KUDA CHIGONGA
versus
THE COMMISSIONER GENERAL OF ZIMRA

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 15 November 2016 & 28 September 2017

Opposed Matter

C Warara, for the applicant
C Malaba, for the respondent

NDEWERE J: The applicant imported a motor vehicle through the Beitbridge Border Post in December 2014 under the Customs and Excise (Suspensions) Regulations which suspended duty on motor vehicles imported by physically handicapped persons (also known as the disability rebate). The applicant, as an individual had met the requirements of the disability rebate in terms of the above Regulations.

An assessment was raised to accept the importation by the applicant under the disability rebate on 2 December 2014. But before the motor vehicle was released, the respondent's officials observed inconsistencies on the documents presented. The observations were that the motor vehicle in issue was purchased from a company based in South Africa called Melrose Motor Investments (Pvt) Ltd, for ZAR550 000.00. The payment of the vehicle was made by Onara Transport Logistics (Pvt) Ltd. The SARPCO Certificate and the ITAC Certificate were issued in the name of Juliet Mutonhori, yet applicant was alleging to be the owner of the vehicle.

The motor vehicle was detained on Receipt for items held (RIH) number 181748 of 9 December 2014. The motor vehicle was later placed on Notice of Seizure number 043727 L on 19

December 2014. Applicant was requested to provide proof that he was the owner of the motor vehicle in view of the fact that the SARCPO and ITAC Certificates were in Juliet Mutonhori's name and that payment for the motor vehicle was by a third person, Onara Transport Logistics (Pvt) Ltd. The applicant was unable to provide proof of payment or any other confirmation of ownership evidence.

The applicant appealed to the respondent against the seizure in terms of the Customs & Excise Act, [*Chapter 23:02*]. Before his appeal was finalised, the applicant filed the present application for the release of the motor vehicle to him on 2 October 2015.

The respondent opposed the application. He raised some points *in limine.*

The respondent raised the improper citation of the respondent in its Supplementary Heads of Argument filed on 9 November 2016. The respondent submitted that improper citation of the respondent, being a point of law, could be raised at any time. The applicant did not dispute the respondent's averment that the issue of improper citation could be raised at any time.

Respondent relied on the case of *Muchakata* v *Netherburn Mine* 1996 (1) ZLR 153 (SC) where the Supreme Court held that it was proper to raise a point of law which went to the root of the matter, at any time, even for the first time on appeal, if its consideration involved no unfairness to the party against whom it was directed. The case of *Zesa* v *Bopoto* 1997 (1) ZLR 126 (SC) was also referred to. At page 130 of the above judgment, KORSAH JA had this to say;

> "..It seems that to raise a point of law for the first time on appeal,
> "… it is sufficient to show that the point of law which is the subject of appeal has been brought before the judge's mind. Whether this is effected by argument or observation of the Advocate, or whether the judge's own mind originated the point, makes no difference, so long as the point was before his mind in the case under appeal."

The above position is indeed the settled position of the law. A point of law can be raised at any time. It was therefore proper for the respondent *in casu* to raise the improper citation in the supplementary Heads of Argument.

The respondent referred the court to s 3 of the Revenue Authority Act, [*Chapter 23:11*] which provides as follows:

> "there is hereby established an authority, to be known as the Zimbabwe Revenue Authority, which shall be a body corporate capable of suing and being sued <u>in its own name</u> and subject to this Act, of performing all acts that bodies corporate may by law perform." (the underlining is my own)

So if the Revenue Authority was established and clothed with the capacity to sue and be sued in its own name, why sue it in the name of another person? As correctly pointed out by the respondent, given the provisions of s 3, it the body itself, the Authority, not the person leading it, who should have been cited.

Accordingly, the point *in limine* raised by the respondent about the improper citation of the respondent, is hereby upheld.

A related issue on the citation of the parties which respondent raised was the failure by the applicant to join Juliet Mutonhori and Onara Transport Logistics (Pvt) Ltd to the application, yet they are the ones who paid for the motor vehicle and obtained its certificates.

While the court is not persuaded that the misjoinder is fatal to the application, the applicant's failure to cite Juliet Mutonhori & Onara Transport left the court wondering if he was serious about his claim that the car belonged to him and was wrongly seized. Surely, joining the two involved persons as parties would have clarified matters further for his benefit.

The 3rd point *in limine* was the applicant's failure to institute proceedings within three months.

