

CARE INTERNATIONAL IN ZIMBABWE
versus
ZIMBABWE REVENUE AUTHORITY
and
DESMOND MANINIMINI
and
SURVIVAL HARDWARE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 24 March 2015 and 15 April 2015

Opposed Matter

D. Ochieng, for the applicant
A. Moyo, for the 1st respondent
A. Makoni, for the 3rd respondent

MTSHIYA J: On 10 April 2013 the applicant filed this application for the following relief:

- “1. The decision of the 1st Respondent of the 20th of December 2012 directing the Applicant to pay duty in the sum of US\$219 437.62 and a penalty of the same amount be and is hereby set aside.
2. The costs of this application shall be borne by the Respondents jointly and severally one paying the other to be absolved”.

The first, second and third respondents all filed their notices of opposition to the application on 25 April 2013.

The background to the relief sought is that following investigations, which are common cause to the other parties, the first respondent directed the applicant to pay duty totalling US\$219 437-62 together with a penalty in the same amount in respect of goods it alleged the applicant had fraudulently imported into the country. The applicant, a non-profit making organisation engaged in humanitarian work, is, in law, “entitled to a rebate or refund of duty on such goods as the Commissioner General of the first respondent may approve”.

On 27 September 2012, the first respondent, the Zimbabwe Revenue Authority (ZIMRA), seized 27 wire rolls weighing about 14.096 tonnes and 387 rolls of barbed wire weighing about 20 tonnes from the premises of the third respondent. The third respondent was one of the applicant’s approved suppliers. The goods were seized “on suspicion that

although a rebate of duty had been applied for and granted, the goods were not destined for consumption or use in an aid or technical co-operation project” in which the applicant was involved. That led to investigations by both the applicant and the first respondent. In the main the findings were that:

“19.1 During the period extending from March 2011 – September 2012 fraudulent purchase orders in the name of **Care International** had been raised by the 2nd Respondent, who was employed as a Procurement Supervisor by **Care International**. The purchase orders raised were neither processed nor approved by **Care International** in terms of its procurement procedures”.

On 20 December 2012, following the conclusion of the investigations, the first respondent then wrote to the applicant in the following terms:

“RE: POST CLEARANCE AUDIT 2009-2012: CARE ZIMBABWE

I refer to the Post Clearance Audit exercise which our office was conducting on your organisation.

Please be advised that CARE Zimbabwe is being held responsible for the payment of duty totalling to USD 219 437.62 plus a penalty of USD 219 437.62. These amounts are arising from all the importations done by your organization and were not properly sanctioned in terms of sec 122 of the Customs and Excise (General) Regulations 2001, REBATE OF DUTY ON GOODS IMPORTED BY A FOREIGN ORGANISATION UNDER AN AID OR TECHNICAL COOPERATION AGREEMENT. As per our meeting in the morning, please note that we will be waiting for your feedback by the 4th of January 2013.

I wish to thank you so much for your cooperation during the exercise.

Let me take this opportunity to remind you that goods cleared under the said rebate shall not be disposed of other than for the purpose for which the rebate was granted without authority from the Commissioner General.

Please feel free to contact the ZIMRA office for further information and clarification on the above case.

Yours faithfully

L. Chibika (Ms)
For Regional Manager Customs and Excise Region 1”

It is the decision contained in the above letter that the applicant seeks to have set aside.

A number of points *in limine* were raised by all the respondents.

In the main, in its opposing affidavit, the first respondent raised three main points *in limine*. These were that:

- (a) The applicant had not complied with s 196(1) of the Customs and Excise Act [Chapter 23:02] (“the Act”)
- (b) the applicant had not exhausted domestic remedies; and
- (c) the applicant was approaching the court with dirty hands.

The first point *in limine* raised by the first respondent, is of crucial importance, because, all the other points can only be dealt with if the applicant is properly before the court. That includes points raised by other respondents. To that and, the first respondent averred:-

- “6.1 The Application before this Honourable Court is premature and irregular. I aver so because Applicant has not complied with the mandatory provisions of **section 196(1) of the Customs Act**. The said section makes it mandatory that before instituting proceedings against the 1st Respondent one **shall** first give sixty days notice of its intention to institute civil proceedings against the 1st Respondent before the proceedings are instituted.
- 6.2 In the present case, the Applicant has not given any notice to the 1st Respondent as required by the said section as read with the **State Liabilities Act [Chapter 8:14]**
- 6.3 Over the years it has been the approach of this Honourable Court that the failure to give the required notice renders the application fatally defective, and I aver that the present case is no exception and it should be dismissed.
- 6.4 I am further advised that no court of law has the discretion to dispense with strict compliance with the provisions of a statute. Again it follows that the present application is invalid for want of compliance with **section 196 (1) of the Act**.
- 6.5 On the above basis this application ought to be dismissed with costs”.

However, notwithstanding the fact that the other points *in limine* raised by the other respondents depend on the determination of the first point *in limine* raised by the first respondent, I shall briefly state them herein.

The second respondent, who did not attend the hearing, also raised a number of points *in limine*. However, he being in default at the hearing and therefore barred, detailing his points *in limine* will not serve any purpose.

The third respondent’s points *in limine* were given as follows:

- “4. The deponent to the Applicant’s affidavit has no authority to act on behalf of the Applicant. He has not given this honourable court proof of such authority nor has he

made the necessary averment that could clothe him with authority. Accordingly the application is improperly before Court.

5. Secondly, the 3rd Respondent has wrongfully been made a party to these proceedings as no specific and substantive relief is being sought from it. 3rd Respondent has been inconvenienced and made to suffer unnecessary costs.
6. Accordingly, this application is an abuse of Court process and should be dismissed with costs on a legal practitioner and client scale”.

As the first point *in limine* raised by the first respondent is to the effect that there is no valid application before the court, it is therefore imperative to start by examining that point. That is important because if that point is upheld, everything else *in casu* will, in my view, indeed fall away. Upholding the point *in limine* will mean that the application is fatally irregular and cannot be entertained.

It is important to proceed by indicating the exact provisions of the law that the first respondent is relying on in raising its first point *in limine*.

Sections 6 and 7 of the State Liabilities Act [*Chapter 8:14*] provide as follows:

“6. **Notice to be given of intention to institute proceedings against State and officials in respect of certain claims**

- (1) Subject to this Act, no legal proceedings in respect of any claim for –
 - (a) money, whether arising out of contract, delict or otherwise; or
 - (b) the delivery or release of any goods;and whether or not joined with or made as an alternative to any other claim, shall be instituted against –
 - (i) the State; or
 - (ii) the President, a Vice-President or any Minister or Deputy Minister in his official capacity or;
 - (iii) any officer or employee of the State in his official capacity;unless notice in writing of the intention to bring the claim has been served in accordance with subsection (2) at least sixty days before the institution of the proceedings.
- (2) A notice referred to in subsection (1) –
 - (a) Shall be given to each person upon whom the process relating to the claim is required to be served; and
 - (b) Shall set out the grounds of the claim; and
 - (c) Where the claim arises out of goods sold and delivered or services rendered, shall specify the date and place of the sale or rendering of the services and shall have attached copies of any relevant invoice and requisition, where available; and
 - (d) Where the claim is against or in respect of an act or omission of any officer or employee of the State, shall specify the name and official post, rank or number and place of employment or station of the officer or employee, if known.

- (3) the court before which any proceedings referred to in subsection (1) are brought may condone any failure to comply with that subsection where the court is satisfied that there has been substantial compliance therewith or that the failure will not unduly prejudice the defendant.
- (4) For the purposes of this section, legal proceedings shall be deemed to be instituted by the service of any process, including a notice of application to court and any other document by which legal proceedings are commenced, in which the claim concerned is made.

7. Exemptions

Section six shall not apply to –

- (a) a claim in which the debt concerned has been admitted to the claimant, expressly and in writing; or
- (b) a counter-claim; or
- (c) a claim which the court or a judge or magistrate, on application, has determined to be urgent; or
- (d) a claim in respect of which the defendant has waived, expressly and in writing, the notice required by section six”.

The above exemptions are not relevant *in casu*.

