REPUBLIC OF MALAWI

IN THE MALAWI SUPREME COURT OF APPEAL

SITTING AT LILONGWE

MSCA CIVIL APPEAL NO.61 OF 2019

(From High Court, Civil Division, Lilongwe District Registry, Civil Cause no. 1133 of 2019)

BETWEEN:

A.T. BAISI .... **APPELLANT**

-AND-

LILONGWE CITY COUNCIL...**RESPONDENT**

CORAM: **HON. CHIEF JUSTICE R.R. MZIKAMANDA SC**
HON. JUSTICE F.E. KAPANDA SC, JA
HON. JUSTICE H.S.B. POTANI SC, JA
HON. JUSTICE J. KATSALA SC, JA
HON. JUSTICE I.C. KAMANGA SC, JA
HON. JUSTICE M.C.C. MKANDAWIRE SC, JA
HON. JUSTICE S.A. KALEMBERA SC, JA
HON. JUSTICE R. MBVUNDULA SC, JA
HON. JUSTICE D. nyaKAUNDA KAMANGA SC, JA
Nkhutabasa, Kubwalo, Counsel for the Appellant
Tsabola, Counsel for the Respondent
Shaibu, Tchukambiri, Judicial Research Officers
Chimtande, Minikwa, Court Clerks
Mutinti, Msimuko, Recording Officers

JUDGMENT

Mbvundula SC, JA *(All the other Justices of Appeal concurring)*

1. The main issue before this Court is whether the respondent, in the purported exercise of powers conferred upon it under section 91 of the Local Government Act (Cap. 22:01of the Laws of Malawi), (hereinafter referred to

as "the Act"), conducted itself in a just, fair and lawful manner regarding the sale of the appellant's property, which it was authorised by a court order to seize and sell on account of the appellant's default to timely pay city rates. One further issue, which arose at the hearing of the appeal, is whether, as claimed by the appellant, the High Court ought not to have granted the respondent's prayer based on estoppel and limitation.

2. The facts underlying the case are undisputed and can be summarized as follows. The appellant was at all material times the titleholder and owner of a property located at Plot Number 50/7 within the respondent's rating jurisdiction. Pursuant to the provisions of section 91 of the Act, the respondent published a notice on 2nd March 2015 to assessable property owners within its jurisdiction notifying them of outstanding city rates. This notice included the appellant's property to which was attributed a city rates debt amounting to K103 520 142.30. Through a letter dated 13th November 2016, the appellant expressed shock and disbelief at the figure and requested the respondent to revisit and explain the same. However, the respondent ignored the request and opted to proceed to apply in the High Court for an order allowing it to seize and sell the property under the provisions of the said section 91. The High Court granted the respondent's prayer leading to the appellant bringing the present appeal against the High Court order.

3. The grounds of appeal, as amended, are as follows:

a. the High Court erred in fact in holding that the evidence before the Court the Respondent had established or proved the city rates said to be owed by the Appellant; (sic)
b. the High Court erred in law in holding that the city rates said to be owed by the Appellant could not be faulted on account of the Respondent's failure to prove the same since at law the Appellant ought to have paid the city rates assessed before contesting the same;
c. the High Court erred in law in ordering the seizure and sale of the Appellant's property when the Respondent's action was at law caught by estoppel;
d. the High Court erred in law in ordering the seizure and sale of the Appellant's property when enforcement of the city rates said to be owed by the Appellant was at law statute barred.

4. We will begin by simultaneously addressing the issues emanating from grounds (a) and (b) of the amended grounds of appeal, namely:

a. whether the High Court erred in fact in holding that on the evidence before the court, the respondent had established or proved the city rates said to be owed by the appellant; and
b. whether the High Court erred in law in holding that the city rates said to be owed by the Appellant could not be faulted on account of the respondent's failure to prove the same since at law the appellant ought to have paid the city rates assessed before contesting the same.

5. We reproduce hereunder the provisions of section 91 (1) – (4) of the Act, which are of relevance:

> "**91. Seizure of property in default**
> (1) In addition to any remedy provided under Part VI relating to recovery of debt, if any sum due for any rate levied on any assessable property remains unpaid for a period of three years after the date upon which such sum became payable the Council shall publish a notice in the Gazette and a newspaper circulating in the local government area showing the name and address of the owner, the description of the property, the amount of rates outstanding, requiring the owner to pay the arrears within thirty days of the date of publication of the notice.
> (2) If the arrears are not paid within the stated period in subsection (1) after notice to any mortgagee, the property shall be seized by the Council through a court of law and thereafter sold by public auction in satisfaction of the rate due.
> (3) The Council shall give notice of the sale by advertisement in the Gazette and a newspaper circulating within the local government area.
> (4) The owner may recover possession of the property by paying in full all arrears and expenses incurred by the Council at any time before the sale."

5. The court below, in paragraph 4 of its judgment, with regard to the aforesaid provisions, stated the following:

> "4. Once such publication has been properly made, it becomes incumbent upon the property owner to remedy the default within 30 days of such publication or risk losing the property through a court

sanctioned seizure for purposes of selling to recover the unpaid city rates. In the context of effective local government administration the importance of collecting revenue through rates for proper delivery of social services and general governance of the local government area cannot be overemphasized (see sections 44 (1) and 79 (1) of the Local Government Act on sources of revenue). According to section 90 of the Local Government Act the city rates are attached to the property itself (hence the remedy to seize the same and realise the funds from its sale)."

6. About the appellant's case, the court stated:

> "... *A.T. Baisi* has argued that the plaintiff [the present respondent] has failed to establish the extent of his arrears. However, an analysis of the evidence shows that the City Council did explain how that figure was arrived at (see paragraph 5 of *A.T. Baisi's* affidavit in opposition). More importantly, this argument misses the stipulations of section 78 of the Local Government Act which states that
>
>> "The rates levied upon a property in respect of which an objection or appeal has been lodged shall be payable according to the valuation appearing in the valuation roll or supplementary roll pending the determination of the objection or appeal."

7. The law does not disallow any challenge to the rate being levied by the City Council; it simply makes that challenge conditional upon payment of sum assessed. In this instance, therefore, Mr. *A.T. Baisi* should first pay and then he can contest the sum levied through the appropriate mechanisms. Thus, on the law as it stands, the City Council, would be entitled to seize and sell the property in order to remedy the gazetted for default in city rates on [the appellant's property]."

8. We must perhaps state that the reference to section 78 of the Local Government Act in relation to the current dispute was a misdirection since it has no bearing on the dispute at hand. This is because the objection or appeal referred to section 78 is not with respect to the amount of rates for which section 91 may be invoked. When a rate payer invokes the provisions of

section 76 as read with section 68 of the Act, it is in relation to a specific provision that states:

> "68 (1) Every valuation roll and supplementary valuation roll shall in respect of every assessable property included therein show separately—
> (a) the total valuation of the assessable property;
> (b) the value of the assessable land; and
> (c) the value of the assessable improvements situated thereon,
> and shall also show what are, to the best of the knowledge and belief of the valuer, the name and address of the owner ..."

9. Section 76 stipulates as follows:

> "**76. Objection to valuation roll**
> (1) Any person who is aggrieved—
> (a) by the inclusion of any property in, or by the omission of any property from, any valuation roll; or
> (b) by any rule ascribed in any valuation roll or supplementary valuation roll to any assessable property, or by any other entry made or omitted to be made in the same with respect to any assessable property, may object to the valuer at any time before the expiration of twenty-eight days from the first day on which the rate is payable.
> (2) Any objection given under subsection (1) shall be in writing and shall specify the grounds of the objection.
> (3) Upon receipt of an objection under subsection (1) the valuer—
> (a) in the case of an objection to the inclusion or omission from the valuation roll of any property may if he thinks fit alter the valuation roll accordingly.
> (b) In the case of an objection to a valuation shall cause the property in question to be reassessed and may alter the valuation downwards or upwards or confirm the original valuation and shall set out in writing to the person objecting the reasons for such decision."

10. In brief, section 76 deals with objections or appeals to the valuer who has compiled a valuation roll on behalf of a local authority against the inclusion of

or omission of a property in the valuation roll or the property's value assessment. Section 78 then provides that merely raising such an objection, i.e. "an objection or appeal" under section 76, does not entitle one to refuse to pay any rate levied by the council. The appellant's present grievance has nothing to do with matters under section 76 as it is not about a valuation attributed to his property, but the amount of city rates being claimed by the respondent council. Accordingly, the provisions of section 78 are inapplicable to the appellant's case, as his concerns are confined to the amount of debt claimed by the respondent and how it was arrived at.

11. Section 91 (4), on the other hand, though somewhat similar in terms to section 78, deals with full settlement of all arrears and expenses incurred by the council at any time before the seizure and sale order is effected; in other words, the property owner may redeem the property from sale by settling the arrears and expenses before sale. That provision, rather than section 78, would apply in the circumstances of this case.

12. However, we are of the clear and undoubted opinion, that the provisions of section 91 (4) are not the only legal consideration at play in the circumstances of this case. As will be demonstrated, in our judgment other even more important considerations come into play with regard to the present dispute.

13. We begin by reference to the appellant's letter dated 13th November 2016, addressed to the respondent upon being advised of the aforementioned city rates amount. In his affidavit in opposition to the respondent's originating motion, he stated as follows:

> "3. **<u>THAT</u>** I refer to paragraphs 5 and 6 of the affidavit in support of the originating summons and state that when it was brought to my attention that I owed the Plaintiffs the sum of MK 103 520 142.30 I was shocked as there was no way the city rates could have totaled up to MK 103 520 142.30 at the present rateable amount of MK41 889.75 per six months.
>
> 4. **<u>THAT</u>** I wrote the Plaintiff through their lawyers to revise the city rates as they did not make sense. A copy of the letter that I wrote to the Plaintiff is attached hereto and marked **<u>ATB1</u>**.

5. **THAT** in response, the Plaintiff advised me that according to their calculations from the year 2000 to 2009 the city rates stood at MK 43 454 008.66 and that from 2009 to 2016 the figure had risen to MK 103 520 142.30 having factored in the 4% surcharge."

14. The appellant's assertion that he sought an explanation is not disputed. Although the appellant did not mention so in his letter, i.e. document marked ABT1, we find that the appellant was seeking a detailed debtor's statement of his rates account from the respondent, which perhaps is what the respondent referred to as their calculations. An objective mind would wonder why, if indeed the calculations were done, or indeed properly carried out, the respondent would seek to withhold them from the property owner who requested for them.

15. Even in the court below the respondent did not produce the alleged calculations as evidence to substantiate the debt. All the respondent stated in the court below was that the appellant owed those amounts of city rates and that he refused to pay them. It is apparent, however, that even the allegation that he refused to pay contradicted the fact that the appellant voluntarily deposited the amount that he believed was owed, into the respondent's bank account, expecting the respondent to demonstrate otherwise, which was the respondent's burden, as it is common legal knowledge that a party who alleges something must prove it on a balance of probabilities, as noted in the cases of *Electoral Commission and another v Mkandawire* [2011] MLR 47 (SCA) and *Chipiliro Banda v Southern Bottlers Ltd* [2014] MLR 72 (SCA).

16. We note that the court below considered the appellant's argument regarding the respondent's failure to establish the extent of the appellant's arrears, and found that the respondent did explain how the figure was arrived at. Nevertheless, we would disagree with that finding due to the respondent's grossly inadequate and unsatisfactory explanation lacking proof. For a start, the respondent failed to provide an explanation to the court below regarding the initial figure of K43 454 008.66 attributed to the period spanning from 2000 to 2009, as well as the subsequent increase to K103 520 142.30 over time, and the impact of the 4% surcharge on the same. It was imperative that this be carried out and demonstrated meticulously. Anything less than that would not suffice. In this regard, the court below should not have found that

the respondent had explained how the figure of K103 520 142.30 was arrived at.

17. The respondent bears a statutory duty to provide information within its custody and control. The obligation is imposed by both the Local Government Act, which serves as the primary legislation governing the respondent's operations, as well as the Constitution of the Republic.

18. Section 90 (2) of the Local Government Act confers upon any ratepayer the right to receive information pertaining to their rates account, hence imposes a correlative duty on the part of the respondent to provide that information. The relevant part of section 90 (2) reads as follows:

> "(2) The Chief Executive Officer ... of the Council shall *on request by the owner* and on payment of a fee to be fixed by the Council *give a statement setting out in respect of any property the amount of the rates outstanding on the property at the date of issue* and such statement shall be known as rates certificate." [emphasis supplied]

19. As already observed, in the present case, the appellant indeed exercised his right under that provision of the Act, by requesting for a statement of his rates account, but the respondent elected not to discharge its duty thereunder by neglecting to provide the statement. This is clear from the absence of evidence showing that the respondent provided the detailed debtor's statement alluded to earlier, covering the whole period from 2000 to 2016.

20. We are aware that the respondent exhibited the document marked "LCC2" as purported evidence of the outstanding debt due. However, it is merely an invoice, as opposed to a statement detailing how the claim therein was arrived at, thus falling far short of the statutory requirements. We find that the respondent failed to meet its obligations under section 90 (2) of the Act and is not entitled to exercise its rights under the very same law that it breached in the transaction. The respondent lacks the entitlement to pick and choose the provisions of the Act or the law, in general, to comply with. They are obligated to adhere to all these provisions. In particular, they are required to refrain from engaging in acts, omissions and decisions that could adversely affect the rights of any person, without lawful justification. The impression of

the respondent's conduct in this Court's view, is that of a public body exhibiting oppressive tendencies, acting in bad faith, and abusing its power.