Section 193 (12) of the Customs and Excise Act [*Chapter 23:02*] provides as follows:

> "(12) Subject to section one hundred and ninety-six, the person from whom the Articles have been seized or the owner thereof may institute proceedings for –
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> (a) the recovery of any articles which have not been released from seizure by the Commissioner in terms of paragraph (a) of subsection (6); or
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> (b) the payment of compensation by the Commissioner in respect of any articles which have been dealt with in terms of the proviso to subsection (6);
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> within three months of the notice being given or published in terms of subsection (11), after which period no such proceedings may be instituted."

The motor vehicle in dispute was seized on 19 December, 2014. The applicant instituted proceedings for the release of the motor vehicle on 2 October, 2015, more than nine months later, yet in terms of s 193 (12) of the Act referred to above, proceedings ought to have been instituted within three months. Thus instituting the proceedings on 2 October, 2015, was in direct conflict with the specific provision of s 193 (12) of the Customs and Excise Act, [*Chapter 23:02*].

In addition to the specific provisions of s 193 (12), the respondent also submitted that persons whose goods have been seized are advised of the rights and remedies at their disposal at

the bottom of the Notices of Seizures. The respondent submitted that the applicant was informed about his rights and remedies. The applicant did not dispute this submission by the respondent. Despite the additional information availed to the applicant by the respondent, the applicant still chose to institute proceedings after the prescribed three months period.

As correctly pointed out in *Harry* v *Director of Customs* 1991 (2) ZLR 39; *Murphy* v *Director of Customs and Excise* 1992 (1) ZLR 28, and *Ronald Machacha* v *ZIMRA* HB 186/11; the failure to give the required three months' notice meant that the claims had been prescribed in terms of s 193 (12) of the Customs and Excise Act and accordingly, the claims could not succeed. The applicant's claim in the current case has similarly prescribed in terms of the above section and cannot be entertained by the court on the merits. The 3rd point *in limine* is accordingly upheld.

The fourth point *in limine* raised by the respondent was the applicant's failure to give sixty days' notice in terms of s 196 (1) of the Customs and Excise Act, [*Chapter 23:02*]. Section 196 (1) of the Customs and Excise Act, provides as follows:

> "No civil proceedings shall be instituted against the State, the Commissioner or an officer under the Act or any other law relating to customs and excise until sixty days after notice has been given in terms of the State Liabilities Act [*Chapter 8:15*].

Despite the specific provisions referred to above of giving sixty days' notice, the applicant did not given any notice. I agree with the respondent that this failure to give notice is fatal to the application. As previously stated, in addition to the statutory requirement, the respondent went out of its way to inform all owners of goods seized of their rights and remedies on the notices of seizure themselves. There was therefore no excuse for the applicant's failure to give the sixty days' notice. In the present case, the respondent was still investigating and was keen to interview other involved persons yet the applicant went ahead to institute proceedings without giving the required notice. Giving notice would have propelled the respondent to finalise investigations during the notice period. As it is, the applicant's application was actually an ambush for the respondent who had not yet finalised investigations.

As correctly pointed out in *Betty Dube* v *ZIMRA* HB 02/14,

> "These provisions expressly and directly prohibit any litigation against the State, Commissioner or any officer, for anything done or omitted to be done by the State and named officials under the Customs and Excise Act or any other law for that matter relating to Customs without the requisite notice being given."

As Honourable KAMOCHA J further stated in the *Betty Dube* case above,

> "This court, however, is not empowered to override the provisions of other legislation in the land. In particular the mandatory provisions of s 196 (1) and 196 (2) of the Act …..".

I am of the same view that the court cannot choose to ignore some of the legislation of the land. The court is bound to enforce all the laws of the land.

Another case in point is *Care International in Zimbabwe* v *Zimbabwe Revenue Authority and 2 Others* HH 373/15. The learned judge had this to say;

> "The endorsement of the seizure notice cannot be taken lightly. It explains the law and those affected, like the applicant, should obey the mandatory provisions of the law. There was therefore a clear need on the part of the applicant to give the requisite notice to the first respondent before making this application. Failure to give the notice, was, in my view, fatal. There is therefore no proper application before the court….."

Having upheld three of the points *in limine*, raised by the respondent namely, the wrong citation of the respondent, the failure to institute proceedings within three months and the failure to give sixty days notice, there is nothing else left for the court to do. The court cannot consider the merits of the application because upholding the three points *in limine* means there is no proper application before the court. Accordingly, the application is dismissed, with costs.

Warara & Associates, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners