASE

Briefly, 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

[1] Judicial Review case Number 11 of 2013

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

The Applicant's case

In both oral and written submissions, counsel for the Applicant submitted to this court that 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 back to the year 2011. In that letter, Counsel submits that it was delivered to Applicant on 12th January 2017 at or around 4:30pm. Thus, no sooner had the Applicant received the said letter than the Respondent issued a Distraint Certificate on 13th January 2017 at around 9:00 am purporting to enforce recovery of Income Tax and Value Added Tax as contained in the Distraint Certificate. Counsel for the Applicant argues that according to Section 40(2) of the Value Added Tax Act and Section 107 of the Taxation Act prescribes that there should be notice in writing. Counsel argues that there was no written notice given to the Applicant by the respondent. In the circumstances, the Applicant says that the Respondent has exceeded the limits of the law and its powers by the decision affecting the Applicants business.

On the second issue of combination and form counsel argues that in spite of mandatory provisions of Section 40(3) of the Value Added Tax Act as to the Form of a Warrant of Distress to be compliant with form A set out in the Fifth Schedule, the Distraint Certificate in the said Certificate is in a form not known to the law in spite of it purporting to enforce recovery of valued added tax.

Counsel is of the view that the form that the Respondent used was non-compliant with the Value Added Tax Act and has no prescription under the Taxation Act. Counsel cited the case of **Chidzankufa v Nedbank Malawi Limited**[2], where a Court declared null and void a Bill of Sale that did not comply with Form 2. It was held that Section 14 of the Bills of Sale Act makes it clear that compliance with Form No 2 is mandatory for all bills of sale given as security for payment of money. Counsel submitted that Value Added Tax Act prescribes the form to be used as shown by **BNL 4.** Counsel submitted that Taxation Act does not prescribe the form to be used.

Further, the prescribed form does not recognize the conflating of tax regimes and that the Distraint Certificate did the opposite of the law. While counsel for the Applicant concedes that Taxation Act does not prescribe any form thus the Respondent could argue that they could do it anyhow, however it cannot be combined with one that is prescribed under Section 40(2) of the Value Added Tax Act as a result of the problems that arise in the subsequent process as

[2] (1 of 2008) MW COMM C 4 (unreported)

stipulated in Section 40(7) of the Value Added Tax Act and Section 107 (3) (b) of the Taxation Act. While the former Section prescribes that a distress must be kept for 14 days, the latter prescribes for 5 days. Therefore, it is the contention of the Applicant that conflating of Distraint under the said Certificate creates an irreconcilable position to the detriment of the Applicant.

As to the last issue of legitimate expectation, the Applicants avers that in issuing and implementing the Distraint Certificate dated 13th January 2017, the Respondent took into consideration irrelevant considerations, ignored relevant considerations, breached the Applicants legitimate expectations on the subject of recovery of outstanding taxes and that if any, has been actuated by malice or propelled with intent to muzzling the Applicant's press freedom.

The Applicant further avers that in the negotiations that emanated from Judicial Review Cause No.11 of 2013, the Respondent acknowledges it owes the Applicant K1, 025, 444, 674.80 in tax credits and that this sum would be used to offset the Applicants tax liability. As a result, the parties have not prosecuted the said Judicial Review Cause No.11 of 2013 to conclusion pending a formal conclusion of the matter through Consent Order as suggested by the Respondent. It is while the formal conclusion of the matter is pending that on 12th January 2017 the Respondent delivered the audit report indicating that the sum of K675, 969, 316.75 is due and payable.

The respondent Case

Counsel for the Respondent argues that the notice was given. She argues that there was first audit report of 22nd June 2016 and the Applicant responded to that report. The Respondent then issued notice after the response on 20th July 2016 and in that response the Respondent admitted that the sum of K215, 373, 831.13 is actually owing to Malawi Revenue Authority and that the Respondents are demanding the sum the Applicant is not disputing.

Thereafter, on 15th September, 2016 the Respondent again issued a demand for the sum of K1, 948, 067, 300.09[3] . Counsel submitted that the Applicant lodged a complaint with the Respondent. After consideration of the complaint, the Respondent arrived at the sum of MK675, 569, 616. 75, a sum which they issued a Certificate of Distraint. Counsel argues that this sum was not as a result of a different audit. Counsel stated that the Applicant was already aware of the amount the Respondent was claiming. She submitted that the Applicant had notice since June 2016. Counsel told the court that in practice, 7 days notice is given before enforcement of the certificate.

On the issue of the form of the Distraint and the combination of different tax regimes, Counsel submitted that the **Chidzankufa Case** cited by the Applicant was so specific on what should happen if there is non-compliance. She argues that the position is different as the Value Added Tax Act does not stipulate that any non-compliance of Form A be declared invalid. Counsel argued that in this case the court is referring to Section 14 of the Bills of Sale Act. She argues

[3]not certain if the same is the correct figure

that instead the court should look at the contents of the form rather than design of the same. She submitted that in her view, the Distraint Certificate had all elements as provided under the prescribed Form A. On combination, counsel did not object to the combination. However, she submitted to the court that in the unlikely event that the form is nullified, the income tax amounting to MK124, 945, 502. 50, be allowed to stand as it is on a prescribed form.

Lastly on the issue of legitimate expectation the Respondent contends that that this Court ought not to lose sight that they were two audits and should be treated separately, because the issue of the first audit is the subject matter in another matter in the High Court. She submitted that what Counsel for Applicant referred this court to in the letter proposing for settlement of the liabilities is not the liability that is in this Court and not the subject of liability under the distraint.

Counsel further argues that in the letters the Applicant is relying on legitimate expectation, the Respondent is not making any statement or any assertion that it is agreeing with the Applicant's position nor that it would not take any action. Moreover, according to the Respondent they continued demanding the payment of the taxes. Thus it is difficult to see where the applicant base their legitimate expectation on.

It is also the Respondent's argument that the Clearance Certificate it gave to the Applicant did not mean that the tax liability or the sum owed to former does not owe. She submitted that what the Respondent considered in this case was tax liability nothing else. Further, the Applicant is not disputing that it owes Malawi Revenue Authority.

The Respondent therefore argues that the Applicant has not demonstrated a case befitting reliefs it is seeking and prays to this court to dismiss the matter in its entirety with costs to the Respondent.

THE LAW ON JUDICIAL REVIEW

Judicial review as has been stated in many cases is aimed at reviewing the decision making process and not the merits of the decision itself. In the case of **JAMADAR-V-ATTORNEY GENERAL**[4], Justice Chimasula Phiri, as he then was, had the following to say:

> "one has got to understand the nature and scope of judicial review. The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case, that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected, and that it is no

[4] **[2000-2001]MLR 175, pp 179-180**

> part of the judiciary or individual judges for that of the authority constituted by law to decide the matters in question.....Thus, a decision of an inferior court or a public authority, may be quashed where the court or authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable or where the decision is unreasonable in the Wednesbury sense. The function of the court is to see that lawful authority is not abused by unfair treatment. Judicial review applies whether or not there is some avenue or appeal against the decision on the merits. In judicial review proceedings, the court can grant orders of mandamus, prohibition and certiorari. The court too has power in judicial review proceedings, to grant declarations and injunctions, and to award damages."

In the case of **BLANTYRE CITY ASSEMBLY V KAM'MWAMBA AND SIX OTHERS**[5], Justice Kamwambe had this to say on the purpose of judicial review:

> " ...it is trite law that the remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made but the decision making process. The purpose of this judicial review remedy is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question."

The Judge went further to say:

> " A decision of a public authority may be quashed where that authority acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice in a case where those rules are applicable, or where there is an error of law on the face of the record, or that the decision is unreasonable in the wednesbury sense. The court does not in a judicial review application act as a Court of

[5] **[2008] MLR 21 at page 24. See also par. 53/41/19 Rules of Supreme Court, 1999 ,Nangwale V State, Speaker of the National Assembly and Another, [2005] MLR 303 at 310, and Chief Constable of North Wales Police V Evans [1982] 1 WLR 1155 at 1160.**

> Appeal from the authority or body concerned. The function of the court is to see that lawful authority is not abused by unfair treatment."

In the case of **Council of Civil Service Unions-V-Minister for Civil Service**[6], it was stated that the remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. Commenting on the grounds of judicial review, Chombo J in the case of **State and Another –V-Malawi Electoral Commission**[7] said the following:

> " grounds for judicial review are numerous but there are three commonly used classifications. These are illegality, irrationality and procedural impropriety. Illegality refers to decisions or actions that are *ultra vires* the relevant legislation see **Padfield v Minister of Agriculture Fishing and Food [1960] AC 997**. In this case, a decision was held to be *ultra vires* the relevant statute because of a refusal to refer a complaint relating to milk price-fixing to a committee of investigation contrary to the policy and objects of the relevant statute. Illegality also refers to decisions or actions based upon an incorrect interpretation of the law; see **Re: Islam (Tafazzul) [1983] 1 AC 688.** An incorrect interpretation of the law can in turn result into want of jurisdiction or excessive exercise of jurisdiction; see **Rocal Communications Limited [1981] AC 374, [1980] 2 ALL ER 634**. irrationality is multifaceted and is reflected in any of the following conduct by a public authority: (a) acting for an improper purpose; (b) acting with bad faith; (c) typically fettered discretion; (d) improperly delegating functions; (e) reaching a conclusion that nobody properly directing itself on the relevant law and acting reasonably could have reached (wednesbury unreasonableness); (f) failing to take into account relevant matters or taking into account irrelevant matters; (g) abuse of power; (h) acting in a disproportionate manner. Procedural impropriety is the most common and most ancient ground for judicial review. What is of concern here is the right to a fair hearing; obligation on public bodies to comply with express procedural rules and to avoid bias."

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[6] **[1985] AC 374**

[7] **[2004] MLR 374 at pp378-379.**

In a nutshell, the above is the law on judicial review.

Analysis of the evidence

The Applicant seeks from this Court to declare that on the construction of Taxation Act (Cap 41:01) and Value Added Tax (Cap 42:02) of the Laws of Malawi, the regime of distress for income tax and for distress for valued added tax are distinct and different. Thus the combination 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 should be declared non-compliant with the mandatory prescribed Form A under the Taxation Act.

The Respondent appears not to dispute the Applicant's allegation that the Form used was not compliant with the mandatory prescribed Form. What the respondent is saying is that in the case of **Chidzankufa Case** , the court is referring to section 14 of the Bills of Sale Act. It is the contention of the Respondent that this Section specifically states that if one does not comply with the Form prescribed, such other Form used is void. However, with Value Added Tax Act, even though it states the Form but it does not explicitly nullify any other Form. Therefore as to the Respondent, what matters in the Distraint Certificate is the content.

The starting point is Section 40(3) of the Value Added Tax Act. It states as follows:

> "The written authority of the Commissioner General to distrain under this Act shall be a warrant as in Form A set out in the Fifth Schedule, and shall be the authority to levy by distress the amount of any Value Added Tax, penalty or interest due."

My reading of this provision shows that it is mandatory to use Form A set out in the Fifth Schedule, in as far as value added tax enforcement is concerned. To use a different Form altogether will, in my considered view, be against dictates of the law. I am of the considered view that framers of the law inserted that Form A for a purpose. To allow therefore any other Form to be used contrary to the prescribed Form will result in chaos. I do not think that I am inclined to take the reasoning by counsel for the respondent that what matters is the content and not the Form as doing so will be abetting non compliance, which I am not, as a court, supposed to do at all cost.

In the case of **Chidzankufa v Nedbank Malawi Limited**[8], the Court stated:

> "I have seriously considered the defendant's submission and the authorities cited and in my view the case at hand can be distinguished from those cases on one point. The issue at hand is one that involves strict compliance with the law, an

[8] supra

> Act of Parliament to be specific. The Act itself prescribes the form that a bill of sale must take. It provides that that form must be complied with at all times. Further, it specifically states that non -compliance with the form renders a bill of sale void. Thus the Act demands absolute compliance with the form. I would like to believe that the law did not require strict compliance with the prescribed Form for nothing. It must have been for a purpose. A good purpose for that matter. Therefore, in my judgment, it would be grossly wrong and contrary to public policy if this court were to hold that parties can ignore the prescribed form (thereby flouting the law) but still be able to benefit from the law. In other words, and put it more precisely, the court cannot validate what the Act has specifically invalidated".

I am of the view that the above words also apply in the present case. This court therefore holds that the respondent is to abide by the dictates of the law as provided under the Value Added Tax Act by using a prescribed Form, in this case, Form A, as set out in the Fifth Schedule. Imagine a situation in our legal system where litigants disregard dictates of the law and embarks on manufacturing of their own Forms. The end result definitely will be chaos. Though the **Chidzankufa Case** was dealing with a provision that stipulated declaration of any other Form void, I am of the view that where the law prescribes a Form to be used in enforcement of taxes and indeed any other Form under different Laws and Regulations, the same needs to be complied with. To adopt the Respondent's reasoning that what matters is the content and not design will be contrary to what the law is providing. I therefore declare the Form used herein by the respondent illegal, therefore null and void, in far as it did not strictly comply with the prescribed Form A.

