

TENDAI KASEKE
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 3 March 2023 & 7 February 2024

Opposed Application – *Declaratur* Immigrants Rebate

Mr *M Nkomo*, for the applicants
Mr *E Mukucha*, for the respondent

MUSITHU J: The applicant approached this court for a *declaratur* in terms of s 68 (1) of the Constitution of Zimbabwe as read with s 3(1) of the Administrative Justice Act and r 59(1) of the High Court Rules, 2021. The relief sought is set out in the draft order as follows:

“IT IS DECLARED THAT:

1. Statutory Instrument 10 of 2022 does not apply to a returning immigrant who had purchased his/her vehicle for import on or before the 16th of January 2022, who has been, or is subsequently granted returning resident status.
2. The Applicant is entitled to the immigration returning resident rebate.
3. The Respondent is hereby ordered to facilitate the clearance of the Applicant’s Honda Fit Hybrid vehicle chassis number GP 11014532 within 48 hours of service of this order.
4. The storage fees which have accrued on the Applicant’s vehicle from the date of entry into storage with the Zimbabwe Revenue Authority, to the date of service of this order, are hereby waived.
5. The Respondent shall pay the costs of the Application on a Legal Practitioner and client scale.”

The Applicant’s Case

The applicant was accepted as a returning resident by the Department of Immigration on 30 January 2022, having been absent from the country for a period more than six years. As a returning resident, he qualified for the immigrants’ rebate which entitled him to import a vehicle of choice duty free amongst other things. The applicant purchased a 2010 Honda Fit Hybrid on 13 January 2022 (the vehicle), in anticipation of benefiting from the immigrant’s rebate upon his return to Zimbabwe. The invoice confirming the purchase of the vehicle was issued on 15 January 2022 by Questroyal Investments cc, Durban South Africa.

On 16 February 2022, the applicant was denied the immigrants' rebate by the respondent on the grounds that she did not own the vehicle six months prior to her time of arrival. That decision was made pursuant to s 3(a) of Statutory Instrument 10 of 2022 (the amendment regulations). The applicant sought a review of that decision in terms of s 120 of the Customs and Excise Act¹ (the Act), as read with s 105 of the Customs and Excise (General) Regulations, 2001² (the Regulations). His request was turned down by the respondent's regional manager for the same reason that the vehicle was not purchased and owned at least six months prior to the time of arrival. A further appeal was turned by the respondent's Commissioner for Customs and Excise, leaving the applicant with no further domestic remedy than to approach this court.

The respondent's decision to deny the applicant the immigrant's rebate is attacked on three basis, vis, lawfulness, reasonableness and substantive fairness. On lawfulness, it was contended that the first respondent made a mistake of the law. Conduct that flowed from a mistaken application of the law was unlawful. The amendment regulations, which came into effect on 17 January 2022 were an amending instrument which could not affect rights and interests that were already vested. The applicant averred that his right to equal protection and benefit of the law had been violated.

The applicant further averred that the law had been applied to him retrospectively. The new law was supposed to apply from the date of promulgation going forward. The applicant claimed that he had already purchased his vehicle on 15 January 2022 before the entry into force of the amendment regulations. The requirement that the vehicle ought to have been owned six months prior to his time of arrival did not apply to him. The applicant also argued that the regulations created a substantive legitimate expectation for permanent residents like himself to enjoy the benefits of a returning resident. The interpretation of the law by the respondent had the effect of trampling upon that legitimate expectation and was therefore unlawful.

As regards the aspect of reasonableness, the applicant averred that administrative authorities were enjoined to apply the law in a manner that was fair, rational, non-arbitrary and reasonable. The manner in which the respondent had applied the law herein constituted an abuse of its administrative authority. The same law entitled the applicant to an immigrant's

¹ [Chapter 23:02]

² Statutory Instrument 154 of 2001

rebate on the importation of his vehicle as a returning resident. He would not have known that the law would change two days after the purchase of the vehicle.

The applicant argued that the instrument amending the law was issued without notice to people like himself. The existing returning resident regime had been in existence without change for some forty-eight years prior to the new legislative regime. It could not have been the intention of the legislature to prejudice people who had structured their affairs in a manner that entitled them to the benefit of the law.

Concerning the issue of substantive fairness, it was averred that administrative authorities like the respondent were required to apply the law in a manner that resulted in substantive fairness. It was substantively unfair that after the law had engendered a legitimate expectation in a returning resident to benefit from the immigrant's rebate, the respondent applied the law in a manner that eroded that benefit.

The Respondent's Case

According to the respondent, the applicant was denied the rebate because he did not qualify for that facility in terms of the amendment regulations. His time of arrival was 30 January 2022, while the amendment regulations were promulgated on 17 January 2022. That law required that the vehicle be owned by the applicant at least six months before the time of arrival. The applicant had failed that test.

The respondent denied that its conduct failed to pass the test of fairness since it simply complied with the law. At the time that the applicant was accepted as a returning resident, the amendment regulations were the law, following the amendment of the old law with effect from 17 January 2022. That law applied to all immigrants whose time of arrival was after the effective date of the law. The respondent also averred that the question of the retrospective application of the law did not arise since the applicant presented himself at the port of entry when the law had changed.

The respondent also averred that the applicant could not claim a legitimate expectation over a situation that had been changed by the law. The applicant ought to have challenged the validity of the new law if his complaint was with that law. The had been applied as it was. That law had been published and gazetted like any other law and it had to be complied with. Further, once the law was gazetted, the presumption was that every citizen was aware of its existence.

The Submissions

In their brief oral submissions, counsel largely abided by their heads of argument. Mr *Nkomo* for the applicant argued that the law had a retrospective application which eroded the benefit that had accrued to the applicant. The applicant purchased the vehicle prior to the promulgation of the law. In denying him the rebate, the respondent had failed to act in a fair manner. The respondent's conduct was tantamount to an abuse of discretion which was clearly an affront to s 68 of the Constitution.

In response, Mr *Mukucha* for the respondent submitted that the right to enjoy the rebate was exercised at the point of entry. By the time that the applicant arrived at the point of entry, a new law was in existence. That law did not admit of any exceptions. The applicant did not even attack the legality of the law that denied him the rebate. His appeal was more on humanitarian grounds than the law.

The Analysis

The applicant's heads of argument set out four issues for determination. These are whether:

- the applicant's right to the importation of his motor vehicle as a returning resident had vested by the time the statutory instrument was promulgated.
- the applicant has a substantive legitimate expectation to the importation of his motor vehicle, which should be upheld by the court.
- the respondent's conduct passes the test for lawfulness, reasonableness and substantive fairness.
- A case has been made out for the court to exercise its discretion in terms of s 14 of the High Court Act [*Chapter 7:06*].

The above issues are easily resolvable upon a proper interpretation of the relevant provisions of the amendment regulations that changed the existing law on the treatment of vehicles imported by returning residents. The amendment regulations amended the Customs and Excise (Suspension) Regulations, 2003, published in Statutory Instrument 257 of 2003 (the principal regulations) by introducing s 9 NO after s 9 NN. Section 9 NO (2) and (3)(a) of the amendment regulations state as follows:

“(2) For the purposes of this section, motor vehicles shall be treated as being owned by an immigrant only if such motor vehicle were in physical existence and fully paid for by the immigrant at least six months before the time of his or her arrival.

(3) Subject to this section, a suspension of duty may be granted in respect of motor vehicles, imported by an immigrant if such motor vehicles—

(a) are shown to the satisfaction of the Commissioner to have been owned by such immigrant at least six months before the time of his or her arrival and at the time of their importation;

(b) are intended for personal use in Zimbabwe

The amendment regulations also define the words ‘time of arrival’ in s 9 NO (1) as follows:

“time of arrival” means—

(a) in relation to an immigrant who has previously resided or been employed in Zimbabwe and who—

(i) has been on a course of study, the first occasion on which he or she returns to Zimbabwe after successfully completing such course of study; or

(ii) has been on contract employment, the first occasion on which he or she returns to Zimbabwe after the expiry of such contract; or

(iii) has been on an extended absence for any other reason, the first occasion on which he or she returns to Zimbabwe:

Provided that the time of arrival of a former resident who enters Zimbabwe as a visitor and does not depart from Zimbabwe shall be deemed to be the first occasion on which he or she imports any motor vehicle in terms of this section within three months from the grant of his or her permanent returning resident status.”

The general rule of interpretation of legal instruments is that words must be given their ordinary grammatical meaning where the language used is clear and unambiguous. It is only in those instances where the language used is ambiguous or capable of conveying more than one meaning that the courts are enjoined to have recourse to other principles of interpretation of statutes.³ This approach is consistent with the court’s duty to interpret and apply the law in order to render justice between litigants.

In the Constitutional Court case of *Chihava and Ors v The Provincial Magistrate Francis Mapfumo N.O. & Anor* 2015 (2) ZLR 31 (CC) at pp 35H-37B the Constitutional Court articulated the position of the law as follows:

“The starting point in relation to the interpretation of statutes generally would be what is termed ‘the golden rule’ of statutory interpretation. This rule is authoritatively stated thus in the case of *Coopers and Lybrand & Others v Bryant* 1995 (3) SA 761 (A) at 767:

‘According to the “golden rule” of interpretation, the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument.’” (the underlining is for emphasis)

The respondent’s decision to deny the applicant the immigrant’s rebate, and the applicant’s complaint must be considered in the context of the above position of the law. It is unquestionable that the applicant is a returning resident. He therefore fits within the definition of immigrant under s 9 NO (1) of the amendment regulations. That section defines an immigrant as a resident of Zimbabwe who enters the country on return after having resided

³ See *Zambezi Gas Zimbabwe (Private) Limited v N.R. Barber (Private) Limited & Another* SC 3/20 at p 7

outside Zimbabwe for a period of not less than two years. The applicant's time of arrival for purposes of reckoning his qualification for the immigrant's rebate is also not in dispute. It is his denial of the immigrant's rebate in respect of his vehicle that founds his complaint.

In terms of s 9 NO (2) and (3)(a) of the amendment regulations, an immigrant only qualifies for the immigrant's rebate in respect of a motor vehicle if they can prove that the vehicle was in physical existence and fully paid for by the immigrant at least six months before their time of arrival. It is not in dispute that the applicant's time of arrival was 30 January 2022. The invoice attached to his founding affidavit shows that the vehicle was purchased on 15 January 2022. The amendment regulations were promulgated on 17 January 2022.

From an application of the ordinary rule of interpretation to the relevant provisions of the amendment regulations, I find nothing absurd or ambiguous in the construction of that law. The applicant was expected to satisfy the commissioner that the vehicle was in existence and fully paid for at least six months before his time of arrival. The applicant does not dispute that his case falls outside the ambit of the law thus disqualifying from benefiting. He does not deny that his vehicle was not in existence, and neither was it fully paid for six months before his time of arrival. It is unfortunate for him that the law was changed on the eve of his return to Zimbabwe. But then it is the law.

The conduct of the respondent must be considered in the context of the law that it was required to interpret and apply. The reasonableness of that law is not an issue before the court. Whether or not that law was reasonable is measured by a different standard which is aimed at determining the constitutionality or lawfulness of that law. The conduct of the respondent cannot be impugned on the basis that it applied the law as it stands. The fact that the consequences of that law are harsh on the applicant does not make that law unconstitutional, unless the applicant had petitioned the court to interrogate the lawfulness of that law. The law may appear unreasonable in terms of its consequences, but it must be complied with until the court declares it unconstitutional. I have already noted that the applicant has not approached the court for the striking off of the amendment regulations on the basis that they are unconstitutional.

Going back to the applicant's first issue, the court determines that while the applicant satisfied the other requirements of the amendment regulations, he still fell short on the decisive requirement that the vehicle must have been in physical existence and fully paid for at least six months before the time of arrival. The second issue is related to the first issue. It was whether

the applicant had a legitimate expectation that must be upheld and given effect to by this court. The applicant indeed had a legitimate expectation that he would enjoy the immigrant's rebate prior to the change in the law. Once the law was changed, that expectation could not longer be termed legitimate as it was now subject to the law. A legitimate expectation cannot override specific provisions of the law, unless as already noted, that law is struck out on the basis that it is unconstitutional.

The third issue is whether the respondent's conduct passes the test of lawfulness, reasonableness and substantive fairness. As correctly observed on behalf of the applicant, the right to administrative justice has been elevated to one of the fundamental rights by s 68 of the Constitution. The Administrative Justice Act seeks to give effect to as well operationalise that right to administrative justice. The administrative conduct of administrative authorities such as the respondent and its officials must be grounded on the rule of law. Section 3 of the Administrative Justice Act is apposite in that regard. It states that:

"3 Duty of administrative authority

(1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall—

(a) act lawfully, reasonably and in a fair manner; and

(b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and

(c) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.

(2) In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), an administrative authority shall give a person referred to in subsection (1)—

(a) adequate notice of the nature and purpose of the proposed action; and

(b) a reasonable opportunity to make adequate representations; and

(c) adequate notice of any right of review or appeal where applicable."

From a consideration of the record of proceedings and submissions by counsel, I have no doubt in making a finding that the respondent acted in a lawful, reasonable and fair manner as required by s 3 above. The record of proceedings is replete with correspondence that was exchanged between the respondent and the applicant's legal practitioners. The respondent furnished the applicant with written reasons for denying him the rebate. The applicant was also given an opportunity to make representations as well escalate his complaint to the next level within the respondent's establishment. In his letter of 9 May 2022 addressed to the applicant's legal practitioners, the respondent's Commissioner of Customs and Excise informed them of

the applicant's right to approach the courts of law if he was not satisfied with the commissioner's decision.

As already observed, the respondent's conduct must be considered in the broader context of the legislation that it is required to interpret and apply. As an administrative authority, the respondent must have regard to s 68 of the Constitution as read with the administrative Justice Act in the conduct of its operations. An administrative authority is not expected to exercise discretion, where the law does not permit the exercise of such discretion. Doing so would be tantamount to an abuse of authority and an affront to the rule of law. The need to act in a lawful manner implies an observance of the rule law. The court determines that there was nothing unlawful, unreasonable and unfair about the respondent's conduct.

The last issue was whether the applicant made a proper case for this court to exercise its discretion and grant the *declaratur* sought. In his heads of argument, the applicant also argued that there was a case for invoking the common law *contra fiscum* rule. The *contra fiscum* rule provides that where a statutory provision is ambiguous, that ambiguity must be resolved in favour of the taxpayer. It has as its premise, the presumption that laws are not created to be unjust, inequitable or unreasonable. I have already determined that I find no ambiguity in the construction of the amendment regulations. The mere fact that the law had the effect of denying the applicant a rebate that he thought he was entitled to does not justify the need to conjure up the *contra fiscum* rule. The applicant should have attacked the constitutionality of the law since his gripe seems to be with the validity of that law.

For the foregoing reasons, the court determines that the applicant has not made a proper case to invite this court to grant him the relief that he seeks.

Costs

The general rule is that costs follow the event. I find no reason to deny the respondent its costs of suit on the ordinary scale as the successful party.

Disposition

Resultantly it is ordered that:

1. The application is hereby dismissed.
2. The applicant shall pay the respondent's costs of suit.