IN THE IGH COURT OF MALAWI

PRINCIPAL REGISTRY

REVENUE DIVISION

JUDICIAL REVIEW CAUSE NUMBER 4 OF 2022

BETWEEN:

MAPETO DWSM LIMITED — CLAIMANT

-AND-

COMMISSIONER GENERAL OF MALAWI REVENUE AUTHORITY — DEFENDANT

CORAM: HONOURABLE JUSTICE JOSEPH CHIGONA

MR. PEARSON WAME, OF COUNSEL FOR THE CLAIMANT

MR. ANTHONY CHUNGU, OF COUNSEL FOR THE DEFENDANT

MRS. LYDIA SAUTI PHIRI, OF COUNSEL FOR THE DEFENDANT

MR. FELIX KAMCHIPUTU, COURT CLERK

CHIGONA, J.

ORDER

[1] This is the court's order on the application for permission to apply for judicial review and an interlocutory injunction, filed by the claimant, Mapeto DWSM Limited, one of the textiles manufacturing companies in Malawi. The application is made pursuant to Order 19 rule 20 (4) of the Courts (High Court) (Civil Procedure) Rules, 2017, hereinafter to be referred as Civil Procedure Rules. The application is supported by a sworn statement by Latif and a sworn statement

in reply to the sworn statement in opposition to the application by Yasin Mohammed and skeleton arguments. Counsel adopted these supporting documents in their entirety.

[2] The claimant seeks permission to apply for judicial review of the decision of the defendant to cancel industrial rebate registration of the claimant without affording the claimant a right to be heard. The decision of the defendant is contained in a letter dated 25th March 2022, which the claimant describes as illegal and unlawful for being inconsistent with section 43 of the Constitution. The claimant argues that such a cancellation without affording the claimant a right to be heard is also *ultra vires*, unreasonable in the *Wednesbury* sense and devoid of the claimant's legitimate expectation of being accorded a fair administrative practice as enshrined in section 43 of the Constitution. The claimant through counsel argues that the decision is contrary to the true interpretation of Regulation 116 and Paragraph 13 of the Eighth Paragraph to Customs and Excise Regulations.

[3] The claimant, once granted permission, is seeking a declaration that the decision of the defendant is illegal and unlawful for being inconsistent with section 43 of the Constitution. The claimant also seeks a declaration that the decision is unreasonable as it affected the claimant's legitimate expectations to be accorded a fair administrative treatment under section 43 of the Constitution. The claimant seeks a declaration that pursuant to Regulation 116 and Paragraph 13 of the Eighth Schedule to the Customs and Excise Regulations and section 43 of the Constitution, the defendant owes a duty to the claimant to accord them a fair administrative process. The claimant seeks a like order to *certiorari* quashing the defendant's decision and a stay of the same.

CLAIMANT'S CASE (FACTS OF THE CASE)

[4] The facts of the case as extracted from the sworn statement in support of the application are that the claimant was at all material times registered under the Industrial Rebate Registration in the Textile Manufacturing Industry-Fabric Manufacturing as exhibit **FGL1,** a bundle of Licenses, is showing. That in January 2021, the Claimant placed an order for raw materials from its importers Hongkong Polychem Company for fabric Manufacturing as evidenced by exhibit **FGL2.** When the goods arrived in Malawi, they were duly assessed and duty paid and with authority from the defendant, container number CMAU-0713109 was released as evidenced by copies of importation documents, defendant's receipts and release order exhibited and marked as **FGL3, FGL4** and **FGL5** respectively.

[5] The deponent avers that following the importation of CMAU-0713109, the claimant has imported more than 200 containers of similar raw materials without breaching the terms of the Industrial Rebate Registration as evidenced by exhibit **FGL6,** a bundle of Customs Clearance documents. The deponent avers that through a letter dated 25th March 2022, the defendant without according the claimant the right to be heard, and through suppression of material facts, decided to cancel the Industrial Rebate Registration as evidenced by the letter of cancellation exhibited and marked as **FGL7.** The deponent avers that the defendant's decision-making process is unfair, illegal and unreasonable, and amenable to review by this court.

[6] During the hearing of the application, counsel for the claimant reiterated what is contained in the sworn statement in support of the application as outlined above. Counsel submitted that the

defendant was supposed to accord the claimant a right to be heard before cancellation of the Industrial Rebate. Counsel further submitted that before the cancellation, there was supposed to be a period to allow the claimant put its house in order.

DEFENDANT'S CASE

[7] The defendant filed a sworn statement in opposition to the application to apply permission for judicial review by Chimwemwe Kawalewale, Customs and Excise Deputy Commissioner responsible for Facilitation. I have to put it on record that since the present application is on permission to apply for judicial review, I will only refer to certain paragraphs of the sworn statement, relevant to disposal of the present application. The deponent agrees with the claimant that Industrial Rebate Registration was granted to the claimant as evidenced by the Application Form and Bond exhibited and marked as **CK1A** and **CK1B** respectively. The deponent avers that upon registration, the claimant was to import raw materials for its fabric business free of duty except for the payment of Value Added Tax. The deponent avers that through a tip-offs anonymous, it was alleged that the claimant imported, under the said Industrial Rebate Scheme (IRS), ready-made fabrics and twine and falsely declared them to customs authorities as raw materials, namely, unbleached grey fabrics and yarn respectively.

