MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

JUDICIAL CAUSE NO. 20 OF 2016

BETWEEN:

THE STATE

AND

THE DIRECTOR OF ENVIROMEMNTAL AFFAIRS.....RESPONDENT

AND

***EX-PARTE:* AERO PLASTIC INDUSTRIES LIMITED**

AND ABDUL MAJID SATTAR T/A RAINBOW PLASTICS AND 12 OTHERS.....APPLICANTS

CORAM: THE HON. JUSTICE HEALEY POTANI

Mr. Mbeta, Counsel for the Applicants

Mr. Kaphale Hon Attorney General, Counsel for the Respondent

Mr. Mathanda, Court Clerk

RULING

Pursuant to Order 53 of the Rules of the Supreme Court (RSC), the applicants, after obtaining the requisite leave from the court, commenced these judicial review proceedings for purposes of challenging two decisions of the respondent made on or about, February 11, 2016, and thereafter. The first decision is that of closing

down the applicants' factories and imposing fines on them and/or their distributors/customers on allegations that they were manufacturing and distributing and/or selling thin plastics of less than 60 microns in contravention of Regulation 3 of the Environment Management (Plastics) Regulations, 2015 without affording them the right to be heard. The second decision under challenge is that of adopting, implementing and enforcing the Environment Management (Plastics) Regulations, 2015 particularly regulation 3 on the ban on manufacturing, distribution and consumption of thin plastics that are less than 60 microns without due regard to relevant factors/considerations such as the hardship the decision would cause to the applicants, their distributors and consumers and the similar regulations on the minimum microns within the Southern Africa Development Community (SADC) region and beyond. By way of reliefs, the applicants seek a declaration that the first decision complained of is contrary to the rules of natural justice and section 43 of the constitution and therefore unreasonable in the wednesbury sense, unconstitutional and therefore void and an order like certiorari quashing the said decision. With regard to the second decision, the applicants seek a declaration that the decision did not take into account relevant factors/considerations such as the hardship the decision would cause to the applicants, their distributors and consumers and the similar regulations on the minimum microns within the Southern Africa Development Community (SADC) region and beyond and a consequential direction that the respondent should adopt the minimum microns for thin plastics under similar regulations in the SADC region and beyond, to wit 24 and 30 microns.

At some stage, the respondent applied to have the leave for judicial review discharged but later the parties agreed that the matter should just proceed with the hearing and determination of the substantive judicial review.

The facts on which the applicants rely in the pursuit of their case are verified by the affidavit Tariq Kidy, Hamza Kassam and Javeed Jussab who are directors of some of the applicants' businesses. The respondent vigorously opposes the grant of the reliefs the applicants are seeking and in that regard, reliance is placed on facts as deposed in the affidavit and supplementary affidavit in opposition of Tawonga Grace Mbale-Luka, Director of Environmental Affairs who is the actual current respondent office holder. And mention should be made that at the instance of counsel for the applicants, the respondent was subjected to cross examination on her affidavit evidence.

The facts as they emerge from the evidence before the court indisputably show that in January 2016, the respondent inspected factories run by the applicants and alleged that the applicants were manufacturing plastics of less than 60 microns in contravention of Regulation 3 of the Environment Management (Plastics) Regulations, 2015. Then on or about February11, the respondent's agents went to the factories and it is alleged that immediately upon arrival, they closed the factories without availing the applicants the right to be heard on the allegations. Subsequently, the respondent imposed fines on some of the applicants, their distributors and customers on the allegations of manufacturing, distributing and selling thin plastics of less than 60 microns. It is the assertion of the applicants that the decisions complained of which were made without hearing them have an adverse effect.

The respondent vigorously disputes to have taken the measures complained of by the applicants without hearing them and without due regard to relevant factors/considerations such as the hardship the decision would cause to the applicants, their distributors and consumers and the similar regulations on the minimum microns within the Southern Africa Development Community (SADC)

region and beyond. In this regard, in the affidavits of the respondent alluded to earlier give a detailed chronology of the processes leading to the legislative framework under which the respondent acted in arriving at the decisions complained of herein. Essentially, the respondent has endeavoured to demonstrate there were a lot of considerations of relevant factors and consultations with concerned stakeholders including the applicants hence the respondent's contention that the applicants' case has no basis and should be dismissed.

At this juncture, it is important to remember that judicial review is meant to ensure that public officers and bodies entrusted with exercising statutory powers act in compliance with and within the confines of the law. The realm of judicial review is largely settled as articulated in a litany of decided local and foreign cases. In **Khembo v The State (National Compensation Tribunal)**[2004] MLR 151 (HC) the parameters of judicial review were stated as follows:

The governing law of applications for judicial review is Order 53 of the Rules of the Supreme Court. According to Order 53 rule 1–Order 53 rule 14(1) the remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application 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 an individual is given fair treatment by the authority to which he has been subjected and that it is not 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. See ***Chief Constable of North Wales Police v Evans*** *[1982] 3 All ER 141 at 143 per Lord Hailsham LC.* [Emphasis supplied]

The position of the law is therefore very clear and settled that the jurisdiction of the court in judicial review is not to question the merits of the decision(s) complained of but to scrutinise the decision making process if it accorded the complainant a fair treatment. As it is said at times, judicial review is concerned with procedural fairness. That said, the applicants' complaint is twofold. Firstly, they complain that

the respondent did not hear them before closing down their factories and imposing fines on them for alleged contravention of Regulation 3 of the Environment Management (Plastics) Regulations, 2015 which outlaws the manufacturing, distributing and selling of thin plastics of less than 60 microns. The second complaint is that in adopting, implementing and enforcing the Environment Management (Plastics) Regulations, 2015 particularly regulation 3 on the ban on manufacturing, distribution and selling ,of thin plastics that are less than 60 microns, the respondent did not pay due regard to relevant factors/considerations such as the hardship the decision would cause to the applicants, their distributors and consumers and the similar regulations on the minimum microns within the Southern Africa Development Community (SADC) region and beyond.

Regarding the first complaint, the evidence of the respondent indisputably shows that the applicants' business premises/factories were first inspected in July, 2015, whereupon it was discovered that they were producing the outlawed plastics and warning letters were duly issued as evidenced by exhibit ***TGM7a*** to the affidavit in opposition. The warning demanded a stop in the production of the outlawed plastics or else the respondent would close the factories and/or impose other sanctions. In the considered view of the court, if the applicants has any representations to make, then they would have made them by way of responding to the warning. In other words, the warning itself in a sense afforded the applicants an opportunity to be heard which they did not utilise instead they continued with the production of the outlawed plastics. This continued up to around January 19, 2016, when another inspection on the applicants' factories showed that the unlawful production had not stopped prompting the respondent to order the closure of the factories. Certainly, the respondent having earlier warned the applicants who did not make representations but continued with the mischief, the respondent cannot be

accused of not having heard the applicants before closing the factories. The respondent made every effort to treat the applicants fairly. It is also significant to note that in exhibits ***TGM8a*** and ***TGM8b,*** the applicants admitted wrong doing. The complaint of not being heard is therefore unattainable and is accordingly dismissed.

The second complaint has two aspects namely alleged failure by the respondent to due regard to relevant factors/considerations such as the hardship the decision would cause to the applicants, their distributors and consumers and alleged failure to take into account similar regulations on the minimum microns within the Southern Africa Development Community (SADC) region and beyond.

On the first aspect, the evidence shows that from as way back as 2004 when the idea to ban the manufacturing and use of thin plastics because of their adverse effect on the environment was initiated or mooted, the government through the Department of Environmental Affairs which is headed by the respondent has undertaken a number of activities aimed at engaging and sensitising various stakeholders and interest groups including the applicants through their mother body known as Plastic Manufacturers Association of Malawi [PMAM]. These engagements/consultations culminated into publication of a general public notice in the local media that the enforcement of the ban on production and use of thin plastics would start on April 30, 2013, and in readiness of the commencement of the enforcement, the respondents' department called for a consultative meeting on March 14, 2013, with a view to get feedback from stakeholders including PMAM. At that meeting, one of the concerns that were raised was that the period for the commencement of the enforcement of the ban was too short since plastic manufacturers and users needed more time to clear existing stocks of plastic products, raw materials and consignments that were under shipment as such a

