

IN THE HIGH COURT OF MALAWI BLANTYRE
PRINCIPLE REGISTRY
CIVIL CAUSE NO. 214 OF 2003



BETWEEN

H.H MASULA t/a
AJINGA WHOLESALERS.....1ST PLAINTIFF
M. FOLOJALA.....2nd PLAINTIFF

AND

MALAWI REVENUE AUTHORITY.....DEFENDANT

CORAM: JANE ANSAH, J
Chisale of Counsel for the Plaintiff
Ngutwa of Counsel for the Defendant
Fatch Court Clerk

RULING

JANE ANSAH, J: On 23rd January 2003 the Applicants made an application to this Court for an order for stay of sale of motor vehicle registration No. BL 4652 which was seized by the defendant. In the same application the Applicants sought for the revocation of a Notice of Dstraint invoked under section 92 of the Customs and Excise Act. The application is supported by an affidavit sworn by the 1st Applicant. The application was preceded by a Writ of summons in which the applicants, as plaintiffs are claiming damages for conversion and for loss of use of motor vehicle.

From what can be gathered from the affidavit of the first applicant, the facts leading to this application appear to be based on the action taken by



the Malawi Revenue Authority with regard to diverted surtax. It is alleged by the defendant that between January and February 2002, the 1st Applicant bought 769 metric tones of Surtax free sugar for export but exported 438 tonnes thereof, thereby diverting 333 tonnes for home consumption resulting in the lose of surtax, in the sum of K1,694,720.00, due to the defendant. On that basis, the defendant ordered the 1st applicant to pay the said sum which should have been paid as surtax plus a fine of K5000,000.00. The 1st Applicant having failed to pay the demanded sum, the defendants invoking section 92 of the Customs and Excise Act and seized the motor vehicle the subject of this application, as a lien for the demanded unpaid surtax. The Applicant's claim is that although the seized vehicle was in the custody of the 1st Applicant, it belongs to the 2nd Applicant and that despite the defendant being told that the vehicle belongs to the second applicant who has got nothing to do with Sugar business, the defendant has refused to release the vehicle.

There are attachments to the applicant's affidavit, these include photocopies of the notice of distraint from the defendants, passport of the 2nd applicant and a temporary registration book for the vehicle in the name of the 2nd applicant.

Mr Chisale, Counsel for the Applicants submitted that the vehicle as evidenced by the temporary registration book, belongs to the second Applicant who has got nothing to do with this case. Further, he contended that the meaning of section 92 of the Customs and excise Act does not support the action of the defendant in that the vehicle is outside the items that can be seized and kept as a lien under the said Customs and Excise Act. It is also the Applicant's contention that the vehicle is a perishable item in that if it is left without being used it will be damaged, thus, they are praying that an order be made compelling the defendant to deliver possession of the said vehicle and for an interlocutory injunction restraining the defendant, its employees, servant and/or agents from selling the said motor vehicle before the determination of the matters herein.

Mr Ngutwa, Counsel for the defendants has submitted that the vehicle was seized after efforts to recover the diverted surtax failed. It is his contention that the action is in line with section 92 of the Customs and Excise Act.

The application is based on two main issues, viz, the interpretation of section 92 of the Customs and Excise Act and the ownership of the vehicle the subject of this matter an issue beyond this application for it cannot be resolved by affidavit evidence as the vehicle registration book is not *per se* proof of ownership.

Section 92 of the Customs and Excise Act reads:

“The correct amount of duty payable in respect of any goods or services shall, from the time when it should have been paid, constitute a debt due to the Government by the person concerned, and shall, at any time after it becomes due, be recoverable in court by proceedings in the name of the Controller, and any goods in a bonded warehouse or in the custody of the department or any goods used or produced in the business concerned and belonging to that person, ...be subject to a lien for such debt and may be detained by the department until such debt is paid,....”

On the one hand, Counsel for the Applicants contended that according to section 92, a lien, can only be placed on goods or items which are already in possession of the defendant in a bonded warehouse or in custody of the department. He argued further that the section provides for a class of goods that are subject to a lien, but contrary to the section the defendants seized a vehicle from the 1st Applicant. He pointed out that even if the vehicle belonged to the 1st Applicant, the defendant could not place a lien on it as it is out of the classification. On the other hand, Counsel for the defendant submitted that section 92 was rightly invoked, arguing that a closer look at the section reveals several interpretations. The interpretations includes that the defendant can invoke the section and take possession of goods that are already in the possession of the department, and also goods used by the person who is indebted to the defendants. It follows therefore, that if goods are used by the person indebted to the defendant, then they are out of the control of the defendant.

Looking at section 92, which reads in part:

“...or any goods used or produced in the business concerned and belonging to that person,be subject to a lien..”

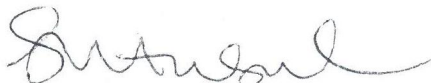
I am inclined to agree with counsel for the defendant that section 92 has several meanings, one of which include goods used by the indebted person. Thus, the vehicle in this case is within this interpretation. The defendant therefore rightly invoked section 92 in this regard. Therefore the prayer for the delivery of the vehicle fails.

Counsel for the Applicants prayed in the alternative for a mandatory injunction. The court has jurisdiction to grant a mandatory injunction to avoid damage which is probable to the Applicant's property. However, this is only done in very exceptional cases and will not be granted on affidavit evidence where issues of fact are heavily contested, thus *viva voce* evidence is appropriate for such an order. It is therefore not proper that I grant the interlocutory mandatory injunction.

Finally, the Applicants prayed for an interlocutory injunction restraining the defendants from selling the vehicle. Following the principle laid down in the American Cynamid case, the question that has to be asked is whether there are triable issues. It is clear in these affidavits that there are triable issues that need to be settled. It is argued on behalf of both parties that they are in a position to pay damages. The Applicants, on the one hand, are dependent on business, which is dependent on the economy of the day. On the other hand, the defendant is well known and, it is an on going concern. It is true as argued by counsel for the defendant that the defendant will always be there and in a position to pay damages as opposed to businesses that are a fact of economic performance. It cannot be predicted with accuracy that the Applicant's business will still be viable in a couple of months or two years time. Indeed, looking at both parties, the defendant is more likely to be in a position to pay damages if need arose. I therefore grant the defendant's prayer that it should continue to hold the vehicle as a lien for their claim. I also grant the Applicant's

prayer for an interlocutory injunction restraining the defendant from selling the vehicle until the determination of this case.

Pronounced in Chambers this 4th day of April, 2003 at Blantyre



Jane Mayemu Ansah

JUDGE