[8] The deponent avers that container number CMAU0713109 with a declaration number **BLA C3607** of 18th March 2012 was to be offloaded in the presence of the officers of the defendant for them to check if the goods were indeed raw materials for making fabrics under the IRS. The understanding was that the offloading was to happen on 20th March 2021 in the morning. That to their surprise, the container was already offloaded when they visited on 20th March 2021. The pictures of the offloaded goods are exhibited and marked as **CK3A** and **CK3B** respectively. That upon inspection of the goods, the deponent avers that they discovered inconsistencies with the documentation in terms of number of packages and supplementary units in metres. That further inspection of the premises by the officers discovered finished fabrics of rolls not produced by the claimant. The officers placed an embargo on the container and trailer and also on 80 bales pending investigations under section 149 of the Customs and Excise Act. The deponent avers that inspection of the warehouses discovered concealment of goods and that legal processes were put in place. The concealment pictures are exhibited and marked as **CK7.**

[9] The deponent avers that their investigations clearly shows that the claimant breached the IRS by importing finished products disguised as raw materials so as to evade payment of excise and duty. That the examination of the claimant's factory and machinery revealed incapacity for the high-quality production, branding and packaging of the finished fabrics and twine, contrary to what was actually found in the various warehouses. The deponent avers that these four warehouses were also storage places not approved under the IRS. The deponent submitted that even assuming that these warehouses were approved storage facilities, they breached customs laws as they had concealed entrances and therefore not easily accessible by customs officials, as a matter of fact, which is contrary to the dictates of the IRS.

[10] The deponent avers that the actions of the claimant resulted in loss of duty amounting to MK1, 980, 685, 404.87. The deponent avers that considering these grave violations of the customs laws

and the IRS, the Commissioner General cancelled the claimant's privilege under the IRS on 25th March 2022.

[11] During the hearing of the application, counsel Sauti Phiri emphasized to this court that the Commissioner General took time to investigate the matter and made a finding that the claimant was not complying with the terms and conditions of the IRS. Counsel submitted that the Commissioner General therefore invoked Paragraph 15 of the Eighth Schedule to the Customs and Excise Regulations which gives him power to cancel the Industrial Rebate upon being satisfied that the conditions of the Industrial Rebate were not complied with.

[12] Counsel submitted that pursuant to Eighth Schedule to the Customs and Excise Regulations, the cancellation does not depend on hearing of the beneficiary as it is a privilege and not a right to a taxpayer. Counsel submitted that under customs laws, there are specific areas that require hearings such as agents' cancellation but not Industrial Rebate cancellations. Counsel submitted that the claimant should not imply issues into a tax law as the general principle of interpretation in tax statutes is strict interpretation.

[13] Counsel submitted that there was no unreasonableness as all facts were taken into consideration after thorough investigations. Counsel submitted that the fact that the claimant was able to import other containers while investigations were on-going does not impute any unreasonableness on the decision to cancel the Rebate. In conclusion, counsel prayed for dismissal of the application for permission to apply for judicial review.

[14] Counsel Chungu submitted that the decision of the defendant does not mean that the claimant was taken out of business. What it simply means is that the claimant was put in the same position as all taxpayers not under IRS. He submitted that the cancellation of the Industrial Rebate will not affect goods imported or those in the warehouse. In conclusion, counsel submitted that there are no any triable issues warranting permission to apply for judicial review.

[15] As already alluded to, the claimant filed a sworn statement in reply to sworn statement in opposition by one Yaseen Muhammad. The deponent avers that at the time of offloading the said container CMAU0713109, the claimant (I think it's the defendant in this case) had issued a release order without a condition to have the container inspected and that **CK2** is not an undertaking for physical examination as alleged and that at the time when the said container was sealed by the defendant, the said container was already offloaded on 19th March 2021. The deponent avers that a copy of the release order was confiscated by the defendant during the search process and it is still in the custody of the defendant.

[16] The deponent avers that those allegations relating to alleged discovery of other goods was not the basis of the cancellation of the Rebate and the same is the basis of criminal proceedings. He further submitted that the claimant has not been found guilty by any competent tribunal, nor did the defendant summon the claimant for hearing relating to the said allegations other than the commencement of the criminal proceedings which are still pending.

[17] In his oral reply during the hearing of the application, counsel for the claimant submitted that there is a triable issue, which is, whether the decision of the defendant to cancel the Industrial

Rebate without according the claimant the right to be heard complies with section 43 of the Constitution.

THE LAW AND DISPOSAL OF THE APPLICATION

[18] The law under Order 19 rule 20 of the Civil procedure Rules stipulates that an application for permission to apply for judicial review is to made without notice to the defendant. The court is at liberty to order an *interpartes* hearing where doing so is in the best interest of justice. In the present application, the claimant made the present application without notice to the defendant. Upon reading the supporting documents, I ordered that the same be made *interpartes* to accord the defendant a chance to respond to the issues raised. The resultant *interpartes* hearing on 28th April 2022 was a result of that order.

[19] The purpose of permission stage in judicial review proceedings is to deal with applications which are frivolous, vexatious or hopeless and abuse of the court process. This is a sieving stage aimed at making sure that only deserving cases proceed to substantive hearing. The court is to grant permission only in applications where the court is satisfied that there are triable issues warranting further consideration. In the case of **Honourable George Chaponda and The State President of Malawi, Ex parte Mr. Charles Kajoloweka, The Registered Trustees of Youth and Society, The Registered Trustees of CCAP Synod of Livingstonia (Church and Society Programme) and The Registered Trustees of Centre for Development of People**[1], the Supreme Court of Appeal had the following to say on the permission stage:

> "We would like to agree with the court below on its understanding of the law when it stated that 'leave should be granted' if on the material then available the court thinks without going into the matter at depth, that there is an arguable case granting the relief claimed by the applicant. The test to be applied in deciding whether the judge is satisfied that there is a case fit for further investigation at a full interpartes hearing for a substantive judicial review is also discussed in **R v Secretary of State for Home Department, Ex parte Rukshanda Begum**[2]. ..Thus, in **R v Inland Revenue Commissioner, Ex parte National Federation of the Self Employed and Small Businesses**[3], it was instructively put that the right to refuse leave to move for judicial review is an important safeguard against courts being flooded and public bodies being harassed by irresponsible applications for judicial review. Further, in the same judgment it was stated by Lord Diplock that the requirement of leave may prevent administrative action being paralyzed by a pending, but possibly spurious, legal challenge. It is easy to understand that the aim of this requirement is therefore to 'sieve out' proceedings which in the court's view, are spurious, and

[1] MSCA CIVIL APPEAL NUMBER 5 OF 2017 (Unreported)

[2] [1990] COD 109 CA

[3] [1982] A.C. 617. See also State and Governor of the Reserve Bank of Malawi ex parte Finance Bank of Malawi, Miscellaneous Civil cause Number 127 of 2005 (High Court, unreported).

> remain with those which the court is satisfied are 'arguable cases'. The purpose for the requirement of leave is to eliminate at an early stage, any applications which are either frivolous, vexatious or hopeless and to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained is designed to prevent the time of the court being wasted by busy bodies with misguided complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."

[20] I am also persuaded by what my brother Judge said in the case of the **State (on the application of Zuneth Sattar) v The Director of Public Prosecutions and The Director of Anti-Corruption Bureau and the Attorney General[4],** when he stated the following:

> "Permission to apply for Judicial Review will be granted if the court is satisfied that there is an arguable case for granting the relief claimed by the Applicant. At this stage there is no need for this court to go into the matter in depth. Once the court is satisfied that there is an arguable case then permission should be granted. The discretion that the court exercises at this stage is not the same as that which the court is called on to exercise when all the evidence in the matter has been fully argued at the hearing of the application for judicial review."

[21] At this stage, I am not called upon to consider all the evidence adduced before me. What I have to decide is whether the claimant has, on the available sworn statement evidence, made out a *prima facie* case for permission to apply for judicial review.

[22] Reverting to the present application, I have considered the material before me. I have arrived at a decision in favour of the claimant. I am more than convinced that there are arguable issues in this matter warranting further consideration. These issues include whether or not the defendant in exercising his powers of cancellation is not subject to the dictates of section 43 of the Constitution. Another arguable issue, in my considered view, is whether the cancellation has or not affected the legitimate expectation(s) of the claimant to be heard. Further, I am of the view that this court has also to resolve whether the defendant pursuant to Eighth Schedule of the Customs and Excise Regulations, has the right to cancel the Industrial Rebate upon being satisfied without hearing the claimant. All these, in my considered view, are arguable issues, warranting this court to allow the claimant permission to apply for judicial review. I therefore grant the claimant permission to apply for judicial review.

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[4] Judicial Review Case Number 68 of 2021 (High Court, Principal Registry, Unreported). See also Ombudsman v Malawi Broadcasting Corporation [1999] MLR 329

[23] On the application for an interlocutory injunction, the law is clear that where damages are adequate remedy and the defendant would be in a position to pay them, an interlocutory injunction should be declined[5]. Reverting to the present case, I am of the view that the application for interlocutory injunction should fail as damages, in my considered view, will be an adequate remedy. I am certain that the said damages can as well be assessed with mathematical precision. I therefore decline to grant an interlocutory injunction as prayed for by the claimant.

[23] On costs, I remind myself that costs normally follow the event and are usually in the discretion of the court. I therefore order that each party should bear its own costs for this application.

MADE IN OPEN COURT THIS 31ST DAY OF MAY 2022 AT PRINCIPAL REGISTRY, REVENUE DIVISION, BLANTYRE.

Joseph Chigona

Judge.

[5] Order 10 rule 27 (b) of the CPR, 2017. See also American Cynamid Co. v Ethicon Ltd [1975] 2 WLR 316; Mkwamba v Indefund Ltd [1990] 13 MLR 244.