Further, as to the issue of conflating the two tax regimes under Taxation Act and Value Added Tax Act, this court also agrees with the applicant that different consequences will arise in the subsequent process according to Section 40(7) of the Value Added Tax Act and Section 107 (3) (b) of the Taxation Act. Consequently, indeed the Applicant was put in an irreconcilable position.

Section 40(7) of the Value Added Tax Act provides:

> "The distress taken under this Section may at the cost of the taxable person, be kept for fourteen days, and if the amount due in respect of Value Added Tax, interest or penalty and the cost and charges of and incidental to the distress are not then paid, the property distrained may be sold".

While section 103 (3) (b) of the Taxation Act:

> "A distress levied by the collector shall be kept by the collector for five days at the costs and charges of the person neglecting or refusing to pay, and if the person aforesaid does not pay the sum due, together with the costs and charges, within the said five days, the distress shall be sold by public auction for payment of the sum due and all costs and charges. The costs and charges of taking, keeping and selling the distress shall be retained by the collector, and any overplus coming by the distress, after the deduction of the costs and charges and of the sum due, shall be restored to the owner of the goods distrained".

It is clear from the above Sections that Taxation and Value Added Tax are two distinct tax regimes. Under the Value Added Tax Act, the respondent is allowed to keep distress for 14 days while under the Taxation Act is allowed 5 days. A serious issue will arise if, as the respondent did, combine these two. It will be difficult, in my opinion, to isolate items to be sold after 14 days and items to be sold after 5 days in compliance with the law where the two are combined. I am of the considered view that in both regimes, items distrained, ought to be identified so that after the prescribed time, they be sold. Indeed, combination of these two, will indeed result in total confusion. I therefore hold and declare that what the respondent did in conflating tax regimes under the Value Added Tax Act and Taxation Act was illegal and therefore null and void.

Now let me deal with the issue of notice. Section 40 (2) of Value Added Tax Act provides as follows:

> "Where any Value Added Tax, penalty or interest due under this Act remains unpaid after the time by which this Act requires it to be paid, the Commissioner General may in writing and with notice to the taxable person authorize the levying of distress".

Section 107 (3) of the Taxation Act provides as follows:

> "If any person neglects or refuses to pay any tax due and payable upon demand made by the collector, the collector may, upon the authority of a certificate by the Commissioner that such tax is due and payable, for non-payment thereof

> distrain such person by any of his property, both real and personal without any further authority than such certificate and his warrant of appointment".

Under Section 40(2) of the Value Added Tax Act, it is very clear that there is need for the Commissioner General to issue a notice to the taxable person in writing before authorizing distress. In Section 107 (3) of the Taxation Act, one will also interpret the Section to mean that it also requires notice as it uses the word ' demand'. My reading of that provision is that the Commissioner General needs first to 'demand' before authorizing distress. I am of the considered view that demand imputes 'notice'. The only common thing in both provisions is that there is no prescribed time in terms of the notice. Counsel for the respondent told the court that in practice, **the respondent gives 7 days' notice in cases of this nature**.

The Applicant submitted that the Respondent served them a letter (**BNL 3)** on 12th January 2017 where the Respondent, among other things, advised the applicant of a revised audit report. It is this revised audit that came up with a sum of MK675, 969, 316. 75 as a sum due and payable to the Respondent representing various taxes. Counsel for the Applicant submitted to the court that this letter came on 12th January 2017 at around 17:00 hours. Counsel submitted that at around 9:00 hours on 13th January 2017, the Applicant was served with a Distraint Certificate **(BNL 2).** These facts were not disputed at all. What the Applicant is arguing is that in these circumstances, there was no notice given. The respondent counter argued that notice was given as this was not a new issue to the Applicant. Counsel for the respondent argues that the Applicant knew what the Respondent was demanding as early as 22nd June 2016 when the first audit was issued. Counsel submitted that the sum of MK675, 969,316.75 was arrived at after looking into complaints lodged by the Applicant following demands made by the Respondent. Hence, to the Respondent, the Applicant has no moral ground to argue that notice was not given.

I have carefully examined events leading to the issuance of the letter dated 12th January 2017. It is a fact that the parties exchanged correspondences on the sum payable. The sum of MK675, 969, 316. 75 was arrived at after protracted correspondences. This was a reduced sum from the initial sums that were demanded by the respondent.

I am of the considered view that the Respondent was to abide by the law in giving a reasonable notice to the Applicant before enforcement of the Distraint Certificate. I do not think that the various correspondences between the Applicant and the Respondent constitute notice. The respondent did not tender in this court any notice that was previously issued to the Applicant. My understanding is that reduction of the sum to MK675, 969, 316. 75 could have exercised the Respondent's mind to issue a reasonable notice to the Applicant before issuing the Distraint Certificate. Between, 17:00hrs, 12th January and 9:00hrs, 13th January 2017, one can easily conclude that there was no reasonable notice given to the Applicant to pay the sum due to the Respondent. The conduct on the part of the Respondent reflected in the Distraint Certificate and

the manner the distress was carried out is indeed contrary to the law and the conduct expected of a reasonable tax collector. This was even contrary to what counsel for the Respondent told this court that usually a 7 days' notice is given to a taxpayer before enforcement of a Distraint Certificate. This was also a clear departure from previous practice where the Respondent would give the Applicant notice before distress as evidenced by **BNL 6.** I therefore hold and declare that there was no reasonable notice given by the Respondent to the Applicant before issuing the Distraint Certificate contrary to Section 40(2) of the Value Added Tax Act and Section 107 (3) of the Taxation Act.

Let me mention that the Respondent, as a Public body, responsible for collection of tax on behalf of the people of Malawi is always under a continuous obligation to follow the dictates of the law. The respondent must at all times in discharging its functions not depart even slightly from the law. The Respondent has to, at all cost, be diligent in making sure that taxes are collected in a manner as prescribed by the law

Counsel for the Applicant also argued that their legitimate expectations were defeated by the Respondent when the Respondent refused to use tax credits as promised in **BNL 2**. I am of the considered view that as it is now, it is improper for me to go into issues under Judicial Review 11 of 2013. **BNL 2** was written on behalf of the Respondent to the Applicant in compliance with the court direction to find an amicable solution to the issue(s) in **Judicial Review Number 11 of 2013**. It was not disputed that a Consent Order that was being proposed by the parties did not materialize. Hence, I am of the considered view that **BNL 2** is strictly on **Judicial Review Number 11 of 2013**, which is still in Court. As for **BNL 5A** and **BNL 5B**, strict perusal of these letters will show that it was the Applicant who was requesting offset of tax liabilities and tax credits. Nowhere on record has it been shown to me that the Respondent gave a promise that the tax liabilities in the present case will enjoy offset. Hence, its difficult on my part to conclude that the Applicant's legitimate expectations were affected. In the case of **Council of Civil Service Unions and others v Minister for the Civil Service**[9], Lord Fraser quoting Lord Diplock in **O'Reilly v Mackman**[10] stated:

> "Legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."

This concerned a longstanding settled practice for trade unions to be consulted by the Government before the service conditions of staff at GCHQ were altered. The House of Lords held that this had generated a legitimate expectation that they would be consulted before a ban on

[9] [1984] 3 ALL ER935 at 944
[10] [1982] 3 ALL ER 1124; [1983] 2 AC 237

staff being trade union members was introduced. However, the Lords went on to hold that, on the facts, this legitimate expectation was overridden by considerations of national security. In the present case, the Applicant has not shown to me any promise or practice that tax credits will be used to offset tax liabilities. As alluded to, the letters are just proposals.

Reliefs Sought

I therefore declare that:

1) The Respondent's Decision in the Distraint Certificate dated 13th January 2017 to distrain for the compounded sum of 675, 969, 616.75 allegedly comprising Value Added Tax, Corporate Tax, Withholding Tax, Fringe Benefit Tax and Pay As You Earn Ta due and owing to the Malawi Revenue Authority is procedurally improper, unfair and unjust.
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 is irrational and procedurally unjust.
3) The Respondent's decision contained in the Distraint Certificate dated 13th January 2017 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 under the Value Added Tax Act is irrational, unfair and unjust.
4) The Respondent's decision contained in the Distraint Certificate dated 13th January 2017 to issue distress for alleged taxes due without reasonable notice in terms of the Value Tax Act and without providing for reasonable time for compliance in terms of the Value Added Tax Act and the Taxation Act is procedurally improper, unfair and unjust.

And I subsequently grant an order of certiorari in favour of the Applicant quashing the decisions of the Respondent and nullifying the Respondent's Distraint Notice dated 13th January 2017; and an order of mandamus directing the Respondent to take appropriate lawful steps prior to proceeding with the enforcement of the taxes in question by way of distress against the Applicant.

Finally, on the issue of costs. Costs normally follow the event and are in the discretion of the court. I therefore award costs of the present proceedings to the Applicant.

Pronounced in Open Court at Principal Registry, Blantyre this 12th day of October 2017 in the Republic of Malawi.

JOSEPH CHIGONA

JUDGE