



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
JUDICIAL REVIEW CASE NO. 33 OF 2015**

BETWEEN:

THE STATE

-AND-

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

EX PARTE: AIRTEL MALAWI LIMITED APPLICANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Sauti Phiri, of Counsel, for the Applicant

Ms. Makwinja, of Counsel, for the Respondent

Mrs. A. Mpasu, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

This case is before this Court, through the judicial review machinery within the purview of section 43 of the Constitution and order 53 of the Rules of the Supreme Court, so that this Court can judicially review the decision by the Respondent “to enforce the collection of non resident tax from Airtel Malawi Limited, which is a resident of Malawi, when MRA has an issue with Zain International BV, which is not resident in Malawi and is not the same as Airtel Malawi Limited” [hereinafter referred to as the “challenged decision”].

The Applicant seeks (a) a declaration that the challenged decision is unlawful for being ultra-vires, alternatively, outside the limits of its tax jurisdiction (b) a declaration that MRA lacks jurisdiction both in the narrow and wider senses, (c) a declaration that the Respondent has erred in law by misinterpreting the Taxation Act and the rule that a shareholder of a company is not the same as the company, (d) an order similar to certiorari quashing the challenged decision and an injunction

restraining the Respondent from demanding full payment of the Applicant's purported tax liabilities pending determination of the judicial review.

It is trite law that the remedy of judicial is not available in cases where other remedies exist and have not been used, such as an appeal to the superior court or statutory appellate tribunal or recourse to another forum: See **R. v Epping and Harlow General Commissioners Ex-parte Goldstraw (1983) 3 ALL ER 257 at 262**. This proposition of the law is premised on the fact that judicial review is a remedy of last resort. It is, therefore, important that the judicial review process should not be clogged with unnecessary cases, that is, cases which are perfectly capable of being dealt with by other tribunals. In this regard, I wish to deal with the issue of alternative remedies first because if it turns out that the Applicant has alternative remedies which it has not utilized or exhausted, then it would not be necessary in my view to consider the other matters.

The Applicant dealt with the issue of alternative remedies in the Amended Notice of Application for Leave to Apply for Judicial Review, otherwise known as "Form 86A". Paragraph 3 of Form 86A is relevant and, for reasons which appear presently, it is necessary to reproduce the paragraph *in extenso*:

- 3.1 *An Applicant for judicial review must first have recourse to the alternative remedy procedures, exhaust them, and then apply for judicial review, as last resort.*
- 3.2 *In State v. Malawi Development Corporation ex parte Nathan Mpinganjira HC/PR Misc. Civil Cause No. 63 of 2003 (unreported) Kapanda J, as he then was, dismissed the judicial review application because the Applicant did not first resort to the available avenue of the Industrial Relations Court.*
- 3.3 *Similarly in State v. Liliongwe First Grade Magistrate's Court exparte Shaxia Zhang HC/PR Misc Civil Cause No. 248 of 2007 (unreported) Manyungwa J dismissed the judicial review application because the Applicant had failed to exhaust the alternative remedies available to him.*
- 3.4 *The two cases cited above demonstrate that a judicial review application will be refused if:*
 - 3.4.1 *An Applicant fails to use an alternative remedy; or*
 - 3.4.2 *Uses it, but does not exhaust it.*
- 3.5 *Where an alternative remedy exists but the Applicant by his or her own fault fails to use or exhaust it, then cadit question.*

- 3.6 *Different considerations apply where although the alternative mechanism exists, the Applicant is unable to use or exhaust it because of the fault of the public authority. Chinangwa JA in State v. Commissioner General of Malawi Revenue Authority ex parte Banja La Mtsogolo Ltd Civil Appeal No. 33 of 2014 (unreported) accepted this as a plausible explanation.*
- 3.7 *The Applicant commenced the use of the alternative remedy in April 2014 when it filed its grounds of appeal. The Commissioner General failed to file its Reply within the mandatory prescribed time. As per the Rules of Procedure for Appeals, by reason of the default of the MRA in failing to lodge a Reply, the Special Arbitrator mechanism selected by the Applicant in April 2014 was disabled.*
- 3.8 *For a period of 10 months, from April 2014 to February 2015, the Applicant has been unable to access the Special Tax Arbitration process because of MRA's failure to lodge a Reply.*
- 3.9 *In effect, although the alternative remedy mechanism existed on paper, it has unavailable in practice.*
- 3.10 *The rule the judicial review will not be granted if there is an alternative remedy, comports that the alternative should not just exist on paper, but must be available and accessible in practice.*
- 3.11 *At any rate, the law has always accepted that this is a general rule. In exceptional cases, an Applicant may be allowed to pursue judicial review even though an alternative remedy has not been exhausted.*
- 3.12 *Kenya Nyirenda J has approved in State v. Commissioner General of Malawi Revenue Authority ex parte Shadrack Namalomba Judicial Review Case No. 22 of 2015 (unreported) the statement made by Lord Scarman in Re Preston (1985) AC 835 that in exceptional circumstances the existence of an alternative remedy is not fatal.*
- 3.13 *Justice Nyirenda quotes Glidewell LF in R v. Hallstrom exp W [1985] 3 All ER 775 who outlined some of the factors to be considered whether the exception should apply. These include:*
- 3.13.1 *Whether the alternative remedy would resolve the question at issue fully;*
- 3.13.2 *Whether the alternative remedy would be quicker.*
- 3.14 *It is submitted that as has been proven already, due to tardiness on the part of the MRA, the alternative dispute mechanism has been frustrated by MRA for a period in excess of 10 months.*

- 3.15 *Further, this alternative remedy will not be able to resolve fully the issue of abuse of power, and acting in an irrational manner. In addition the Special Tax Arbitrator cannot resolve the issue of proportionality that the judicial review process is being requested to adjudicate on.*
- 3.16 *In addition the Special Tax Arbitrator cannot resolve the issue of proportionality that the judicial review process is being requested to adjudicate on.*
- 3.17 *Further, since 9th June 2015, at the behest of the Respondent, the alternative appeal avenue is unavailable to the Applicant.*
- 3.18 *It is the Respondent who has deliberately ignored or failed to file a Reply within the prescribed time, thereby disabling the Applicant's access to the appeal process under the Rules.*
- 3.19 *In effect, the Applicant has no alternative remedy.*” – Emphasis by underlining supplied

Paragraph 3 of Form 86A quoted above has to be read together with the Applicant's Affidavit dated 7th July 2015. The relevant part provides as follows:

- “4. **THAT** since 17th March 2015, which was the date this Court granted leave for judicial review, there have been developments in the arbitration proceedings before the Special Tax Arbitrator, the major one:
5. **THAT** on application by the Applicant, the Special Tax Arbitrator, issued a notice to hear her substantive tax appeal on 25th May 2015. I attach copy of the Notice of Hearing marked SP1.
6. **THAT** the Respondent applied on the Special Tax Arbitrator that the hearing should not take place.
7. **THAT** on 9th June 2015 the Special Tax Arbitrator ruled, albeit erroneously, that there are no arbitration proceedings before her because the Respondent has failed to file a Reply in accordance with the Rules of Procedure for Appeals under the Eight Schedule to the Taxation Act. I attach hereto copy of the Ruling which is marked SP2.
8. **THAT** the consequence of the Ruling of 9th June 2015 is that the Applicant's alternative remedy of appeal pursuant to and in accordance with the Rules of Procedure for Appeals has virtually shut.
9. **THAT the Applicant has filed a notice of appeal against the Ruling of 9th June 2015.**

10. THAT until the Ruling of 9th June 2015 is reversed on appeal the Applicant is unable to pursue its appeal against the tax assessment made by the Respondent.

– Emphasis by underlining supplied

It is clear from a reading of paragraphs 9 and 10 of the Respondent's Affidavit that the Applicant has yet to exhaust the alternative remedy mechanism that it resorted to. In the premises, I have to pause here, as a matter of prudence, to address what to my mind now constitutes the threshold question, namely, whether or not this Court can step in to exercise its powers of judicial review when an appeal against the Ruling of 9th June 2015 is still pending.

I have read the six cases that have been cited by the Applicant, namely, (a) **State v. Malawi Development Corporation ex parte Nathan Mpinganjira HC/PR Misc. Civil Cause No. 63 of 2003 (unreported)**, (b) **State v. Lilongwe First Grade Magistrate's Court ex. parte Shaxia Zhang HC/PR Misc Civil Cause No. 248 of 2007 (unreported)**, (c) **State v. Commissioner General of Malawi Revenue Authority ex parte Shadrack Namalomba Judicial Review Case No. 22 of 2015 (unreported)**, (d) **Re Preston (1985) AC 835**, (e) **R v. Hallstrom exp W [1985] 3 All ER 775** and (f) **State v. Commissioner General of Malawi Revenue Authority ex parte Banja La Mtsogolo Ltd Civil Appeal No. 33 of 2014 (unreported)** and none of the cases affords guidance on the threshold question posed above. In the first five cases, the applicants had not resorted to the alternative mechanisms at all. With respect to **State v. Commissioner General of Malawi Revenue Authority ex parte Banja La Mtsogolo Ltd**, there is no evidence before this Court showing that, following the Applicant filing its notice of appeal against the Ruling of 9th June 2015, the Respondent or any other public authority has frustrated the appeal process.

All in all, it is my finding that the Applicant prematurely sought relief from this Court before fully exhausting the appeal procedures provided under the tax laws. In the premises, the Originating Motion that the Applicant took out for judicial review herein is dismissed with costs.

Pronounced in Court this 26th day of July 2016 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda

JUDGE