

ZAMBEZI POWER (PRIVATE) LTD  
(In liquidation)  
versus  
ZIMBABWE REVENUE AUTHORITY  
and  
PAUL MUSARIRAMBI  
and  
PRINO FREIGHT (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE  
CHIWESHE JP  
HARARE, 21 July 2017 & 29 September 2017

### **Opposed Matter**

*T. Biti*, for the plaintiff  
*A. Moyo*, for the defendants

CHIWESHE JP: The plaintiff issued summons claiming:

- “(a) Judgment in the sum of \$479 215.27 (four hundred and seventy nine thousand, two hundred and fifteen United States dollars and twenty seven cents) as against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, jointly and severally each paying the other, being amounts paid by the plaintiff for onward transmission to the 1<sup>st</sup> defendant which amount, the defendants unlawfully converted to their own use;
- (b) Judgment in the sum of \$6 000 000.00 (six million United States dollars) being a delictual claim for damages against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and severally each paying the other being a delictual claim in respect of the actual and prospective loss of net income suffered by the plaintiff calculated in the period between 2014 to 2018 as a result of the actions of the defendants;  
**Or alternatively,**
- (c) Judgment in the sum of \$6 000 000.00 (six million dollars) being a contractual claim for damages as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, jointly and severally each paying the other, in respect of the actual and prospective loss of income suffered by the plaintiff calculated in the period between 2014 to 2018 as a result of the actions of the defendants;
- (d) Interest at the legal rate on US479 215.27 (four hundred and seventy nine thousand, two hundred and fifteen United States dollars and twenty seven cents) against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and severally each paying the other from the date of summons to the date of payment; and

(e) Costs of suit calculated on a scale as between attorney and client.”

The first defendant entered appearance to defend the action on 24 May 2017 and filed four special pleas in bar to the plaintiff’s claims.

Firstly, it is specially pleaded that the plaintiff has not given the notice required in terms of s 196 (1) of the Customs and Excise Act [*Chapter 23:11*] which provides:

“Notice of action to be given to officer

1. No civil proceedings shall be instituted against the State, the commissioner or an officer for anything done or omitted to be done by the commissioner or an officer under this 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*].”

Secondly, the first defendant pleads prescription in terms of s 196 (2) of the Customs and Excise Act wherein the prescriptive period is eight months. The plaintiff summons having been issued on 15 May 2017 and the cause of action having arisen on 8 December 2014, the plaintiff’s claims have been extinguished by prescription.

Thirdly the 1<sup>st</sup> defendant raises the plea of *res judicata*, in so far as the plaintiff’s claims are based on the alleged wrongful conduct of the 1<sup>st</sup> defendant in the following ways, namely, that it wrongfully placed an embargo on plaintiff’s goods in the bonded warehouse, it wrongfully declined to issue the plaintiff with a Tax Clearance Certificate and that it wrongfully reported the plaintiff to the Police for contraventions of the law. The same issues were covered under case number HC 7413/14 which proceedings were instituted by the plaintiff. This court found under that case that the first defendant had acted lawfully in the circumstances. Accordingly, says the first defendant, the plaintiff’s claims are now *res judicata* and ought to be dismissed on that basis.

Fourthly, the plaintiff states that it was placed under provisional liquidation in 2015. It therefore lacks *locus standi* to institute the present proceedings. It ought to be represented by the provisional liquidator. The plaintiff’s claims ought to be dismissed on that score argues the 1<sup>st</sup> defendant.

I find as a matter of fact that the requisite notice to sue required to be given in terms of s 5 of the State Liabilities Act [*Chapter 8:14*] was indeed given by letter dated 31 March 2015 served by the Messenger of Court on an officer in the employ of the 1<sup>st</sup> defendant on 22 June 2016.

With regards prescription, Mr *Biti*, for the plaintiff does not deny that in terms of s 196 (2) of the Customs and Excise Act the plaintiff is prescribed. Rather he seeks to argue that the prescription period as provided under that section is unconstitutional as it constitutes an unreasonable and unjustifiable limit on the plaintiff’s right of access to the courts. It is therefore *ultra vires* the

Constitution. In that regard reliance has been placed on the decision by my sister TSANGA J in *Nyika & Anor v Minister of Home Affairs and Ors* HH 181-16 wherein it was held that the 8 months prescription period is inconsistent with and ultra vires the Constitution with regards to sections 69 (2) and 59 (1) of the same. Mr *Biti* has submitted detailed heads of argument in support of that contention.

The first defendant has conceded, in light of the evidence at hand, that the notice required in terms of section 196(1) of the Act was duly given. Its special plea in that regard must therefore be dismissed. As to the special plea of *res judicata* raised by the 1<sup>st</sup> defendant in view of the judgment under case number HH 448-14 (HC 7413/14), the requirements for it to be upheld have been laid down in a number of cases. Suffice it to say that for that plea to succeed, it must be shown that the action in which judgment was given was between the same parties, with respect the same subject matter and based on the same ground or complaint as the action under consideration. See *Banda and Ors vs ZISCO* 1990 (1) ZLR 340 (s). I find that under case number 7413/14 the issue put before the court was whether the first defendant had acted properly and lawfully in declining to issue the plaintiff with a tax clearance certificate. The court ruled in favour of the defendant stating that “the respondent was within its rights in refusing to issue the applicant with a tax clearance certificate.” In short the first defendant was exonerated from the same complaint that the plaintiff now seeks adjudication. Mr *Biti* for the plaintiff has argued that the present cause of action is different in that in the previous case what was sought was an order compelling the issuance of a tax clearance certificate whereas in the present matter the plaintiff seeks damages on the basis of negligence. I disagree with that reasoning in so far as the basis for the claim for damages arises from the refusal by the first defendant to issue the tax clearance certificate. Once it is accepted that the first defendant acted lawfully, no claim for damages could possibly arise. The special plea of *res judicata* has merit. I would uphold it.

It is trite that an entity under provisional liquidation has no *locus standi* in *judicio* to institute proceedings in its name. It can only do so through the provisional liquidator. The plaintiff states that it was placed under provisional liquidation in 2015. It thus has no *locus standi* to institute the present proceedings. Indeed no meaningful submissions to the contrary have been made by the plaintiff. The first defendant’s special plea on that point must be upheld. See *Allied Bank Ltd v Celeb Dengu* SC 53/16.

As regards the argument advanced by Mr *Biti* regarding the constitutionality or otherwise of section 196 (2) of the Customs and Excise Act, I agree with Mr *Moyo* in his submission that this constitutional issue is not properly before me. Firstly, no factual basis has been canvassed upon which to found the constitutional issue at hand. The constitutional issue has been raised only in the plaintiff’s heads of argument. The plaintiff must as a rule, place evidence before the court alleging the facts

upon which it is argued a breach of a constitutional right has or will occur. As it is, Mr *Biti*'s arguments are hanging in the air and for that reason can only assume the status of an academic exercise. See *Douglas Togarasei Mwonzora and 31 Ors v The State* CCZ 9/2015.

Secondly, it would be improper to hear and determine a constitutional issue in the absence of the Minister responsible for administering the Customs and Excise Act who obviously is an interested party and who must be given the opportunity to defend the constitutionality of section 196 (1) of that Act. He should have been joined in the proceedings together with the Attorney General. Thirdly, and most importantly, there is a presumption of constitutionality in the existing legislation. Until a provision is set aside on the grounds that it is *ultra vires* the Constitution, it remains part of our law. Section 196 (1) of the Customs and Excise Act has not been so set aside. It therefore remains in force and must be accepted as such. Accordingly the special plea of prescription raised by the first defendant must be upheld on that basis.

In the circumstances I would hold as follows:

- a) the special plea as to prescription is upheld.
- b) the special plea of *res judicata* is upheld.
- c) the special plea that the plaintiff lacks *locus standi in judicio* is upheld.
- d) the special plea as to compliance with the provisions of section 196 (1) of the Customs and Excise Act, requiring the giving of eight months' notice before commencing of civil proceedings is dismissed.

Thus the plaintiff lacks the *locus standi* to sue the defendants in this matter. In any event its claims have either prescribed or rendered *res judicata* by a prior judgment of this court.

In the result the plaintiff's claims as against the first defendant must be dismissed with costs. It is so ordered.

*Tendai Biti Law*, plaintiff's legal practitioners  
*Kantor & Immerman*, 1<sup>st</sup> defendant's legal practitioners