request was made to extend the ban by a year. Fears were also raised on the negative effect the ban would bring to those in the plastic manufacturing business and the resulting possible loss of jobs which be adverse to the country's economy. In view of the concerns raised and the respondent's department having appreciated the technical, economic and social implications of the ban, it was resolved that the respondent would prepare Environment Management (Plastics) Regulations and extend the commencement of the ban from April 30, 2013, to June 30, 2014, and a notice to that effect, exhibit ***TGM3,*** was published. As the deadline of June 30, 2014, drew closer PMAM by letter dated March 27, 2014, exhibited as ***TGM4*** wrote the minister responsible asking for a further extension by another 1 year to June 30, 2015, on the ground that the ban would have an adverse effect on their industry and the minister granted the extension sought but stated that that would be the last extension. The minister's letter dated April 14, 2014, is exhibited as ***TGM5.*** According to the respondent, both the PMAM's letter to the minister asking for the extension and the minister's response thereto were not copied to the respondent as such when the June 30, 2014, came, the respondent's department started enforcing the ban as it was not aware of the ministerial extension. The enforcement was challenged in court through a judicial review which was later settled out of court. As part of the out of court settlement, an agreement/arrangement exhibited as ***TGM6*** was arrived at and it provided for arrangements for the implementation of the ban which took into consideration the concerns from plastic manufacturers which were mainly economic implications to their industry.

As can clearly be seen, the respondent's department made every endeavour to engage almost all relevant stakeholders and those likely to be affected by the ban including the applicant through PMAM. It is the evidence of the respondent that

from the engagements and consultations, it came to light that the ban could cause economic hardship, loss of revenue and loss of jobs but at the same time considering the government policy of promoting sustainable development within the carrying capacity of the environment and in order to strike some kind of a balance on the seemingly competing interests, the Environment Management (Plastics) Regulations 2015 were formulated in such a fashion that certain thin plastic products and uses would be exempted from the ban. Significantly, the evidence especially exhibit ***TGM6*** which PMAM signed for provided for interim arrangements for implementation of the ban, shows that a phased approach was put in place on the implementation of the ban in order, among others, to give time to manufacturers like the applicants to make necessary technological adjustments that would enable them to produce thicker plastics. All this was to ensure that possible economic hardships or loss of revenue the ban would occasion should be mitigated. The court therefore fails to comprehend and is baffled as to what applicants are up to when they allege that the respondent did not pay due regard to relevant factors/considerations such as the hardship the decision would cause to the applicants, their distributors and consumers. From the evidence, as it has just been shown, the respondent conducted extensive consultations with all relevant stakeholders including the applicants and only came up with the regulations on the ban and implementation thereof after taking into account the feedback and relevant factors including economic implications of the ban. In the end result, the applicants' complaint that the respondent did not pay due regard to relevant factors/considerations such as the hardship the decision would cause to the applicants, their distributors and consumers is baseless and unsustainable.

Moving on to the second aspect which is the alleged failure to take into account similar regulations on the minimum microns within the Southern Africa

Development Community (SADC) region and beyond, the evidence of the respondent both in her affidavits and cross examination settles the matter. The evidence of the respondent is essentially that in formulating, and enforcing/implementing the Environment Management (Plastics) Regulations, 2015, what obtains in the SADC region was considered and it was observed that is those countries where thin plastics of less than 60 microns are allowed they have in place advanced waste management systems that arrest the adverse environmental effects thin plastics cause unlike in Malawi where no such systems are in place such that Malawi needs its own tailor made regulations to address its specific challenges. This is a policy decision the executive through the respondent is entrusted with. This brings to mind the sentiments of Lord Roskill in **Council of the Civil Service Union v Minister for the Civil Service** [1984] 3 All E. R. 949 at page 954 that:

> *It is not for the courts to determine whether a particular policy or particular decisions taken in fulfillment of that policy are fair.*

It is also the evidence of the respondent that there is no SADC treaty, protocol or convention whatsoever binding on Malawi on the manufacture, distribution and use of plastics. Indeed the applicants have not shown that there is any such instrument which binds Malawi and which has been contravened. And the court would hasten to say that if such an instrument were in place, it would be a retrogressive move as it would amount to a one size fits all approach which might fail to address the unique, special and specific challenges of individual member states. The applicants' complaint that the respondent did not take into consideration what obtains in the SADC region is unsustainable and must fail.

It is in the light of the foregoing that the conclusion the court comes to is that in all the processes leading to the decisions complained of the applicants were given fair

treatment by the respondent as such applicants' case must fail in its entirety and is accordingly dismissed. It is noted that at the commencement of these proceedings sometime in early 2016, the applicants obtained a stay order staying the implementation of the decisions complained of herein which effectively meant that the ban on the manufacturing, distribution, sale and use of plastics of less than 60 microns could not be implemented. The matter having been dismissed, the respondents are at liberty to implement the regulations and ban.

The applicants are to bear costs of these proceedings.

Made this day of June 14, 2018, at Blantyre in the Republic of Malawi.

HEALEY POTANI

JUDGE