IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA
FIRST INSTANCE DIVISION

(Coram: Monica K. Mugenyi, PJ; Faustin Ntezilyayo, and Fakihi A. Jundu, J J)

APPLICATION NO. 13 OF 2017

(Arising from Reference No. 7 of 2017)

BRITISH AMERICAN TOBACCO (U) LTD ..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF
THE REPUBLIC OF UGANDA ..... RESPONDENT

25TH JANUARY 2018

RULING OF THE COURT

Introduction

1. This is an Application by the British American Tobacco (BAT) Uganda Ltd ('the Applicant') for interim orders against the Attorney General of the Republic of Uganda ('the Respondent') pursuant to Article 39 of the Treaty for the Establishment of the East African Community ('the Treaty), and Rules 21 and 73 of this Court's Rules of Procedure.

2. The Applicant is a company incorporated under the laws of Uganda, and is operational and domiciled in the said Partner State. On the strength of the Treaty, the Protocol on Customs Union of 2004, as well as its own internal restructuring; the Applicant opted to move its cigarette manufacturing factory from Uganda to Kenya on the understanding that the East African Community (EAC) represented a single customs entity for tariff purposes.

3. In 2014 Uganda enacted the *Excise Duty Act No.11 of 2014*, which *inter alia* made provision for an excise duty on cigarettes that uniformly applied to all such goods originating from any of the EAC Partner States. However, in 2017 the said Act was amended to create a distinction between locally manufactured goods and imported goods. Under the Amended Act, whereas the Applicant's goods were initially treated as locally manufactured goods, they were subsequently re-classified by the Uganda Revenue Authority (URA) to be goods from a foreign country on account of their originating from Kenya, and subjected to the applicable excise duty.

4. It is the Applicant's contention that URA's erroneous application of the *Excise Duty Act* (as amended) amounted to discrimination between goods originating from Uganda and those from Kenya in so far as a different duty was imposed on goods from Kenya as opposed to like goods from Uganda in contravention of the Treaty and the Protocols thereunder.

5. The Applicant did file **Reference No. 7 of 2017** challenging the legality of sections 2(a) and (b) of Uganda's *Excise Duty (Amendment) Act No.11 of 2017*, and relatedly filed the present Application seeking to stay the operation of the said law pending the determination of that Reference. At the hearing of the Application, the Applicant was represented by Mssrs. Kiryowa Kiwanuka and Peter Kauma, while Ms. Margaret Nabakooza, Mr. Richard Adrole and Mr. Sam Tusubira appeared for the Respondent.

Applicant's Submissions

6. Learned Counsel for the Applicant highlighted the principles governing the grant of interim injunctions as expounded in the case of **Timothy Alvin Kahoho vs. The Secretary General of the EAC, EACJ Application No. 5 of 2012**, *namely* proof of a *prima facie* case with probability of success, irreparable injury that cannot be compensated by damages and, where the Court is in doubt on any of those two principles, a determination of the matter on the balance of convenience.

7. Mr. Kiryowa linked the demonstration of a *prima facie* case to the existence of a triable issue for determination in the Reference, arguing that should a triable issue be found to exist a *prima facie* case would have been established. Learned Counsel contended that in the present case there was indeed a triable issue as to whether or not the Republic of Uganda, vide the *Excise Duty (Amendment) Act*, was discriminating against goods of a Partner State in contravention of the Treaty and the Protocols made thereunder. Citing the case of **American Cyanamid Company vs. Ethicon Limited (1975) AC 396**, he contended that whereas at this stage of the case the Court would not have considered the Reference on its merits, looking at the evidence on record it was (in his view) apparent that there was indeed a triable question such as would establish a *prima facie* case with a very high likelihood of success.

8. With regard to the question of whether or not any injury suffered by the Applicant as a result of the Respondent's alleged actions could be atoned for in damages, the Applicant relied upon paragraphs 10 – 19 of one Mathu Kiunjuri's Affidavit to support the preposition that the injury that it stood to suffer as a consequence of the Respondent's actions was two-fold: on the one hand, it was faced with the possibility of incurring additional financial costs that would either be absorbed by the Applicant or passed on to its customers; and, on the other hand, it was likely to suffer unquantifiable reputational injury arising from uncompetitive goods that could erode the company's business goodwill built over a 30 year operational period, and see a reduction in its market outreach. The argument was made that both scenarios would negatively impact the company's business operations, occasioning

immeasurable and irreparable injury that cannot be adequately compensated by an award of damages.

9. Learned Counsel referred us to the cases of **Samsung Electronics Limited vs. Apple Incorporation (2012) EWCA Civ 1223** and **Kiwi European Holding B.V & Anor vs. Djaoto Arua Misc. Appl. No. 457 of 2006** to buttress his argument that reputational injury was immeasurable, as well as **Legal Brains Trust vs. Attorney General & Another Misc. Appl. No. 638 of 2014**, where a party opposing an application for interim orders had unsuccessfully argued that a sovereign state had a right to make laws and such laws would be enforced until they were declared illegal on the merits of the case.

10. As to where the balance of convenience lies in this matter, Mr. Kiryowa contended that no averment whatsoever had been made that the Respondent either stood to suffer any injury if the interim orders sought were granted nor had it been averred that the said Respondent was willing and able to atone in damages for any injury suffered by the Applicant. He argued that the balance of convenience in this matter weighed in favour of the Applicant, who had clearly demonstrated the injury it stood to suffer. In that regard, learned Counsel cited the cases of **Lansing Linde Limited vs. Kerr (1991) 1AllER 417**, **Cayne vs. Global Natural Resources PLC (1984) 1AllER 225** and **The Democratic Party & Mukasa Fred Mbidde vs. The Secretary General of the EAC & The Attorney General of the Republic of Uganda, EACJ Application No. 6 of 2011.**

11. Finally, the Applicant's submissions did allude to the present Application having been filed pursuant to a notice from URA to the Applicant to pay additional taxes following the re-categorisation of the Applicant's goods from Kenya as imported goods after the company had paid taxes for them as locally manufactured goods. They further submitted that it was, therefore, the pre-recategorisation status of the goods that the Applicant sought to maintain pending the determination of the Reference.

Respondent's Submissions

12. Ms. Nabakooza relied on an Affidavit in Reply deponed by Jane Kibirige, the Clerk to the Ugandan Parliament, to argue that the impugned Act was enacted in accordance with due legislative process and pursuant to a House Committee Report that had recommended the differentiation in excise duty on locally manufactured goods viz imported goods in accordance with the practice of Uganda's neighbours in the region. She further argued that given the reasons that were advanced by the House in support of the enactment of the impugned law, the Reference from which the present Application arises did not have a likelihood of success.

13. Pointing out that the Applicants had filed the Reference on 9th August 2017, way after the commencement of the impugned Act on 1st July 2017, it was her contention that mere filing of the Reference could not hinder the continued enforcement of a law before the hearing of the Reference on its merits. Indeed, Ms. Nabakooza did argue that the status quo in place presently was the enforcement of the impugned law by URA, and faulted the Applicant's pursuit of the maintenance of a

status quo that depicted a repealed excise duty rate that was applicable under a repealed law. It was her contention that the status quo sought to be maintained by the present Application was no longer available.

14. Ms. Nabakooza sought to rebut the Applicant's contention that non-grant of interim orders would subject it to irreparable injury, contending that Annexures E1 and E2 to the Affidavit in support of the Application (tax payment registration slips) depicted items that were easily quantifiable financially and therefore could be compensated by an award of damages. She dismissed the Applicant's contrary claims to irreparable injury as sepuculative and maintained that the balance of convenience tilted heavily in favour of the Respondent due to the fact that the process entailed in the enactment of the impugned law had been lengthy and costly to Uganda, not to mention the fact that the law was already being enforced.

15. For his part, Mr. Androle contended that the Applicants had not satisfactorily demonstrated that the Reference depicted a *prima facie* case with a likelihood of success. In tacit agreement with learned Counsel for the Applicant on the meaning of a *prima facie* case, Mr. Androle referred us to this Court's decision in **Mbidde Foundation Ltd & The Rt. Hon. Margaret Zziwa vs. The Secretary General of the East African Community Consolidated Applications 5 & 10 of 2014**, where a *prima facie* case was supposedly held to mean a claim that was not frivolous or vexatious, one that presented a serious question to be tried. On that basis and without delving into the merits of the Reference as had been reportedly extolled in the case of **Henry Kyalimpa vs. The Attorney General of the Republic of Uganda,**

EACJ Application No.3 of 2013, it was Mr. Adrole's submission that the the material on record *per se* had failed to establish a *prima facie* case with probability of success.

16. Reiterating Ms. Nabakooza's submision that the Applicant was not liable to suffer any injury that could not be compensated by an award of damages, Mr. Adrole did also make reference to the following exposition in **Giella vs. Cassman Brown (1973) EA 258**, as cited with approval in **Mbidde Foundation Ltd & The Rt. Hon. Margaret Zziwa** (supra):

> **The object of an interlocutory injunction or in this case an interim order is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. But the plaintiff's need for such protection must be weighed against the corresponding need for the defendant to protect against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the certainty were resolved in the defendant's favour at the trial.**

17. In like vein, he re-echoed Ms. Nabakooza's position that the balance of convenience tilted in favour of the Respondents given that there was an Act of Parliament in force, the stay of application of which would amount to a shift in status quo to revert to a repealed law which, in the Respondent Counsel's view, was untenable. To buttress this position,

Mr. Adrole referred us to the case of **East African Industry vs. True Foods (1972) E.A. 420** as cited with approval in **Mbidde Foundation Ltd & The Rt. Hon. Margaret Zziwa** (supra), where it was held:

> **I think the harm the respondent company would suffer as a result of an injunction, if it succeeded in the suit is likely to be greater and graver than that which the appellant company would suffer from the refusal of an injunction should it be successful. Moreover and I attach particular significance to this, I cannot see that the appellant company would suffer any loss that could not sufficiently be compensated.**

18. In an attempt to distinguish the facts of the present case from those in **Legal Brains Trust** (supra), learned Counsel further argued that in that case the law that had been subjected to an interim injunction was subsidiary legislation and not principal legislation, as is the case presently. We understood this argument to suggest that whereas subsidiary law was injunctible, principal legislation was not.

Submissions in Reply

19. In a brief reply, it was clarified for the Applicant that what was in issue in the Reference was not the *Excise Duty (Amendment) Act per se*, but the interpretation given to section 2(a) and (b) thereof by URA such as to make it discriminatory in application. In response to the Respondent's assertion that by the time the Reference was filed the status quo the Applicant sought to retain had been repealed, Mr. Kiryowa argued that the present Application aptly represented a case of changing status quo at the behest of the Respondent and invited the

Court to interrogate this issue further by recourse to the case law on the subject that he had cited earlier in his submissions. He maintained that his client did not seek the application of the repealed law but, rather, to have the Amended law properly interpreted by the relevant bodies.

20. Be that as it may, Mr. Kiryowa faulted the Respondent's argument that a law that had been enacted pursuant to due process should remain in force in Uganda until such time as this Court declared it inconsistent with the Treaty, maintaining his position that a repealed law could indeed be the subject of interim orders if found to infringe on a party's rights. He contested the Respondent's suggestion that a law that was enacted pursuant to a costly due process could not be challenged regardless of its non-compliance with the EAC legal regime, to which Partner States are bound. In that regard, and in response to Mr. Adrole's endeavour to distinguish the circumstances in **Legal Brains Trust** (supra) from the present Application, Mr. Kiryowa opined that any attempt to draw a distinction between principal and subsidiary legislation for purposes of the grant of interim orders would be superfluous, rather, the principle established in the **Legal Brains Trust** case was that a law could indeed be the subject of injunctive orders.

Court's Determination

21. The grant of interim orders by this Court is governed by Article 39 of the Treaty. It reads:

> **The Court may, in a case referred to it, make any interim orders or issue any directions which it considers necessary**

or desirable. Interim orders and other directions issued by the Court shall have the same effect *ad interim* as decisions of the Court.

22. As was quite rightly opined by both sets of Counsel, this Court has had occasion to consider numerous interlocutory applications for interim orders and has indeed upheld the trifold principles for the grant thereof advanced in **Giella vs. Cassman Brown** (supra), to wit, '**first, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.**' *See* ***Prof. Peter Anyang' Nyong'o & 10 Others vs. The Attorney General of the Republic of Kenya & 3 Others*** *(supra) and* ***Timothy Alvin Kahoho vs. The Secretary General of the East African Community, EACJ Application No. 5 of 2012***.

23. However, as was stated by this Court in **FORSC & Others vs. Attorney General of the Republic of Burundi & Another, EACJ Appl. No. 16 of 2016**, in the case of **Mbidde Foundation Ltd & The Rt. Hon. Margaret Zziwa vs. The Secretary General of the East African Community Consolidated Applications 5 & 10 of 2014** the foregoing position was juxtaposed against the judicial approach advocated in the case of **American Cyanamid Company vs. Ethicon Limited (1975) AC 396**, which espoused the need for courts faced with an application for an interlocutory injunction to be satisfied that the

claim was not frivolous or vexatious – but that there was a serious question to be tried; without attempting to resolve conflicts of evidence, as was previously required in the determination of 'a *prima facie* case with probability of success', as those were matters to be dealt with at trial.

24. In **FORSC & Others vs. Attorney General of the Republic of Burundi** (supra), this Court upheld the following text in ***Blackstone's Civil Practice 2005*, para. 37.19 – 37.20, pp. 392, 393**, in deference to the demonstration of a serious triable issue rather than a *prima facie* case in applications for interlocutory injunctions:

> **Therefore, the court only needs to be satisfied that there is a serious question to be tried on the merits. The result is that the court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality.**

25. In the present case, both Parties misrepresented a *prima facie* case as extolled in **Giella vs. Cassman Brown** (supra) as being synonymous with the pre-requisite of a serious triable issue as underscored in **American Cyanamid Company** (supra). We are constrained to observe that a *prima facie* case and a serious triable issue are not necessarily one and the same thing and, therefore, would not be used interchangeably. The **American Cyanamid** case explicitly distinguishes a *prima facie* case, which would necessitate the resolution of 'conflicts of evidence on affidavit as to facts on which claims of either party may ultimately depend' (a matter for trial), from a serious question to be tried that is established where a court is

'satisfied that the claim is not frivolous or vexatious'. As was stated in ***Blackstone's Civil Practice 2005,***[1] **'the court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality'.** Stated differently, for a serious triable issue to be established the substantive suit should disclose a cause of action. *See* ***The Siskina (1979) AC 210.***

26. Within the context of EAC Community law, a cause of action demonstrating the prevalence of a serious triable issue has been held to exist where the Reference raises a legitimate legal question under the Court's legal regime as spelt out in Article 30(1); more specifically, where it is the contention therein that the matter complained of violates the national law of a Partner State or infringes any provision of the Treaty. Causes of action before this Court are grounded in a party's recourse to the Court's interpretative and enforcement function as encapsulated in Article 23(1) of the Treaty, rather than the enforcement of typical common law rights. *See* ***Sitenda Sebalu vs. The Secretary General of the East African Community & Others EACJ Ref. No. 1 of 2010***, ***Simon Peter Ochieng & Another vs. The Attorney General of the Republic of Uganda, EACJ Ref. No. 11 of 2013*** *and* ***FORSC & Others vs. Attorney General of the Republic of Burundi*** *(supra).*

27. Applying that standard to the present case, we note that Mr. Kiryowa did make the argument that there was indeed a triable issue in this case as to whether or not the Republic of Uganda, vide the *Excise Duty (Amendment) Act*, was discriminating against goods of a Partner State

[1] Ibid.

in contravention of the Treaty and the Protocols made thereunder. On the other hand, we understood Respondent Counsel to argue that the impugned law was enacted in accordance with due legislative process and the grant of the interim orders sought would be tantamount to reverting to the now repealed *Excise Duty Act of 2014*, yet the reasons that were advanced by the House in support of the enactment of the impugned law were such as would negate the present Application's likelihood of success.

28. Without recourse to the merits thereof, it is apparent on the face of the Reference that it presents a legal question as to whether the enactment by the Respondent of a law that draws a distinction between locally manufactured goods and goods from a foreign country contravenes Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the Treaty; Article 15(1) and (2) of the Customs Union Protocol, and Articles 4, 5, 6 and 32 of the Common Market Protocol. Learned Counsel for the Applicant did clarify in submissions that his client did not take issue with the impugned law *per se* but, rather, with URA's reclassification of the Applicant's goods as imported goods or goods coming from a foreign country. We take the view that the Applicant is bound by his pleadings and the Court's determination would, at this stage, simply be to deduce from the face of those pleadings whether there is a serious issued to be tried. Needless to say, the Reference would be the relevant pleading in this regard because it forms the basis of any 'trial' in respect of which triable issues would arise.

29. We have carefully scrutinised the Reference. We find that paragraph 3(q) – (t) thereof does indeed challenge the legality of section 2 of the *Excise Duty (Amendment) Act*, but sub-paragraph 3(u) does also contest the implementation of the said law. Indeed, the reliefs sought by the Applicant pertain to both the legality and application of section 2 of the impugned law. We reproduce the pertinent paragraphs for ease of reference:

Paragraph 3 of the Reference

(a)– (p) .....

(q) The Applicant contends that section 2 of the Exercise Duty (Amendment) Act No. 11 of 2017 is unlawful, discriminatory and completely negates the purpose for which the Treaty was enacted.

(r) The Applicant contends that section 2 of the Exercise Duty (Amendment) Act No. 11 of 2017 violates and infringes the provisions of the Treaty, to wit, Articles 6(d) and (e), 7(1)(c), 75(1), (4) and (6) and 80(1)(f) of the Treaty.

(s) The Applicant contends that section 2 of the Exercise Duty (Amendment) Act No. 11 of 2017 violates and infringes the provisions of the Customs Union Protocol, to wit, Article 15(1) and (2) of the Customs Union Protocol.

(t) The Applicant contends that section 2 of the Exercise Duty (Amendment) Act No. 11 of 2017 also violates and infringes Articles 4, 5, 6 and 32 of the Common Market Protocol.

(u) The Applicant contends that the provisions of the Act, upon implementation, will adversely affect its operations and will

have a negative impact on its business as the Applicant will be required to pay excessive amounts in excise duty, which its competitors are not subject to, only because the Applicant manufactures its cigarettes in Kenya, and despite the fact that Kenya is an EAC Partner State.

30. Consequently, the Reference does in fact challenge both the *Excise Duty (Amendment) Act*, as well as its enforcement. To that extent, the Court's interpretative mandate does come to bear in examining the impugned law's compliance with the Community's legal regime on trade and investment. Notwithstanding the generality of some of the legal provisions the Applicant seeks to rely on, the issues presented in the Reference do at face value raise formidable questions for interrogation by this Court. In the result, we are satisfied that the present matter raises serious triable issues. We so hold.

31. Turning to the question of irreparable injury, it was submitted for the Applicant that the injury the company stood to suffer would adversely impact its business operations, occasioning immeasurable and irreparable injury that could not be adequately compensated by an award of damages. Conversely, the Respondent contended that the quantifiable injury depicted in tax payment registration slips that were annexed to the affidavit in support of the Application could easily be atoned by an award of damages, while the alleged reputational injury was merely speculative.

32. We have carefully considered the authorities cited by either Party on this issue, as well as the rival submissions of both Parties. It is trite law that 'if damages in the measure recoverable at common law would

be an adequate remedy and a respondent would be in a position to pay them, no interim injunciton should normally be granted'. *See* ***American Cyanamid Company vs. Ethicon Limited (1975) AC 396 at p. 408***. Be that as it may, in ***Blackstone's Civil Practice 2005*, para. 37.22, p. 394** it was opined (quite correctly, in our view) that damages would be inadequate where:

> **(a) The defendant is unlikely to be able to pay the sum likely to be awarded at trial.**
>
> **(b) The wrong is irreparable e.g. loss of the right to vote.**
>
> **(c) The damage is non-pecuniary e.g. libel, nuisance, trade secrets.**
>
> **(d) There is no available market.**
>
> **(e) Damages would be difficult to assess. Examples are loss of goodwill, disruption of business and where the defendant's conduct has the effect of killing off a business before it is established.** *(Our emphasis)*

33. A definition of damages is also instructive. They are defined as follows in the ***Oxford Dictionary of Law*, Oxford University Press, 2009 (7th Edition), p. 246**:

> **General damages are given for losses that the law will presume are the natural and probable consequence of a wrong. .... General damages may also mean damages given for a loss that is incapable of precise estimation such as pain and suffering or loss of reputation. In this context special damages are damages given for losses that can be quantified.**

34. In the present case the Head of Sales, Marketing and Distribution in the Applicant company attested to the financial impact on the company's business operations that would arise from either the absorption of the extra cost caused by a higher duty or the passing on of that cost to their consumers. It was his affidavit evidence that whereas absorption of the cost would lead to negative profit margins, operational losses and financially unstable business, and the deregistration from the Uganda Securities Exchange (USE) owing to consistent operational losses; if the cost was passed on to the company's consumers the unit price increase would cause a 17% market share loss, rendering the business unviable especially given more favourable prices from competitors. The foregoing evidence paints a clear scenario of business disruption, as well as loss of credibility in the market in the event that the company was de-registered from the USE, not to mention reduced trading prospects on the Securities Exchange even if it were reinstated at a later date.

35. Simply stated, the term 'reputation' refers to the qualitative estimation in which a person is generally held. Therefore, the deregistration of a listed company for non-compliance with its financial undertakings to a Securities Exchange would, in our view, certainly negate its credibility in the estimation of the public thus causing it reputational injury. Whereas reputational injury does indeed often attract an award of damages, for purposes of applications for interlocutory orders the question would be how adequate such awards are for atoning the injury that could otherwise be negated by the grant of the orders sought.

36. A similar question was addressed in the case of **Samsung Electronics Limited vs. Apple Incorporation** (supra), to which we were referred on the subject and does appear to affirm this position. In that case the matter before the court was an application for stay pending appeal of a consequential order that required Apple Inc. to publicly advertise that it was wrong to have alleged that Samsung Electronics had copied its iPad design. Compliance with the said order by Apple was held to be likely to cause damage to Apple's reputation and goodwill, and such damage was likely to be unquantifiable and very difficult, if not impossible, to repair in the event that Apple prevailed on the appeal. It seems to us that the same manner in which the wrong that Apple was required to concede was deemed likely to lower the company's estimation in the electronics market, the Applicant's deregistration from a Securities Exchange for non-compliance issues would negate its estimation within its market and stakeholders.

37. Quite clearly, therefore, the Applicant is liable to suffer business disruption, as well as reputational injury. From the ***Oxford Dictionary of Law*** definition of damages, it is abundantly clear that damages would ensue from that injury. The question is whether such injury can be *adequately* compensated by an award of damages. We do find persuasive authority in the position advanced in ***Blackstone's Civil Practice 2005*** above.[2] In our considered view, the difficulty in assessment of damages arising from loss of goodwill, reputation or disruption of business would pose the very real possibility of an inadequate award of damages. In the result, we are satisfied that the

[2] Para. 37.22, p. 394

Applicant is liable to suffer business disruption, as well as reputational injury and loss of goodwill that cannot be adequately compensated by damages.

38. It is now well settled law that where an application for an interlocutory injunction cannot be determined on the existence of a serious triable issue or the adequacy of damages to atone for possible injury to an applicant, the court shall decide the matter on a balance of convenience. *See* ***East African Industry vs. True Foods (1972) E.A. 420***. In the present case it was argued for the Applicant that in the absence of any averment or evidence that the Respondent either stood to suffer any injury if the interim orders sought were granted or was willing and able to atone for any injury suffered by the Applicant in damages, the balance of convenience weighed in favour of the Applicant, who had demonstrated the injury it stood to suffer. Learned Counsel for the Applicant relied on numerous cases that we have cited earlier in this judgment in support of this position. It was also clarified for the Applicant that the status quo sought to be maintained was the pre-recategorisation status of its goods that prevailed prior to the notice from URA to the Applicant seeking additional taxes.

39. On his part, Mr. Adrole opined that the balance of convenience tilted in favour of the Respondents given that there was an Act of Parliament in force, the stay of application of which by a grant of the interim orders sought would have the effect of a shift in status quo to revert to a repealed law. Mr. Adrole did also seek to distinguish the facts of the present case from those in **Legal Brains Trust** (supra), on the basis of the law in issue in that case having been subsidiary legislation as

opposed to principal legislation, as is the case presently. However, this drew sharp criticism from Mr. Kiryowa, who deprecated any attempt to draw a distinction between principal and subsidiary legislation for purposes of applications for interim orders for being superfluous and non-cognisant of the principle that the **Legal Brains Trust** case established. We are constrained to observe that for purposes of the grant of an interim injunction the distinction between subsidiary and principal legislation is fairly redundant. It is quite commonplace for courts to declare a principal legislation illegal or indeed strike it off the law books. It defies logic, therefore, for the argument to be advanced that they cannot grant interim injunctions in respect of impugned principal legislation if the justice of the matter so dictates.

40. We now revert to a consideration of the balance of convenience herein. The balance of convenience in applications such as the one before us is largely determined on a case by case basis. As quite rightly advanced by Mr. Adrole, in **E. A. Industries vs. True Foods** (supra) the court weighed the harm that the respondent company was likely to suffer in the event that the injunction was granted against the harm that the applicant stood to suffer if it was not granted, and attached particular importance to the fact that the harm suffered by the applicant could be adequately compensated by damages, to uphold the refusal of the injunction by the lower court.

41. Similarly, **American Cyanamid** (supra) re-echoed the emphasis on adequacy of damages to atone for harm in the following terms:

The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he

could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at trial. The court must weigh one need against another and determine where 'the balance of convenience' lies.

42. Meanwhile, in **Cayne vs. Global Natural Resources PLC (1984) 1 AIIER 225** the court asserted that it was not mere convenience that needed to be weighed, but the risk of doing an injustice to one side or the other.[3]

43. In the present case we understood the Respondent to have argued the balance of convenience of this matter concurrently with the question of the status quo sought to be preserved. For parity, we propose to adopt the same approach. In the **American Cyanamid** case,[4] the court linked the determination of the balance of convenience to the status quo sought to be preserved as follows:

[3] *Blacstone's Civil Practice 2005*, para. 32.27, pp. 396, 397.
[4] At p.408

Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo.

44. The question is what is the status quo that seeks to be preserved in the matter before us. We have carefully considered the case of **Garden Cottage Foods vs. Milk Marketing Board (1984) AC 130**, to which we were referred by the Applicant. In that case, the possibility of status quo changing was addressed in the following terms (Lord Diplock):

> **The status quo is the existing state of affairs; but since states of affairs do not remain static this raises the query: existing when? In my opinion, the relevant status quo to which reference was made in *American Cyanamid* is the state of affairs existing during the period immediately preceding the issue of the writ claiming the permanent injunction or, if there be unreasonable delay between the issue of the writ and the motion for an interlocutory injunction, the period immediately preceding the motion.**

45. Thus the applicable status quo *ante* is the state of affairs before a respondent commenced the conduct complained of by the applicant, unless there has been unreasonable delay in filing the application for interim orders, in which case it would be the state of affairs immediately before the application. Therefore it behoves an applicant for interim orders to act quickly. However, an apparently unreasonable delay may be negated if sufficiently explained by the applicant. *See* **Blackstone's Civil Practice 2005, *para. 37.29, p. 397***.

46. We have already determined that the Applicant in the present case is likely to suffer irreparable harm that cannot be compensated by damages. On the other hand, we were not addressed on the injury the Respondent stood to suffer beyond the assertion that the balance of convenience tilted heavily in favour of the Respondent given that the process entailed in the enactment of the impugned law had been lengthy and costly to Uganda, not to mention the fact that the law was already being enforced; and staying the application of such a law by a grant of the interim orders sought, before a determination of the main suit, would have the effect of reverting to a repealed status quo. It was submitted for the Respondent that the status quo in place presently was the enforcement of the impugned law by URA and, therefore, the Applicant's pursuit of a status quo that prevailed under a repealed law was untenable. Ms. Nabakooza did also contend that the Applicants had filed the Reference on 9th August 2017, way after the commencement of the impugned Act on 1st July 2017 and mere filing of the Reference could not hinder the continued enforcement of a law before the hearing of the Reference on its merits. In reply, the stance adopted by the Respondent was faulted by the Applicant, on whose behalf it was argued that the Reference did not seek to rescusitate a repealed law but, rather, to secure a proper interpretation of the Amended law. Mr. Kiryowa further argued that the the present Application aptly represented a case of changing status quo at the behest of the Respondent.

47. As we have held earlier in this Ruling, the Applicant's contestation of the misconstruction of the impugned law is indeed borne out by its pleadings. We shall not belabour that point further. Be that as it may,

we are hardpressed to appreciate how a lengthy, costly enactment process can negate the obligation upon lawmakers to enact national laws that are in compliance with Partner States' obligations under the Treaty and its attendant Protocols, or how the fact of costliness of an enactment process can be used to mitigate against a party's right to proper application of a law. Even in the interim, we are unable to fathom how the legthiness or costliness of a law enactment process can amount to irreparable injury to a party that enacted it in the event that the application of such law was stayed temporarily until the disposal of the Reference.

48. We do appreciate that the grant of an interim injunction in this case would inhibit the URA's right to collect the additional duties billed to the Applicant, however, that right must be weighed against the injustice of leaving the Applicant company to bear the brunt of a possibly misconstrued law that could indict it to the payment of exorbitant funds in excise duty pending the determination of the Reference. Would such an eventuality be in tandem with the dictates of commercial justice and expediency that should underpin regional trade? On interim basis, would it be more just to subject a commercial entity, the operations of which are heavily reliant on availability of financial resources and competitive product prices, to the payment of possibly unwarranted extra duties; or to stay the collection of those additional duties by a public entity until the determination of the matters in contention in a suit?

49. We take the considered view that the justice of the matter dictates that the Respondent would suffer less injury from being temporarily

prevented from exercising its right to collect the extra excise duty billed to the Applicant if the interim orders sought in the present Application were granted, than the injury the Applicant stands to suffer as a consequence of paying the additional duty. We so hold.

50. Having so held, quite clearly the factors informing the balance of convenience in this matter are not evenly balanced so as to warrant recourse to the preservation of the status quo as a matter of prudence, as was opined in the **American Cyanamid** case.[5] Nonetheless, had we considered a preservation of the status quo, in **Garden Cottage Foods vs. Milk Marketing Board** (supra) the status quo *ante* that was held in to be applicable in an application for interlocutory injunctions was the state of affairs before a respondent commenced the conduct complained of by the Applicant. In this case, that would be the state of affairs that prevailed prior to the service of a notice of additional taxes by the URA upon the Applicant. Stated differently, a grant of the interim orders sought in this case would in effect forestall the payment by the Applicant of the extra excise duties billed for by URA until the determination of the Reference. This does not amount to a reversal of the application of the impugned law, as was opined by learned Respondent Counsel, but a stay of its application to the Applicant company pending the determination of the Reference.

Conclusion

51. In the result, we do grant the interim orders sought and hereby uphold this Application. The costs thereof shall abide the outcome of

[5] Ibid.

the Reference. We direct that it be fixed for hearing forthwith. It is so ordered.

Dated, signed and delivered at Arusha this 25th day of January, 2018.

HON. LADY JUSTICE MONICA K. MUGENYI

PRINCIPAL JUDGE

HON. DR. JUSTICE FAUSTIN NTEZILYAYO

JUDGE

HON. JUSTICE FAKIHI A. JUNDU

JUDGE