21. The respondent was not only under an obligation to furnish a statement to the respondent before commencing the legal action but it also bore an evidential burden, under section 89 of the Act, which it failed to discharge. Section 89 provides, *inter alia*, that in any proceedings aimed at recovering rates, the rates records, along with all entries, extracts or certified copies signed by the Council's Chief Executive Officer, as well as any necessary copies of any notices required under that Part, shall serve as evidence upon production, demonstrating the levying of such rate and the contents of such extracts, certified copies or notices. There is no evidence that this requirement was satisfied in the court below. No document or record of the aforementioned respondent signed by its Chief Executive Officer was presented in evidence in the court below. The only documents made available to the court by the respondent consisted of copies of the notice to defaulters and the invoice, both containing the disputed amount. This Court is left wondering what the motive behind such concealment of information by the respondent might be. The respondent's failure to comply with section 89 of the Act disentitled it to the remedy it sought in the court below.

22. The rationale for the aforementioned provisions of sections 89 and 90 of the Act is to ensure the satisfaction of both the ratepayer and, where necessary, the court, regarding the council's claim against a ratepayer. In cases where disputes arise between the parties involved, the court is obligated to take special precautions to prevent any unfair treatment of the ratepayer, who happens to be in a weaker position, as between himself and the council.

23. A public body such as the respondent is obligated to operate in accordance with the law and uphold principles of fairness in its conduct. The public body must refrain from acting in a manner that is tantamount to an abuse of power. We cite, in this regard, the judgment of the Scottish Court of Session in *Al Fayed v. Advocate General for Scotland (representing the IRC)* [2004] ScotsCS 278, 77 TC 273, [2004] STC 1703, at paragraph 100 where the court stated:

> "There is no doubt that it is unlawful for a public authority, such as the respondents, *to act with conspicuous unfairness*, and in that sense abuse of power. In applying the test of fairness in a particular case, the court will have regard to all the relevant circumstances and determine whether there has been an abuse of power. It is not difficult to envisage

cases where a public authority is possessed of lawful powers which it misuses in an unfair manner. Thus in *R. v. Inland Revenue Commissioners ex parte Unilever plc* and *R. v. North and East Devon Health Authority ex parte Coughlan*, the power which was held to have been abused in each case was a perfectly lawful power." (emphasis supplied).

24. Macpherson J, in *Reg. v Inland Revenue Commissioners Ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] A.C. 617 (citing Lord Mustill in *Matrix-Securities Ltd v. Inland Revenue Commissioners* [1994] STC 272), noted that abuse of power can be a matter of impression, the test being whether a jury of reasonable men and women would be perfectly persuaded and impressed that, in all the circumstances of the whole of the picture presented, the case did smack of such abuse. The local cases of *Gonthi v Attorney-General* [1996] MLR 48 (HC) and *Kaundama v Attorney-General* [2002-2003] MLR 129 (SCA) discuss instances of abuse of public power.

25. The pertinent provision under the Constitution in this context is section 37. The provision delineates that:

> **"37. Access to information**
> Every person shall have the right of access to all information held by the State *or any of its organs at any level of Government in so far as such information is required for the exercise of his or her rights*." (emphasis supplied)

26. There can be no doubt that the appellant had rights and interests in the property at issue. As such, the respondent had a Constitutional obligation to comply with section 37 and provide the appellant with the necessary information. Respondent's disregard of that obligation was therefore unconstitutional and unlawful since it amounted to an attempt to deprive the respondent of his property without due process, in violation of section 28 (2) of the Constitution, and so arbitrary and liable to be struck down. The word "arbitrary" is defined in *The Collins Compact English Dictionary* as, *inter alia*, something "done without consideration of the wishes of others" [such as] "the arbitrary power of a king". That, in essence, is how the respondent conducted itself towards the appellant in this case.

27. We must also touch on the provisions of section 43 of the Constitution which provides that:

"**43. Administrative justice**

Every person shall have the right to—

(a) lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and

(b) be furnished with reasons, *in writing*, for administrative action where his or her rights, freedoms, legitimate expectations or interests are affected."

28. This constitutional provision on the right to lawful and procedurally fair administrative action has been discussed in the case of *Chawani v The Attorney-General* [2000–2001] MLR 77 (SCA); *Chirwa v The State and National Compensation Tribunal* [2002–2003] MLR 33 (SCA); *Attorney General v Lunguzi and another* [1996] MLR 8 (SCA) and *Mthinda and another (on behalf of other civil servants) v Attorney General* [2011] MLR 191 (HC)

29. The provisions of Section 43 are similar to those of Article 47 of the Kenyan Constitution. In that regard we wish to agree with the dictum of the High Court of Kenya at Nairobi in *Republic v Minister of Finance and 2 others ex parte Kenneth Kiplagat* Miscellaneous Civil Appeal 364 of 2007, regarding a dispute between a taxpayer and the Revenue Authority, which we consider to be good law, that arbitrary action or decision making cannot stand the test of fairness and is liable to be struck down, and further, (particularly at paragraphs 51 to 59), that the exercise of administrative discretion and power by a tax authority affects the taxpayer's legal interests, and as such, the authority is expected to furnish reasons where its administrative action adversely affects such interests, and if the authority fails to do so, it is presumed that the decision was without justification or that the authority took into account concerns other than legitimate considerations, and in either case the decision is to be regarded as arbitrary, hence cannot stand the test of fairness and is liable to be struck down. These principles apply with full force to the circumstances of the case at hand, as the appellant was not furnished with any justification as to why he should have lost his property, all in breach of the Act and the Constitution.

30. We conclude that the respondent's conduct, was illegal in its entirety because it failed to comply with its obligations under various statutes, including the Constitution, that it treated the appellant unfairly, unreasonably, and arbitrarily in the manner it did, and that it was oppressive which constituted an abuse of power. As a result, we allow, the first and second grounds of appeal. In that regard we set aside the decision of the court below.

31. Regarding the third and fourth grounds of appeal, we point out that the appeal before us is by way of a rehearing as provided for under Order III rule 2(1) of the Supreme Court of Appeal Rules and that we only have jurisdiction to consider the issues that were before the court below as properly explained in the cases of *National Bank of Malawi v Right Price Wholesalers Ltd* [2013] MLR 276 (SCA); *Finance Bank of Malawi v S Ferreira t/a S.F. International* [2013] MLR 84 (SCA); *National Bank of Malawi v Cane Products*[2012] MLR 301 (SCA). Accordingly, since the issues of estoppel and limitation were not raised before the court below, they are incompetent for us to adjudicate upon: *National Bank of Malawi v Cane Products* [2012] MLR 301 (SCA); *Registered Trustees of The Small Enterprise Development Organisation of Malawi (SEDOM) v Waka* [2004] MLR 278 (SCA). We accordingly dismiss the third and fourth grounds of appeal.

32. The relief sought by the appellant is in paragraph 4 of his amended notice of appeal, and is that this Court orders that the decision of the High Court ordering that the respondent may seize and sell Plot Number 50/7, the property of the appellant be set aside. Having allowed grounds 1 and 2 of the appeal, we hereby grant the said relief, Consequently, the decision of the High Court granting the respondent (Lilongwe City Council) the order to seize and sell the appellant's property, Plot Number 50/7, is hereby set aside.

33. We also order that the respondent shall:

1. Provide the appellant with a detailed and itemized statement of the alleged outstanding city rates covering the period from 2000 to 2016, in compliance with section 90(2) of the Local Government Act.
2. Furnish the appellant with written reasons for the assessed rates, including the calculations of any surcharges applied, as required under section 43 of the Constitution.

34. The respondent is prohibited from taking any further steps to seize and sell the appellant's property unless and until:

1. The appellant has been given a fair opportunity to review the detailed statement and challenge the rates through appropriate legal mechanisms.
2. The respondent has complied fully with its statutory and constitutional obligations, including transparency and procedural fairness.

35. The respondent is ordered to comply in full with the terms hereof within 90 days from the 11th June 2025, failing which the assessment shall be carried out by an independent auditor currently registered by and currently licenced as such with the Institute of Internal Auditors in Malawi, appointed by the President of the said Institute, the expenses of which shall be borne by the respondent.

36. The respondent shall bear the costs incurred in the High Court and in this Court, to be paid to the appellant.

Delivered and dated at Lilongwe the 11th day of June 2025.

....

HON. CHIEF JUSTICE R.R. MZIKAMANDA SC

....

HON. JUSTICE F.E. KAPANDA SC, JA

....

HON. JUSTICE H.S.B. POTANI SC, JA

....

HON. JUSTICE J. KATSALA SC, JA

....

HON. JUSTICE I.C. KAMANGA SC, JA

....
HON. JUSTICE M.C.C. MKANDAWIRE SC, JA

....
HON. JUSTICE S.A. KALEMBERA SC, JA

....
HON. JUSTICE R.S. MBVUNDULA SC, JA

....
HON. JUSTICE D. nyaKAUNDA KAMANGA SC, JA