



**JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)
CIVIL REVIEW CAUSE NO. 19 OF 2021**

BETWEEN:

**THE STATE (On application of AFRICA
FERTILIZERS LIMITED) CLAIMANT**

-AND-

MALAWI BUREAU OF STANDARDS DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Nkhata, Counsel for the Claimant
Mr. M'meta, Counsel for the Defendant
Mr. Henry Kachingwe, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

Introduction

This is my judgement on an application brought by the Claimant for a review of decisions made by the Defendant in connection with the fertilizers imported and supplied by the Claimant and distributed across various depots across Malawi.

The Defendant is opposed to the application.

Challenged decisions

The decisions which the Claimant seeks to be reviewed are stated in the Notice of Application for Judicial Review as follows:

- “1. *The Defendant’s decision in ordering the recall and re-export of batches numbers BD/PM/01, K/1920/U10 and K/1920/U27 of NPK 23:10:5 + 6S + 1Zn Blue Deebaj fertilizers imported and supplied by African Fertilizers limited and distributed across various depots across Malawi without regard to the Claimant’s rights to be heard.*
2. *The disregard of the Claimant’s right to be heard before taking samples and after re-conducting laboratory tests on batches numbers BD/PM/01, K/1920/U10 and K/1920/U27 of NPK 23:10:5 + 6S + 1Zn Blue Deebaj fertilizers imported and supplied by African Fertilizers limited and distributed across various depots across Malawi.*
3. *The Defendant’s failure in subjecting to independent test batches numbers BD/PM/01, K/1920/U10 and K/1920/U27 of NPK 23:10:5 + 6S + 1Zn Blue Deebaj fertilizers imported and supplied by African Fertilizers limited and distributed across various depots across Malawi before making the decision to recall from the market and re- export the same.*
4. *The Defendant’s decision in taking into account an irrelevant consideration such as a chlorine level in testing the batches when it was not among the technical specification of the sample of fertilizer before procurement.*
5. *All processes leading to the said decision in (1, 2 and 3) above”*

Reliefs being sought

The Claimant seeks the following reliefs:

- “1. *A declaration that the Defendant’s decision which was made without hearing the Claimant is a violation of the guarantee of the right to be heard under the principles of natural justice and the right to lawful and procedural fair administrative action under section 43 of the Constitution therefore Defendant’s decision is procedurally improper, unreasonable and unconstitutional.*
2. *A declaration that the Defendant’s decision to consider the Chlorine levels in the sample of fertilisers when the same was not part of the technical specification on procurement was an irrelevant consideration and therefore the Defendant’s Decision was improper.*
3. *A declaration that the Defendant’s failure in taking into consideration the results of the tests it released on 25th March, 2021 vis-a-vis section 35(3) of the Malawi Bureau of Standards Act is illegal as it violates the Claimant’s right to economic activity under section 29 of the Constitution.*
4. *A like order to Certiorari quashing the decision of the Defendant.*
5. *A like order to prohibition, restraining the Defendant from recalling and re-exporting the fertilizers.*

6. *An order of interlocutory injunction restraining the Defendant, its agents, servants or any other person acting on its behalf from effecting the decision to recall and re-export the fertilizers until the determination of the substantive application.*
7. *An order for costs*
8. *And other order the court may deem fit in the circumstances"*

Claimant's sworn statement

The application for judicial review is supported by a statement sworn by Mr. Imran Patel [Hereinafter referred to as the Claimant's sworn statement"]. He is one of the Claimant's directors and his sworn statement is in the following terms:

- "2. *Unless otherwise stated I depose to matters of fact which are generally within my knowledge and that which has been passed on to me by management of Chipiku Stores the same which I believe to be true.*
3. *I make this statement on 20th April, 2021*
4. *The Claimant, Africa Fertilizers Limited is an importer and distributor of fertilizers, seeds and agrochemicals.*
5. *Prior to March, 2021 the Claimant, submitted to the Defendant samples of batch numbers BD/PM/01, K/1920/U10 and K/1920/U27 of NPK fertilizer branded as 23:10:5+1.Zn for import batch conformance testing.*
6. *On 25th March, 2021 the Defendant released an import batch conformance certificate certifying that batches numbers BD/PM/01, K/1920/U10 and K/1920/U27 of NPK fertilizer branded as 23:10:5+1 Zn have been found to conform to the national product standards. I attach and exhibit the import batch conformation certificate marked "IP 1."*
7. *As a result of the certification, Africa Fertilizers Limited appointed Chipiku Stores as one of their distributors for sale of the said fertilizers.*
8. *On 13th April 2021, the Claimant and Chipiku Stores received a letter from the Defendant, Malawi Bureau of Standards stating that three batches of NPK 23:10:5 + 6S + 1 Zn fertilizer (BD/PM/01, K/1920/U10 and K 1920/U27) have been found to be of sub-standard consequent which Chipiku stores was ordered to stop the sales of NPK 23:10:5 + 6S + 1 Zn of these 3 batches. I attach and exhibit hereto a copy of the letter from Malawi Bureau of standards marked "IP 2."*
9. *I repeat paragraph 8 hereof and state that the letter from the Defendant also orders the Claimant to do the following;*

- a. *Immediately recall the defective fertilizer batches from all its depots and other distribution points by Friday 16th April, 2021 to its warehouses;*
 - b. *Issue a press release by Friday, 16th April, 2021 warning the public about the said substandard batches, stopping them from buying and using the defective batches.*
 - c. *Declare statistics of all quantities of the recalled defective batches to Malawi Bureau of Standards by 19th April, 2021 for follow up action.*
 - d. *Re-export the defective fertilizer by 30th April, 2021 to the supplier in the country of origin, Blue Deebaj, Dubai, United Arab Emirates under close supervision of the Defendant.*
 - e. *Immediately stop further importation of this particular brand of fertilizer into Malawi and ensure that the supplier takes necessary corrective action against the non compliance of their fertilizer after which the Defendant shall require to verify redress on the same through pre-shipment testing processes prior to allowing you to import this brand of fertilizer gain.*
10. *According to the letter marked “IP 2,” the Defendant alleges that they conducted tests on samples from batches number BD/PM/01, K/1920/U10 and K/1920/U27 taken from Chipiku stores in Bolero-Rumphi, Mzuzu and Chulu–Kasungu after receiving complaints from consumers in the respective area concerning the abnormal growth of their crops after applying the fertilizers.*
 11. *According to exhibit marked “IP 2” batch number K/1920/U10 is alleged to have failed the technical specification compliance test on the basis that it had excess Phosphorous in the range of 13.93% against the specified range of 8-12% m/m; Sulphur in the range of 0.285% m/m against the specified range of 4-6%; and Chlorine in the range of 6.42% instead of the specified range of 2% m/m maximum for tobacco use.*
 12. *I repeat paragraph 11 hereof and state the results make reference to chlorine levels in the specification of the fertilizer which is repeated in the test results for batches number K/1920/U27 and BD/PM/01 but it is an irrelevant consideration as the same is not part of technical specifications listed on the compliance sheet supplied by the Defendant or the Smallholder Farm Fertilizers Revolving Fund of Malawi (SFFRFM). I attach and exhibit hereto a copy of the table for Technical specification and Compliance sheet marked as “IP 3” and “IP 4.”*
 13. *Similarly, the samples of the fertilizer were tested for specification to do with production of tobacco crop only while the fertilizer that was supplied by the Claimant was meant for maize production under the Government’s affordable input program.*
 14. *Apart from the above, at all material times when the said test were being conducted by the Defendant, the Defendant never alerted the Claimant of the complaints or of*

the fact that they would be conducting tests on the fertilizers which the Claimant was supplying to Chipiku Stores.

15. *The Defendant has also not supplied the Claimant with evidence that the complainants really used the Claimant's fertilizers or that the said fertilizer were used on the complainant's farm.*
16. *Be that as it may, the discrepancies in the results if true as minimal such that they would do not warrant the order made by the Defendant.*
17. *The Claimant contends that the Defendant's conduct is therefore unprocedural and unreasonable since the Defendant did not inform the Claimant that it was going to be re-testing the fertilizers subsequent to the approval for sale of samples which were taken from the Claimant's warehouse before the Claimant started distribution of the fertilizer across Malawi as shown in exhibit marked "IP 1" above.*
18. *Furthermore, the results which were produced and furnished on the Claimant and Chipiku stores were unilaterally collected and tested by the Defendant and have not been verified through testing by an independent international approved laboratory chosen by both parties.*
19. *In addition, I have been informed by counsel that the decision by the Defendant to receive complaints about the Claimant's product, thereafter unilaterally collect samples, test the samples, and make an order concerning the fertilizers supplied and distributed by the Claimant without hearing the Claimant is a violation of the Claimant's right to a fair administrative action as guaranteed by the Constitution and principles of natural justice.*
20. *Moreover, the decision to recall the product and publish news about the unsuitability of the Claimant's product which is in the market when there has not been independent verification of the results for unsuitability of the product for other crops is detrimental to the reputation of the Claimant and the products that it supplies to the general public thus the same threatens the Claimant's right to engage in economic activity.*
21. *I also repeat paragraphs 19 and 20 hereof and state that the manner in which the decision of the Defendant has been made and the times lines provided therein for the Claimant to comply with the order deprives the Claimant of an avenue for appealing against the decision of the Defendant to any body or institution thereby the Claimant has no alternative remedy for redress of its grievances.*
22. *As a corollary and in the foregoing, the Claimant also prays for an interim relief of injunction restraining the Defendant from implementing its decision as contained in paragraphs 1 to 5 of the letter dated 12th April, 2021 herein marked as Exhibit "IP 2" pending the hearing and determination of the application for judicial review.*

23. *The Claimant also makes an undertaking to pay any damages that may be incurred by the Defendant due to the granting of the order of injunction sought after herein.*
24. *I also depone that this is a matter of extreme urgency as the Defendant has already specified the time lines for implementing its decision and if the Defendant's decision is allowed to stand, the application for judicial review will merely be moot and the Claimant will suffer irreparable damage in relation to its economic interest."*

The letter referred to in paragraph 8 of the Claimant's sworn statement is addressed the Claimant's Managing Director and it is dated 12th April 2021 (Hereinafter referred to as the "Order Recalling Fertilizer"). For reasons that will be clear in due course, it is expedient that the Order Recalling Fertilizer be quoted in full:

"ORDER TO RECALL AND RE-EXPORT SUBSTANDARD BATCHES NOS BD/MP/01, K/1920/U10 & K/1920/U27 OF NPK 23:10:5 + 1Zn BLUE DEEBAJ FERTILIZERS IMPORTED AND SUPPLIED BY AFRICAN FERTILIZERS LTD AND DISTRIBUTED AT VARIOUS DEPOSITS ACROSS MALAWI

We refer to consumer complaints registered in Bolero-Rumphi, Mzuzu, and in Chulu-Kasungu respectively, and to our recent follow-up marker surveillance conducted at Bolero Chipiku Depot-Rumphi, Mzuzu Chipiku Depot Chulu, and Chipiku Depot-Kasungu, in February, 2021 where the above mentioned batches numbers BD/PM/01, K/1920/U10, K/1920/U27 of NPK 23:10:5 + 6S + 1.0Zn fertilizer, which were imported by your company into Malawi, were sampled from for testing in accordance with mandatory Malawi standard, MS 255-Compound fertilizers –Specification.

Please, find attached laboratory results on the tests that were conducted on the samples for your kind attention. Note from the results that all samples of batches numbers BD/MP/01, K/1920/U10, K/1920/U27 partly drawn from the complainants as well as from the three abovementioned depots failed to meet the requirements of MS 255 as follows:

- a) *The Chipiku Bolero complaint sample under batch number K/1920/U10 critically failed due to high Chlorine concentration of 6.42% m/m versus the maximum specified limit of 2% m/m max for tobacco use, and due to critically low Sulphur content of 0.295% m/m versus the 4-6% specified range, apart from registering marginally high Phosphorus (as P₂O₅) content of 13.93% m/m versus the specified range of 8-12% m/m.*
- b) *The Chipiku Chulu complaint sample under batch number K/1920/U27 critically failed due to high Chlorine concentration of 10.3% m/m versus the maximum specified limit of 2% m/m max for tobacco use.*
- c) *The Chipiku Bolero Depot sample under batch number BD/PM/01 registered critically low 6.09% m/m nitrogen (N) content contrary to the required range of 20-25% nitrogen (N) content, plus a critically high Chlorine content of 12.87% m/m versus the maximum specified limit of 2% m/m max for tobacco use.*

- d) *The Chipiku Mzuzu Depot sample under batch number **BD/PM/01** registered critically low 0.21% m/m nitrogen (N) content contrary to the requires range of 20-25% nitrogen (N) content, plus a critically high Chlorine content of 11.92% m/m versus the maximum specified limit of 2% m/m max for tobacco use.*
- e) *The Chipiku Chulu Depot sample under batch number **BD/PM/01** number registered 0.03% m/m nitrogen (N) content contrary to the required range of 20-25% nitrogen (N) content, plus a critically high Chlorine content of 11.14% m/m versus the maximum specified limit of 2% m/m max for tobacco use.*

Further too the above, the tobacco crops to which the fertilizers were applied in tobacco farmers in Bolero, Mzuzu and Kasungu areas respectively showed stunted growth, and had shrinking, cupping, pale green coloured, and yellowish leaves. Similar effects were observed in maize and other crops applied with these batches of fertilizers.

In view of the above, in the interest of consumers' safety and protection from such defective products, and in line with the Malawi Bureau of Standards Act (Cap 51:02), the MBS hereby orders you to:

- 1) *Immediately recall the defective fertilizer batches from all your depots and other distribution by Friday, 16th April, 2021 to your AFL Ltd's Warehouses;*
- 2) *Issue a Press Release by Friday, 16th April, 2021, warning the public about the said substandard batches, stopping them from buying and using the defective batches;*
- 3) *Declare statistics of all quantities of the recalled defective batches to MBS by 19th April, 2021 for our records and follow up action.*
- 4) *Re-export the defective fertilizer by 30th April, 2021 to the supplier in the country of origin, Blue Deebaj, Dubai, UAE under the close supervision of the MBS; and*
- 5) *Immediately stop further importation of this particular brand of fertilizer into Malawi and ensure that the supplier takes necessary corrective action against the non-compliance of their fertilizer, after which the MBS shall require to verify redress on the same through pre-shipment testing processes prior to allowing you to import this brand and type of fertilizer again.*

We look forward to your utmost cooperation in this matter, as failure to comply with the above conditions of this order notice shall result in appropriate mandatory actions against you including legal action.

By copy of this product recall order notice, the undersigned authorities are also notified of this development for their information and possible action."

Defence

As already stated, the Defendant is opposed to the application and it filed the following statement of defence:

“The defendant refers to the Notice of Application for Judicial Review and more particular to the section for “Judgement, Order, Decision or other proceedings in respect of which reliefs are sought” and respond as follows:

1. *The defendant refers to paragraph 1 and does not admit the allegations therein as alleged or at all.*
2. *The Defendant refers to paragraph 2 and does not admit the allegations therein as alleged or at all.*
3. *The defendant has no statutory obligation to abdicate its mandate to a third party. Save as aforesaid, paragraph 3 is denied.*
4. *The defendant has a statutory mandate to apply and enforce Malawi standard 255:1998 on compound fertilizers specification. Save as aforesaid paragraph 4 is denied.*
5. *The Defendant refers to paragraph 5 and dispute the contention.*

Save as aforesaid the defendant each and every allegation of fact contained in the Notice of Application for Judicial Review as if the same were herein set out and traversed seriatim.”

Defendant’s sworn statement

The Defendant also filed a statement in opposition to the application for judicial review. The statement was sworn by Mrs. Gertrude Mwakikunga, the Deputy Director of Quality Assurance Services – Quality Monitoring [Hereinafter referred to as the Defendant’s sworn statement’], and it will be quoted in full:

- “4. *I have read the sworn statement of **Inram Patel** in support of an application for permission to commence judicial review.*

Complaints and results of market surveillance

5. *Sometime in February 2021, the Defendant conducted a market surveillance and re-testing of fertilizers upon receipt of complaints from farmers in Rumphi, Kasungu and Mzimba. I exhibit hereto copies as follows:*
 - a. *Complaint Registration Form from **Leslie Munthali** of Bowoyeke Village, Bolero Rumphi and mark it “GM 1”.*
 - b. *Consumer Complaints Vendor/Manufacturer Consultation Form for **Leslie Munthali** and mark it “GM 2”.*
 - c. *Sampling Form for **Mathews/Joseph** and mark it “GM 3”.*
 - d. *Sampling Form for **M Ngaiyaye** and mark it “GM 4”.*
 - e. *Sampling Form for **J Kandeado** and mark it “GM 5”.*

6. *It transpired that the samples that were collected were part of the following batches that were imported and or distributed by the Claimant: **BD/PM/01, K/1920/U10 and K/1920/U27.***
7. *The fertilizer formulation for batches **BD/PM/01, K/1920/U10 and K/1920/U27** was NPK 23:10:5 +6S. However, on re-testing, there were significant discrepancies on failed parameters for samples obtained during the investigation for phosphorous, sulphur, chlorine, nitrogen, packaging and labeling. I exhibit hereto Annexes 1 to 5 being the laboratory results and mark it “**GM 6**”.*
8. *In the interest of consumer safety and crop productivity, the results in exhibit “**GM 6**” necessitated an immediate cessation of the process for the sale of the offending batches of fertilizers, that is batches **BD/PM/01, K/1920/U10 and K/1920/U27.** I exhibit hereto a copy the Order to recall and re-export substandard batches dated 12th April 2021 and mark it “**GM 7**”.*

Regulatory requirements and compliance with Malawi Standard 255:1998

9. *All compound fertilizer imports are subjected to mandatory conformity assessment as required by Malawi Standard 255:1998 Compound Fertilizers – Specification. I exhibit hereto a copy of the Malawi Standard 255:1998 and mark it “**GM 8**”.*
10. *It is illegal and unlawful for any person to distribute and or sale imported compound fertilizers that:*
 - a. *do not meet the mandatory Malawi Standard 255: 1998; or*
 - b. *do not have a conformance certificate issued pursuant to the conformity assessment as required by the Malawi Standard 255: 1998.*
11. *The Claimant has been distributing and offering for sale compound fertilizers under the following batches without a conformance certificate as required by the regulations:*
 - a. *BD/PM/01*
 - b. *K/1920/U10*
 - c. *K/1920/U27*
12. *The Defendant has the statutory mandate to subject compound fertilizer imports to a conformity assessment process.*
13. *I refer to the compound fertilizer batches that were being traded by the Claimant and state as follows:*

- a. *Batch **BD/PM/01** was sampled on 27th January 2021 and was subjected to conformity assessment processes and was issued with a conformance certificate on 25th March 2021.*
 - b. *Batches **K/1920/U10** and **K/1920/U27** were neither assessed nor authorized for import or sale in Malawi.*
14. *On batches **BD/PM/01**, **K/1920/U10** and **K/1920/U27** there were no labels about the applicability of the fertilizers or its non-applicability to crops such as tobacco as required by Malawi Standard 255:1998.*

Gravity of the non-compliance with Malawi Standard 255:1998

15. *From the records in the Defendant's possession, there was no conformance certificate issued with respect to batches **BD/PM/01**, **K/1920/U10** and **K/1920/U27** as of the date of the market surveillance, that is, February 2021. It follows, as it should, that the Claimant was not entitled to sale the fertilizers from these batches namely **BD/PM/01**, **K/1920/U10** and **K/1920/U27**.*
16. *From the records in the Defendant's possession, batches **K/1920/U10** and **K/1920/U27** were not and have not been subjected to any conformance assessment or at all. It follows, as it should, that the Claimant was committing an offence by importing and offering for sale commodities without authorization in contravention of Malawi Standard 255:1998.*
17. *I verily believe that if the Claimant had subjected the batches **K/1920/U10** and **K/1920/U27** to a conformance assessment they would not have been surprised with the results from the market surveillance.*
18. *The nature of a market surveillance upon receipt of complaints is different from the procedure for collecting samples from an importer prior to distribution of the commodity on the market.*
19. *The Claimant's expectation that the Defendant should have engaged them during the market surveillance is so unreasonable that no reasonable person would entertain such thought. The Defendant would not have known in advance that the offending batches belong to the Claimant.* – Emphasis by underlining supplied

Issue for determination

It is commonplace that the Order Recalling Fertilizer was made by the Defendant under the Malawi Bureau of Standards Act (Act). The issue for determination of the Court in this case is whether or not the powers given to the Defendant under the Act to recall and re-export fertilizers can be exercised without according the importer of the concerned consignment an opportunity to be heard.

Submissions by the Claimant

The position of the Claimant is that the answer to the stated issue has to be in the positive. Counsel Nkhata strongly argued that the Defendant erred in law in issuing the Order Recalling Fertilizer prior to according the Claimant the right to heard. The argument was put thus in the Claimant's skeleton arguments:

"3. THE LAW AND ARGUMENTS

Principles of Natural Justice.

- 3.1 *The remedy for judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. In **Chief Constable of North Wales Police v Evans 1 W.L.R [1982] 1155 at 1160** Lord Hailsham had this to say;*

"It is very important to remember in every case that the purpose of the remedy for judicial review is to ensure that the individual is given fair treatment by the authority to which he is subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constitutes by law to decide the matters in question."

- 3.2 *In **Makono v. Lilongwe City Council and Another [1999] MLR 159**, the court quoted the dicta of Mkandawire J in **Lunguzi v Attorney General, Misc Civil Application Number 55 of 1994** as follows;*

"before i proceed any further, perhaps i should say something about what judicial review is all about. Judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Judicial review is concerned with reviewing not the merits of the decision, but the decision making process through which the decision was reached. It is not intended to take away from these authorities the power and directions properly vested in them by law and to substitute the courts as bodies making decisions. It is intended to see that the relevant authorities use their powers in a proper manner. The purpose of judicial review is therefore to protect the individual against abuse of power by a wide range of authorities.

- 3.3 *According to Justice Kalembera in the **State and Secretary for Health ex parte Bruno Lapozo Miscellaneous Civil Cause number 132 of 2010** the court can only fault the decision making process of a public entity on the following the ground;*

- 1) Had no jurisdiction to act or acted ultra vires its powers;*
- 2) Did not follow the rules of natural justice where such rules apply;*
- 3) Made an error of law on the face of the record and/or.*

4) displayed unreasonableness in the *Wednesbury* sense in the conduct of the proceedings or the making of the decision.

- 3.4 *In the Present matter, the Claimant is contending that the decision made by the Defendant in ordering the re-exportation of the batches of the fertilizer without hearing them is contrary to the rules of natural justice. Rules of natural justice require that an accused or a party be heard before decisions are made that affect his/her interest.*
- 3.5 *In the present context, the Claimant was not aware that there were complaints concerning the fertilizers which it was supplying on the market. The Defendant received complaints, collected samples for the batches of fertilizers and subjected the samples to testing without the Claimant's knowledge. It follows then, that the Claimant, as the interested party was not given an opportunity to be heard on the complaint against its products. The Defendant also did not give the Claimant an opportunity to dispute the result of the test by subjecting the samples collected to an independent test. The conduct of the Defendant leading to the decision to re-export the batches of fertilizer supplied by the Applicant therefore violated the principles of natural justice in that it did not accord the Claimant a chance to be heard. See **R v Secretary of State for Home Department ex- parte Hosenball (1977).***
- 3.6 *In **Kondowe and others v Malawi National Council of Sports [1993] 16(1) MLR 213** the Court held that to ensure the fulfillment of the rules of natural justice, every party to a dispute, especially the one likely to be affected by the decision, should be given an opportunity to know the case against him and of stating his own case. He must be afforded an opportunity to present his version of the facts and to make submissions. A public body such as the respondent could not avoid rules of natural justice. The court's power to interfere with the decision of a body like the respondent was by way of judicial review. Especially where the rules of natural justice have been violated, the court will have the power to review whatever decision the body has taken. See also **Nkhoma and others v Council of the University of Malawi [1993] 16(2) MLR 666.***
- 3.7 *In the Kondowe case, the court held that a decision made without affording an affected party an opportunity to be heard offends the principles of natural justice. Justice Ansah, as she then was, consequently set aside the decision of the Respondent to suspend the Applicant from participating in the football tournament. It is Claimant's argument that the court should set aside the decision of the Defendant.*

Procedural Propriety vis-a-vis Mandatory testing.

- 3.8 *The facts of this application show that there is no dispute concerning whether the samples of the fertilizers were subjected to a conformity test before dispatching them on the market. Or whether the Defendant has*

power to test samples for any products being sold on the market, including the fertilizer herein.

- 3.9 *The Claimant has issues with the manner in which the Defendant conducted tests after receiving the alleged complaints from consumers. Procedurally, the Defendant was supposed to inform the Claimant of the complaints. The Defendant issued a standard conformance certificate on 25th March, 2021. However, on 12th April, 2021 the same Defendant issued a notice ordering recall and re-exportation of the fertilizers being sold by the Claimant. **Section 35 of the Malawi Bureau of Standards Act** provides as follows;*

35.—(1) Notwithstanding anything to the contrary in this Act contained, any person who—

(a) manufactures any commodity and is entitled under a mark permit to apply a certification mark to such a commodity;

(b) manufactures or sells any commodity for which or the manufacture of which a mandatory standard is in force;

(c) manufactures or sells any article in respect of which any other standardization mark is in force; or

(d) performs an act or carries out a process in which a commodity referred to in paragraph (a), (b) or (c) is involved, shall, at the written request of the Bureau, within a period stated in the request, at his own cost—

(i) transmit to the Bureau such samples as may be specified in the request, of the article concerned for examination, testing or analysis; or

(ii) furnish to the Bureau such information as may be so specified with regard to the article concerned or its manufacture.

(2)—(a) The Bureau may examine, test or analyze a sample obtained under this section in order to determine whether the article, component, material or substance concerned complies with, or has the characteristics or has been manufactured in accordance with, the requirements of any provision applicable in terms of this Act.

(b) If any sample obtained under this section is damaged or destroyed during the process of examining, testing or analyzing such sample, the Bureau shall not be liable for the damage to or destruction of the same.

(3) The result of any examination, test or analysis of any sample or a commodity to which a mandatory standard is in force, shall, until the contrary is proved, for all purposes be deemed to be valid for the whole consignment or batch from which the sample was obtained. (Underlining supplied by us)

- 3.10 *It must be observed from the exhibits supplied by the Defendant that the Defendant started receiving complaints about the fertilisers way before they issued a conformance certificate dated 25th March, 2021 was issued. In the circumstances, it was up to the Defendant to request the Claimant to resubmit random samples from the batches of its fertilizer which was on the market. See **section 35(1)(d) supra**. However, since the fertilizer had conformed to the standards, it was improper to subject the same fertilizer to another test without informing the Claimant of the complaints. Similarly, the chlorine used to determine the unsuitability of the fertilizers was not part of the initio requirement as shown on the conformity results. The Defendant thus took an irrelevant consideration in making its decision.*
- 3.11 *The law as cited in paragraph 3.9 creates a legitimate expectation on how tests should be conducted by the Defendant. According to the legitimate expectations doctrine, where a decision-maker leads a person affected by a decision to legitimately expect either that a particular procedure will be followed in reaching a decision or that a particular (and generally favourable) decision will be made (and such a decision would be within his powers), then, save where there is an overriding public interest, the legitimate expectation must be protected. According to **section 35(3) of the Malawi Bureau of Standards Act** (supra) it was the expectation of the Claimant that the whole batch being sold on the marked had passed the conformance test. If there was anything to the contrary to the conformance test results, the Claimant was supposed to be informed that the Defendant intended to retest samples from the batch.*
- 3.12 *As it has already been argued above, in judicial review proceedings like the present application one, the task of the court is not to examine the merits of the decision by a public body. The court must look at the prescribed procedure or process for making the decision complained of. The procedure provided in the Act is there to ensure that the procedural expectations are followed by those exercising powers granted by the Act. Therefore, where the Defendant fails to comply with the established procedure, any decision made in such circumstances must be declared void and of no effect. See **Ridge v Baldwin [1964] AC 40***
- 3.13 *In the premises it is clear that the Defendant's decision was made without subjecting the Claimant as an interested party to the rules of natural justice such as the right to be heard. The Defendant's decision was made in April after the farming season as such there was no overriding public interest warranting them to override the procedural expectation. Since it is clear that the decision was made without following the procedure as provided in the guiding Act, it is therefore unreasonable in the wednesbury sense."*

Submissions by the Defendant

It is the case of the Defendant that it was unreasonable for the Claimant to expect the rules of natural justice to apply where the Defendant's Director General was exercising his powers under section 30 of the Act following results of a market surveillance that the Defendant conducted in response to complaints lodged with the Defendant by members of the general public. The following part of the Defendant's Skeleton Arguments is relevant:

"3. The Applicable Law and Arguments

3.1 Relevant statutory provisions

...

General Powers and Offences

3.1.5 Section 47 of Malawi Bureau of Standards Act states that *"The fact that anything has been done under this Act by the Minister, the Bureau, the Board, a member of a committee of the Board, the Director General or an employee of the Bureau, in connection with any article, material, substance, act or matter, shall not be interpreted as an assurance or guarantee of any nature in respect of that article, material of a substance, act or matter."*

3.1.6 Section 44(1)(a) of Malawi Bureau of Standards Act states that *"Any person who contravenes or fails to comply with any provision of this Act, or any directive, regulation, order, condition, requirement or request made there under commits an offence."*

Mandatory Requirement to Subject a Commodity to Conformance Assessment

3.1.7 Section 35(1)(b) of Malawi Bureau of Standards Act states that *"Notwithstanding anything to the contrary in this Act contained, any person who manufactures or sells any commodity for which or the manufacture of which a mandatory standard is in force, shall, at the written request of the Bureau, within a period stated in the request, at his own cost-(i) transmit to the Bureau such samples as may be specified in the request, of the article concerned for examination, testing or analysis; or (ii) furnish to the Bureau such information as may be so specified with regard to the article concerned or its manufacture."*

3.1.8 Section 35(2)(a) of Malawi Bureau of Standards Act states that *"The Bureau may examine, test or analyze a sample obtained under this section in order to determine whether the article, component, material or substance concerned complies with, or has the*

characteristics or has been manufactured in accordance with, the requirements of any provision applicable in terms of this Act.”

- 3.1.9 **Section 35(3)** of Malawi Bureau of Standards Act states that “The result of any examination, test or analysis of any sample or a commodity to which a mandatory standard is in force, shall until the contrary is proved, for all purposes be deemed to be valid for the whole consignment or batch from which the sample was obtained.”

Regulatory Powers: non Conforming Commodities

- 3.1.10 **Section 30** of the Malawi Bureau of Standards Act provides as follows:

(1) *Where the Director General upon reasonable grounds, suspects that a commodity, excluding a commodity referred to in section 29(5), or a consignment or batch thereof does not comply with or has not been manufactured in accordance with a mandatory standard that applies to it, he may direct a person in whose possession or under whose control that commodity, consignment or batch is, to keep it in his possession or under his control, at or upon premises mentioned in the directive, until the said directive is withdrawn by the Director General in writing.*

(2) (a) *If a certificate referred to in section 5 (3) has not been issued in respect of a consignment of a commodity to which a mandatory standard applies and which has been imported into Malawi, the Commissioner General of the Malawi Revenue Authority may, subject to the request of the Director General until the Director General withdraws his request.*

(2) (b) *for the purpose of paragraph (a), the provisions of the Customs and Excise Act with regard to the security goods shall apply mutatis mutandis.*

(3) *if it is found by the Bureau, or as a result of a test or examination referred to in section 29 (2), as the case may be, that a commodity referred to in subsections (1) or (2) does not comply with the mandatory standard concerned, the Director General may order in writing that:-*

(a) an importer of the consignment concerned of the said commodity return it to the country of origin.

(b) the consignment or batch concerned of the said commodity be confiscated and destroyed; or

(c) the consignment or batch concerned of the said commodity is dealt with in such other manner as may be stated in the order.

...

3.2 ***Procedural Impropriety and the Right to be Heard***

3.2.1. *The essence of judicial review cannot be stated better than it was done by the Kenyan Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd** Civil Appeal No. 185 of 2001. The Court stated as follows:*

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters... The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

3.2.2. *Therefore, if a public authority so conducts himself in an unfair, illegal, unreasonable manner or in bad faith, the Court must step in See **A-G of Hong Kong vs Ng Yuen Shiu [1983] AC 629, 638 (Lord Fraser)**.*

3.3 ***The Defendant’s position***

The Defendant argues as follows:

3.3.1 *The compound fertilizers under batches BD/PM/01, K/1920/U10 and K/1920/U27 were and ought to have been subjected to the mandatory conformity assessment as required by Malawi Standard 255:1998 Compound Fertilizers – Specification and the Malawi Bureau of Standards (Imports Quality Monitoring) Regulations, 2016*

3.3.2 *It is illegal and unlawful for any person to distribute and or sale imported compound fertilizers that do not meet the mandatory Malawi Standard 255: 1998; or do not have a conformance certificate issued pursuant to the conformity assessment as required by the Malawi Standard 255: 1998.*

3.3.3 *The Claimant has been distributing and offering for sale compound fertilizers under batches BD/PM/01, K/1920/U10 and K/1920/U27 without any Batch Conformance Certificates.*

- 3.3.4 *With regard to batch BD/PM/01, the Claimant began distribution and sale of the fertilizers before the Batch Conformance Certificate was issued. It is clear from the evidence before the court that the market surveillance and re-testing was done in February 2021 and yet the Conformance Certificate for batch BD/PM/01 was only issued on 25th March 2021.*
- 3.3.5. *The Defendant has the statutory mandate to subject compound fertilizers to a conformity assessment process. The statutory mandate is not shared with other third parties. Batches K/1920/U10 and K/1920/U27 were neither assessed nor authorized for import or sale in Malawi by the Defendant. These batches of fertilizer were not supposed to be on the market or at all. It follows, as it should, that the Claimant was committing an offence by importing and offering for sale commodities without authorization in contravention of Malawi Standard 255:1998.*
- 3.3.6. *On batches BD/PM/01, K/1920/U10 and K/1920/U27 there were no labels about the applicability of the fertilizers or its non-applicability to crops such as tobacco as required by Malawi Standard 255:1998.*
- 3.3.7. *The parameter for Chlorine is not an alien parameter. It is clearly provided for in the Malawi Standard 255:1998.*
- 3.3.8. *There is no legal requirement to conduct market surveillance with the prior consultation or hearing of all the players on the market.*
- 3.3.9. *The issuance of a Batch Conformance Certificate does not negate the right of the Defendant to carry out any market surveillance and re-testing of any commodity as the care may be.*
- 3.3.10. *The nature of a market surveillance upon receipt of complaints is different from the procedure for collecting samples from an importer prior to distribution of the commodity on the market. The Claimant's expectation that the Defendant should have engaged them during the market surveillance is so unreasonable that no reasonable person would entertain such thought. The Defendant would not have known in advance that the offending batches belonged to the Claimant. – [Emphasis by underlining supplied]*

4. ***Submission and Prayer***

The Claimant's application be dismissed with costs."

Analysis and determination

Administrative justice is the subject matter of section 43 of the Constitution. The provision accords every person the right to:

- “(a) lawful and procedurally fair administrative action, which is justiciable 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.*” – Emphasis by underling supplied

That the framers of the Constitution found the issue of administrative justice weighty enough to have it expressly covered in the Constitution does not come as a surprise to those who are well versed in administrative law. Procedural fairness and regularity are of the indispensable essence of liberty. As rightly observed, even harsh substantive law can be endured if it is fairly and impartially applied: See **Shaughnessy v. United States, 345 US 206 (1953) (Jackson J)**.

Violation of natural justice is to be classified as one of the varieties of wrong procedure, or abuse of power, which transgresses the implications which Parliament is presumed to have intended. Just as a power to act “*as he thinks fit*” does not allow a public authority to act unreasonably or in bad faith, so also it does not allow disregard of the elementary doctrines of fair procedure. As was aptly stated by Lord Selborne in **Spackman v. Plumstead District Board of Works (1885) 10 App. Cas, 229** at 240:

“There would be no decision within the meaning of statute if there were anything of that sort done contrary to the essence of justice”

Referring to the quoted words, the Privy Council in the case of **Attorney General v. Ryan [1980] AC 718** remarked that it has long been settled law that a decision that offends against the principles of natural justice is outside the jurisdiction of the decision-making authority. The same point was made, albeit from a different angle, by Lord Russel in **Fairmount Investments Ltd v. Secretary of State for the Environment [1976] 1 WLR 1256**:

“it is to be implied, unless the contrary appears, that Parliament does not authorize by the Act the exercise of powers in breach of the principles of natural justice, and that Parliament does by the Act require, in the particular procedure, compliance with those principles”

The Defendant does not dispute that it is bound by rules of natural justice when exercising its powers under the Act but contends that the circumstances of this case

are such that it was unreasonable for the Claimant to expect the Defendant to engage the Claimant during the market surveillance because “*no reasonable person would entertain such thought. The Defendant would not have known in advance that the offending batches belonged to the Claimant.*”: see paragraph 3.3.10 of the Defendant’s Skeleton Arguments. See also paragraph 19 of the Defendant’s sworn statement.

With due respect to the Defendant, the reason given for its failure to accord the Claimant an opportunity to be heard lacks merit. The Defendant proceeds on the erroneous premise that the Claimant had to be engaged only at the time that the Defendant was conducting the market surveillance. The Defendant was duty bound to give the Claimant a hearing the moment the Defendant found out or determined that the fertilizer in question belonged to the Claimant or at least at any time before the issuance of the Order Recalling Fertilizer. The Order Recalling Fertilizer was addressed to the Defendant. This confirms that the Defendant was aware of the identity of the “owner” or “importer” of the fertilizer in question before the Order Recalling Fertilizer was issued.

In the present case, the onus was on the Defendant to establish that Parliament did not intend that rules of natural justice should not apply where the Defendant has exercised its powers under the Act following results of a market surveillance conducted by the Defendant. The Defendant has failed to discharge this onus.

It is trite that, as in any other cases of ultra vires, violation of natural justice makes the decision void. This is because rules of natural justice operate as implied mandatory requirement, non-observance of which invalidates the exercise of the power. A lucid explanation for this legal position is to be found in Administrative Law (8th ed.) by H.W.R Wade & C.F. Forsyth, at pp.488 and 489:

“.. a breach of the rules of natural justice resulted in the determination being null and void and, in the same way as any other act which was ultra vires. For the duty to act fairly, just like the duty to act reasonably, was enforced as an implied statutory requirement, so that failure to observe it meant that the administrative act or decision was outside the statutory power, unjustified by law, and therefore ultra vires and void. This assumption was so well understood that it was rarely spelled out in judgements.”

The House of Lords also took the same legal position in the case of **Anisminic Ltd v. Foreign Compensation Commission [1969] 2 AC 147** wherein it was stated that an order made contrary to natural justice was outside jurisdiction and void.

On the basis of the foregoing, I declare that the Order Recalling Fertiliser which was issued without hearing the Claimant violated the guarantee of the right to be heard under the principles of natural justice and the right to lawful and procedural fair

administrative action under section 43 of the Constitution. The Order Recalling Fertiliser was, therefore, procedurally improper, unreasonable and unconstitutional. In the premises, the Court has no other legal option than to quash the Order Recalling Fertiliser. It is so ordered.

For the sake of clarity, this judgement does not in any way stop the Defendant from exercising its powers in respect of the fertilizer in question provided that before the Defendant can impose any sanctions on the Claimant, it has to make sure that the Claimant is, among other matters, accorded the opportunity to be heard under the principles of natural justice and the right to lawful and procedural fair administrative action under section 43 of the Constitution.

Costs

Costs are in the discretion of the Court: see section 30 of the Courts Act. It is also commonplace that costs follow the event. An instructive authority is Order 31(3)(2) of the CPR which provides that where the Court decides to make an order about costs, the unsuccessful party should be ordered to pay the costs of the successful party.

In the present case, the Defendant is the unsuccessful party. In the circumstances, the costs of these proceedings shall be borne by the Defendant. It is so ordered.

Pronounced in Court this 9th day of December 2021 at Lilongwe in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE