

TAWANDA MUNGATE
and
KENNETH MUSHAIKWA
versus
ZIMBABWE REVENUE AUTHORITY
and
COMMISSIONER GENERAL OF THE ZIMBABWE

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 22 March 2019 & 16 October 2023

Opposed Application for Civil Contempt of Court

Mr *L Zero*, for the applicant
Mr *S Bhebhe*, for the respondent

CHINAMORA J: This application for contempt of court was made, in terms of r 79 of the High Court Rules, 2021. The respondent is Zimbabwe Revenue Authority (ZIMRA) and Commissioner General of the Zimbabwe Revenue Authority (N.O.). On 5 July 2021, in an appeal under HC (CA) 354/19 (judgment HH 347-21), MUZOFA J in favour of the applicants was granted as follows:

“Accordingly, the appeal is hereby upheld:

The sentence imposed by the court *a quo* is set aside and substituted as follows:

1. \$2000 in default of payment, 10 months’ imprisonment. The 228 boxes of cigarettes are forfeited to the State.
2. The Nissan Vanette, registration number ADK 0694 and the Mitsubishi Delica, registration number ABU 6387, shall be released to the appellants forthwith.”

Evidently, this court ordered the release of the aforesaid vehicles to the applicants. It is this order that the respondents are said to have breached. The respondents raised an objection *in limine*. The objection *in limine* is to the effect that the applicants have misjoined second respondent, namely, the Commissioner General of the Zimbabwe Revenue Authority (N.O.). In his founding affidavit, Tawanda Mungate who deposed to the affidavit states that:

“The second respondent is the Commissioner general of Zimbabwe Revenue Authority who is the administrative official and employee of the first respondent responsible for the release or return of seized or forfeited articles and reimbursement for value regards articles which have been disposed of or sold in terms of the Customs and Excise Act [*Chapter 23:02*] and whose administrative roles and duties are captured in the Revenue Authority Act [*Chapter 23:12*]. She is also the legal person and highest official capable of satisfying the order in the main sought for by the Applicants. She is cited herein in her official capacity....”

In pursuit of the argument that the applicants have misjoined the second respondent, reliance was placed on s 3 of the Revenue Authority Act [*Chapter 23:11*] which says:

“There is hereby established an authority, to be known as the Zimbabwe Revenue Authority, which shall be a body corporate of suing and being sued in its own name and, subject to this Act, of performing all acts that bodies corporate may by law perform.”

Further reliance was placed on case of *Tregers Industries (Pvt) Ltd v Zimbabwe Revenue Authority* 2006 (2) ZLR 62 (H) where it was stated as follows:

“Ordinarily there is no basis for citing Commissioner personally as a party in a matter handled by employees of the authority. I am fortified in this view by the provisions of the Valued Added Tax [*Chapter 23:12*] as well as the Revenue Authority Act [*Chapter 23:11*]. The latter Act provides in section 5 that the operations of the Zimbabwe Revenue Authority (ZRA) shall, subject to the Act, be controlled and managed by a board which shall consist of the Secretary for Finance, the Commissioner General of the ZRA and other members appointed by the Minister after consultation with the President. In terms of section 4 one of the functions of the functions of the Authority shall be to act as an agent of the State in assessing, collecting and enforcing the payment of all revenue. Of particular importance is section 3 of the Revenue Authority Act which provides:

‘3. 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 in its own name and, subject to this Act, of performing all acts that bodies corporate may by law perform.’”

In terms of s 4 of the Act, ZIMRA is charged with the responsibility of, *inter alia*, collecting and enforcing payment of all revenues. Further, in terms of s 19 of the Act, the ZIMRA board appoints the Commissioner General of the Authority. However, s 3 of the Value Added Tax Act [*Chapter 23:12*], it is the Commissioner General who is responsible for carrying out the provisions of the Act. Section 5 of the same Act provides that the Commissioner General may, subject to the Revenue Authority Act, delegate functions to officers in the employ of the Authority. That the Commissioner General acts under the control of the Board of the Authority there can be no doubt. Section 19 (4) of the Revenue Authority Act provides that the Commissioner General shall be responsible, subject to the Board’s control, for supervising and managing the authority’s staff

activities, funds, etc. As already noted, s 5 of the Revenue Authority Act provides that the operations of the authority shall be controlled and managed by the Revenue Board and s 19 (4) makes it clear that the Commissioner General's position is akin to that of a chief executive in a company. He is appointed by the Board of Authority, which Board also appoints commissioners and other officers and members of staff. Although there is specific reference in the Value Added Tax Act to the Commissioner being responsible for carrying out the provisions of the Act, it is clear that such responsibility is subject to the control and management of the authority through the Revenue Board. At the end of the day it is the authority that is specifically given the power to sue or be sued. In the circumstances, I find that the Commissioner General of the Authority has been wrongly cited as the respondent. Since it is the authority itself that should have been cited. Accordingly, I uphold the point raised *in limine* by the respondents and on that basis alone would dismiss the application.

On this point the applicants argued that r 32, subrule 11 of the High Court Rules, 2021 provides as follows:

“No cause or matter shall be defeated by reason of the mis-joinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter”.

Consequently, the present application cannot fail on account of mis-joinder. In support of this argument, the applicants relied on various High Court judgments in *Masamba v Masamba & Anor* HH 969/15. In the main, the applicants argued that the citation of the second respondent is the only way to satisfy the order under HH 347-21.

After hearing both counsels, I upheld the preliminary point and dismissed the application with costs on the ordinary scale. Let me explain my reasons for this approach. This court is dealing with contempt of court which can have serious repercussions on the affected respondents in the event of the application succeeding. Therefore, I must tread carefully with issues that deal with the freedom of a person. The persons to be affected should be properly cited and joined. Therefore, the mis-joinder of the second respondent as a party to these proceedings is fatal. As a result, the objection *in limine* is upheld. On the question of costs, the general rule is that costs follow the cause, and I have no reason to depart from that approach.

In the result, I make the following order:

1. The point *in limine* on mis-joinder be and is hereby upheld.
2. The applicant for contempt of court be and is hereby dismissed.
3. The applicant to pay costs on the ordinary scale.

Takaindisa Law Chambers, the applicants' legal practitioners
Kantor & Immerman, the respondents' legal practitioners