Section 196 of the Customs and Excise Act (“the Act”) as amended by Act No. 17 of 1999 provides as follows:-

“196 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 term of the State Liabilities Act [*Chapter 8:15*].
- (2) Subject to subsection (12) of section *one hundred and ninety-three*, any proceedings referred to in subsection (1) shall be brought within eight months after the cause thereof arose, and if the plaintiff discontinues the action or if judgment is given against him, the defendant shall receive as costs full indemnity for all expenses incurred by him in or in respect of the action and shall have such remedy for the same as any defendant has in other cases where costs are given by law”.

Section 2 of the Act defines the Commissioner referred to in s 196(1) above as follows:

“Commissioner” means -

- (a) the Commissioner in charge of the department of the Zimbabwe Revenue Authority which is declared in terms of the Revenue Authority Act [*Chapter 23:11*] to be responsible for assessing, collecting and enforcing the payment of duties in terms of this Act; or

- (b) the Commissioner-General of the Zimbabwe Revenue Authority, in relation to any function which he has been authorised under the Revenue Authority Act [*Chapter 23:11*] to exercise”.

The above definition creates a link between the Act and the Revenue Authority Act [*Chapter 23:11*], particularly when read together with ss 38 and 39 of the Revenue and Authority Act.

Sections 38 and 39 of the Revenue and Authority Act provide as follows:

“38 Savings

Where, before the fixed date –

- (a) the Commissioner of Taxes; or
- (b) the Director of Customs and Excise; or
- (c) an officer, proper officer or revenue officer;

made any assessment or decision, or issued any notice or directive, or did any other thing whatsoever in terms of an Act specified in the First Schedule, and that assessment, decision, notice, directive or other thing had or was capable of acquiring effect immediately before the fixed date, it shall be deemed to have been made, issued or done, as the case may be, by the appropriate Commissioner or officer in terms of the Act concerned as amended by this Act, and shall continue to have effect or to be capable of acquiring effect, as the case may be, accordingly.

39 Construction of certain references

Any reference in any enactment, other than a provision of an Act amended by the Third Schedule, or in any document to –

- (a) the Director or Controller of Customs and Excise, shall be construed as a reference to the Commissioner in charge of the department which is declared in terms of subsection (2) of section *twenty-one* to be responsible for assessing, collecting and enforcing the payment of duties under the Customs and Excise Act [*Chapter 23:02*];
- (b) the Department of Customs and Excise, shall be construed as a reference to the department referred to in paragraph (a);
- (c) the Commissioner of Taxes -
 - (i) in relation to value added tax, shall be construed as a reference to the Commissioner in charge of the department which is declared in terms of subsection (3) of section *twenty-one* to be responsible for assessing, collecting and enforcing the payment of the value-added tax leviable under the Value Added Tax Act [*Chapter 23:12*];

- (ii) in relation to any other tax or impost, shall be construed as a reference to the Commissioner in charge of the department which is declared shall be construed as a reference to the Commissioner in charge of the department which is declared in terms of subsection (2) of section *twenty-one* to be responsible for assessing, collecting and enforcing and enforcing the payment of the taxes leviable under the Income Tax Act [*Chapter 23:06*];
- (d) the Department of Taxes, shall be construed as a reference to the department referred to in paragraph (c)”.

In view of the foregoing clear provisions of the law, there can be no doubt that the Commissioner referred to in s 196(1) of the Act is the Commissioner-General responsible for the supervision and management of the first respondent.

It is common cause that the notice referred to in s 196(1) of the Act was not given to the Commissioner General or first respondent before the filing of this application.

The first respondent is an authority established in terms of s 3 of the Revenue Authority Act [*Chapter 23:11*] and its functions are given under s 4 of that Act as follows:

“4. **Functions and powers of Authority**

- (1) The functions of the Authority shall be –
 - (a) to act as an agent of the State in assessing, collecting and enforcing the payment of all revenues; and
 - (b) to advise the Minister on matters relating to the raising and collection of revenue; and
 - (c) to perform any other function that may be conferred or imposed on the Authority in terms of this Act or any other enactment.
- (2) For the better exercise of its functions, the Authority shall have the power, subject to this Act, to do or cause to be done, either by itself or through its agents, all or any of the things specified in the Second Schedule, either absolutely or conditionally and either solely or jointly with others”.

The operations of the authority are supervised and managed by a Commissioner-General, whose functions are stipulated under s 19(4) of the Revenue Authority Act as follows:

- “(4) The Commissioner-General shall be responsible, subject to the Board’s control, for –
 - (a) supervising and managing the Authority’s staff, activities, funds and property; and
 - (b) performing such other functions as the Board may assign to him or as may be conferred or imposed on him by or under this Act or any other enactment”.

There is no dispute regarding the position or authority of the Commissioner-General

in relation to the transition from the former office of Director or Controller of Customs and Excise under the Act. The authority, as agent of the State and under the supervision and management of the Commissioner-General, is charged with carrying out the functions spelt out in the Act and also in s 19(4) of the Revenue Authority Act as quoted above. That explains the continued protection granted under ss 196 and 6 of the Act and the State Liabilities Act respectively.

It was argued that in enacting the Revenue Authority Act, parliament was already aware of the provisions of s 196 of the Act as amended by Act No. 17 of 1999, but it did not deem it necessary to expressly extend the protection to the new entity called the Zimbabwe Revenue Authority (i.e. first respondent). That argument, however, does not go far to explain why the legislature did not expressly remove the protection from the agent of the State, now seized with exactly the same functions that were formerly executed by the department of Customs and Excise. It cannot be denied that the authority (first respondent) is as an agent of the State, and continues to carry out the functions of the former department of Customs and Excise. The law protecting the former officers and the former department of Customs and Excise is still in our statutes. The protection has been retained for the benefit of the first respondent and its officers.

It is important at this stage to also take note of the endorsement on the official Notice of Seizure issued to the applicant on 27 September 2012. The relevant endorsement reads as follows:

“If you wish, you may, within three months from the date of this notice, make your own written representations to the Port Manager of the Port shown on this notice, for the release of the goods.

Additionally or alternatively you may, within three months from the date of this notice and subject to the submission of written notification 60 days beforehand in terms of the provisions of section 196 of the Act, institute proceedings for the recovery of the goods from the Commissioner or for the payment of compensation in respect of any dangerous or perishable goods which have been disposed of by the Commissioner.

If the Commissioner does not release the goods following representations made by you or if you do not institute proceedings within the period specified, any goods declared to be forfeited will become the property of the State without compensation”.

The endorsement on 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 and as already stated, upholding this

point *in limine*, means that the court cannot proceed to do anything else. I liken this position to a situation, where, in an urgent application, the court, upon making a finding that there is no urgency, cannot proceed to the merits.

I am also unable to ignore the authorities relied on by the first respondent, namely *Tasmine P/L v Zimbabwe Revenue Authority* HB 115/09, *Ronald Machacha v Zimbabwe Revenue Authority* HB 186/11, *Puwayi Chiutsi v Commissioner of Police and Zimbabwe Revenue Authority and Anor*, HH 65/05 and *Bethy Dube v ZIMRA* HB 2/14, where the need to comply with s 196(1) of the Act was emphasized.

In *Puwayi, supra*, Bhunu J said:

“Apart from the need to exhaust domestic remedies before approaching the courts section 196 precludes the applicant from approaching the courts before observing laid down procedures As the laid down 60 days period has not yet expired this application is ill-conceived and premature. The section is mandatory and admits of no exception because it constitutes a prohibition without making provision for any exception”.

In addition to the mandatory need for notice, I fully associate myself with the above.

I agree with the first respondent that there is no valid application before the court and accordingly the rest of the other issues raised by the respondents cannot be delved into. This finding estoppes me from going any further.

I therefore order as follows:

1. The first point *in limine* raised by the first respondent be and is hereby upheld.
2. The application is not properly before the court and is therefore dismissed with costs.

Wintertons, applicant's legal practitioners
Kantor & Immerman, 1st respondent's legal practitioners
Mbizo Muchadehama & Makoni, 3rd respondent's legal practitioners
Mr Desmond Maninimini
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