ARRETA CHIDODO
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 23 March 2023 and 5 July 2024

Opposed Matter

M.N Barwe, for the plaintiff
N.T Tsarwe, for the defendant

KATIYO J: The applicant approached this court seeking the following relief;

WHEREUPON, after reading documents filed of record and hearing Counsel

IT IS ORDERED THAT:

1. Application for a Declaratur be and is hereby granted.
2. It is declared that applicant is entitled to an immigrant's rebate in terms of section 105 of Customs and Excise (General) Regulations, SI 154 of 2001 as at 23 October 2020, upon return from the United Kingdom of Great Britain.
3. Respondent's decision rejecting applicant's claim for an immigrant's rebate be and is her aside.
4. Respondent be and is hereby ordered to refund applicant the customs duty paid in the sum ZW 80 366-83 for household goods and USDS17 223.61 for a Range Rover Motor Vehicle.
5. Respondent to pay costs of suit on a legal practitioner and client scale.

The above relief was granted by this Honourable Court on the 16th of February 2022 through default and was equally rescinded by this Honourable Court on the 10th Of November 2022. As a result of these developments the parties were before the court

arguing their matter on merit as there was no settlement reached.

Background

On the 21 first of October 2020, applicant arrived at the Harare International Airport from the United Kingdom where she had ben resident. She was accepted as a returning resident by the Zimbabwe Immigration Department who signified such acceptance by an appropriate stamp in applicant's passport.

On the 23rd of October 2020. Applicant sought to clear goods which she had imported from United Kingdom under in immigrant rebate. These goods were a Range Rover SP HE TDV6 and an assortment of household goods.

On the 27th of October 2020, respondent's Harare Port Station Manager dismissed applicant's application for an immigrant's rebate. The reason that was given for rejecting the application for an immigrant's rebate was the alleged alterations in applicant's passport. It was reasoned that such alterations constituted an alleged violation of section 174(1) (c) of the Customs and Excise Act [*Chapter 23:12*]

Having made that finding, respondent demanded payment of customs duty for the motor vehicle and the household goods. Respondent pointed out that storage charges were also accruing on applicant's goods which had been detained by respondent. Having been pressurized by the threat of mounting storage charges, applicant was left with no option but to pay the customs duty levied by respondent upon her imported goods.

Applicant did not accept responsibility for the alterations in her passport. She gave an explanation of the circumstances under which the alterations were made in her passport as appears in her founding affidavit. No specific finding was made regarding applicant's explanation on the circumstances under which her passport got tempered with respondent's finding was that the alterations constituted an offence without making any reference to applicant's explanation. Applicant appealed to respondent's Harare Regional Manager right up the Commissioner- General with all the appeals being dismissed on the same basis that the passport was altered and that this constituted an offence. Again, in all the appeals, no finding was made regarding applicant's

explanation on the circumstances under which her passport got altered.

Having exhausted all of the domestic remedies within respondent, applicant applied to this Honourable Court seeking a declaration of her rights together with consequential relief. It is worth noting that in all the decisions that were made by respondent and even in the opposing papers before the Honourable court, respondent did not dispute the following evidence produced by applicant as proof of her extended absence from Zimbabwe: CASE NO. HC.181/2

a) The fact that applicant was accepted as a returning resident by the Zimbabwe Immigration Department;
b) The fact that applicant produced a statement of account for rentals which she paid for her stay at Flat 2 Beaminster House, London from 31 March 2008 up to the time she decided to return to Zimbabwe in 2020;
c) The fact that applicant produced a copy of her last contract of employment with an organization called Alpha Care in London which contract had commenced on the 10th of January 2016 and terminated on 31 January 2020;
d) The fact that applicant produced her bank statement reflecting transactions she carried out while in London, and;
e) The fact that applicant produced documentary evidence that her motor vehicle and household goods were in physical existence and fully paid for before she returned to Zimbabwe.

In its opposing papers before the Honourable court, respondent alleged that applicant's passport did not have exit and entry stamps from the Immigration Department of both Zimbabwe and the United Kingdom. It is of course not true that applicant's passport does not have such Zimbabwean control stamps and respondent is not candid with this Honourable court on this point. The lack of sincerity is further displayed by the fact that respondent knows that the United Kingdom's Immigration Department does not physically stamp passports as happens here in Zimbabwe, yet respondent alleges that applicant's passport ought to have such stamps. Respondent

further alleges that applicant's passport does not show when she left Zimbabwe for the United Kingdom and when she entered the United Kingdom. It is difficult to understand how an immigration Control Stamp can afford evidence on the date when applicant left Zimbabwe with the intention of residing in the United Kingdom. At most, one would appreciate that Immigration Control Stamps only afford evidence of applicant's travelling. Even if the United Kingdom Immigration Department was in the respondent's Harare Regional Manager right up the Commissioner- General with all the appeals being dismissed on the same basis that the passport was altered and that this constituted an offence. Again, in all the appeals, no finding was made regarding applicant's explanation on the circumstances under which her passport got altered.

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Even when applicant began residing in the United Kingdom, the law did not bar her from coming back to Zimbabwe on holiday on as many times as she wished.

Clearly, Immigration Control Stamps do not assist with evidence as to when applicant began residing in the United Kingdom. In any event, Zimbabwean Immigration Department accepted applicant as a returning resident. Respondent further claims in its opposing papers that the application before the Honourable court is for review and not for declaration of applicant's rights. It is further alleged that applicant did not satisfy the requirements of a declaratory order.

ISSUES FOR DETERMINATION

Applicant perceives the following issues as capable of disposing this matter:

a) Whether or not applicant managed to prove that she was resident in the United Kingdom for a period of not less than two years so as to entitle her to an Immigrant's rebate at law.
b) Whether or not applicant satisfied the requirements of a declaratory order
c) Whether Or Not Rebate applicant is Entitled to an Immigrant

THE LA DE, S 120 subsection (1) as read with subsection (4) thereof of the Customs and Excise Act [*Chapter 23:02*] provides for Regulations that deal with rebates and the conditions and requirements to be met by an Immigrant to qualify for such a rebate. The relevant provisions of the Customs and Excise Act provide as follows:

"120 Suspension, drawback, rebate, remission or refund of duty

(1) Regulations in terms of section two hundred and thirty- five may provide for-

a)
b) The granting of a drawback, rebate, remission or refund of duty…...

(2) …

(3) ….

(4) Regulations referred to in subsection (1) may provide that any suspension, drawback, rebate, remission or refund of duty shall be subject to such condition, restriction or other requirements referred to therein as may be approved by the Minister and additionally, or alternatively, the Commissioner" (my emphasis)

14. It is therefore in terms of section 120 (4) of the Customs and Excise Act that section 105 of the Customs and Excise (General) Regulations, S1 154 of 2001 stipulates the conditions and requirements for an Immigrant to qualify for a rebate.
15. For purposes of the matter before this Honourable court, section 105 (1) (d) of the Customs and Excise (General) Regulations defines an Immigrant as follows:

"105 Rebate of duty on immigrant's effects (I) In this section – "Immigrant" means any person who enters Zimbabwe-

a)
b)
c)
d) For the purpose of attending any educational institution; and includes the spouses

> of such persons, but excludes any person who has previously resided or been employed in Zimbabwe, unless such a person is returning to Zimbabwe after having resided outside Zimbabwe for a period of not less than two years or any shorter period as may be approved by the Minister" (my emphasis)

Applicant applied for an Immigrant's rebate because she was an Immigrant as defined the relevant legislation. She had resided in the United Kingdom for a period of not less two years before she decided to return to Zimbabwe. Indeed, the Zimbabwe Immigrant Department accepted her as a returning resident. An Immigrant claiming a rebate of duty has the onus of proving that he or she is to the rebate. Section 105 (10 of the Regulations provides as follows:

"**105 Rebate of duty on immigrant's effects**

1) .....
2) .....
10) Any immigrant claiming a rebate of duty in respect of effects or other goods in terms of this section shall give to the proper officer-
    a)
    b) in the case of a person who has been on an extended absence from Zimbabwe, proof of such absence from Zimbabwe" (my emphasis)

Proof of applicant's "extended" absence from Zimbabwe could not be established by respondent through merely looking at Immigration Control stamps which only provide evidence of applicant's travelling. It is respectfully submitted that no single stamp in applicant's passport could have provided evidence on the date when applicant travelled to the United Kingdom with the intention of residing there. The law enjoined respondent to satisfy itself that applicant had produced proof of "extended" absence from Zimbabwe. Regrettably, respondent began to enquire into matters which can only best be dealt with by the Immigration Department of Zimbabwe. Ironically, respondent's attitude towards applicant's passport was not supported by Zimbabwe's Immigration Department, the responsible authority, who accepted applicant as a returning resident. More importantly, respondent does not dispute or put in issue the evidence of applicant's "extended" absence from Zimbabwe. In this regard, the appropriate Immigration stamp endorsing applicant as a returning resident is not

disputed. This is an aspect within the purview of the Immigration department and not respondent. The respondent was shown this evidence.

Respondent does not dispute or put in issue the statement of account for rentals which applicant paid for her stay at Flat 2 Beaminster House, London during the period of her "extended" absence from Zimbabwe. Applicant's transactions with her bank while in London is not disputed.

It is respectfully submitted that respondent cannot formulate its own criterion to determine proof of "extended" absence from Zimbabwe. Proof of an immigrant's travelling can only be determined by the Immigration Department of Zimbabwe and not the respondent. In any event, applicant has produced evidence from both her current and expired British passports which confirm that she came to Zimbabwe on holiday during the "extended" absence from Zimbabwe. The British passports do not have any British Immigration Control Stamp on them as the British Immigration Department maintains an electronic register only.

Applicant has further produced an electronic register provided to her by the British immigration Department upon application. This electronic register provides evidence of her travelling from the United King to Zimbabwe during the period of her "extended" absence from Zimbabwe. It is therefore submitted that applicant managed to discharge the onus placed on her by section 105 (10) of the Regulations by producing evidence of her "extended" absence from Zimbabwe so at to entitle her to an immigrant's rebate.

WHETHER OR NOT APPLICANT SATISFIED THE REQUIREMENTS OF DECLARATORY ORDER

THE LAW

The learned authors Herbstein and Van Winsen in their book *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* Fifth Ed Volume 2 on p.1428 defines a declaratory order in the following terms;

"A declaratory order is an order by which a dispute over the existence of some legal right or obligation is resolved."

The right or obligation can be existing, prospective or contingent. It is clear that

the right which the court must be invited to enquire into must be a legal right. A perusal of case authorities indicates that where a declaratory order is sought, the court on engages in a two-stage enquiry. The court must first satisfy itself, as a condition precedent, that the applicant is an interested person. Only after the court is satisfied that the applicant is an interested person will the court go to the second stage of the enquiry where it has to exercise its discretion whether or not to grant the declaratory order. Thus, in the case of ***Jones* v *Agricultural Finance Corporation* 1995 (1) ZLR 65 (S) at** 72 E-F GUBBAY CJ stated the following:

> "The condition precedent to the grant of a declaratory order under S 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an interested person in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgement of the court. The interest must concern an existing, future or contingent right."

In this regard, Herbstein and Van Winsen *supra* at p. 1433 indicate that a litigant seeking a declaratory order must have relief a legally recognized interest in the relevant action to seek.

In the second stage of the enquiry, the court has to satisfy itself that the matter before it, is a proper case for the grant of a declaratory order. Here the court exercises a discretion. In this regard, it has been repeatedly laid down that the courts will not deal with abstract, hypothetical or academic questions in proceedings for a declaratory order. The applicant does not have a mere academic interest in the decision, but that some tangible and advantage in relation to the applicant's position with reference to an existing, applicant has further produced an electronic register provided to her by the British Immigration Department upon application. This electronic register provides evidence of her traveling from the United Kingdom to Zimbabwe during the period of her "extended" absence from Zimbabwe. It is therefore submitted that applicant managed to discharge the onus placed on her by section 105 (10) of the Regulations by producing evidence of her "extended" absence from Zimbabwe so at to entitle her to an immigrant's rebate.

With this argument the applicant submits that she is a proper and fit person to be

entitled to a rebate.

The respondent on the other hand argues the applicant does not deserve the relief being sought as her travel documents are altered such that they can't tell for how long she was in the UK. The issue of dual citizenship here is not an issue as both parties did not contest it. The respondent argues that the appeal to the Commissioner Customs and Excise against The Regional managers decision to deny her immigrant rebate on the basis that the immigration control stamps on the applicant passport were altered with a pen and the dates of entry and exit were not corresponding was valid. This alteration was defined as forgery in terms of section 174(3) of the Customs and Excise Act [*23:02*] and constitutes a violation according to section 174(1(b) and (c) of the same act. The applicant was also directed that a passport is a major factor in the determination of qualification as an immigrant. The applicant's passport contains only Zimbabwe Immigration Control stamps with no corresponding exit and entry stamps from the country of destination or departure.

One of her grounds of appeal was that the Commissioner erred at law in considering irrelevant material altered passport to be specific. The respondent asserts that, this an application for review clothed as a review as confirmed by withdrawal of a case under HC 7141/21 without tendering any reason or wasted costs. Her major complaint is the denial of a rebate to import her car duty free given that she had presented all other necessary evidence required for one to qualify for the rebate. The respondent is surprised why this application is clothed as a declaratur and yet the grounds clearly indicate a review application. The two administrative authorities gave their decisions in terms of the law which the applicant does not agree with. This application can there not come as first instance as it had gone the full cycle of administrative structure. All of a sudden, the applicant wants this court to declare rights instead of reviewing the procedure adopted by the respondents. Cited the case of *Kwete* v *Africa Community Publishing and Development Trust* HH216/98, case of *Marashu* v *Old Mutual Life Insurance Co Ltd* 2000 (2) ZLR. Also, the case of *Stanley* v *The Commissioner General of the Police and Ors* HB 288/17 where the court ruled that it is inappropriate to bring

an application for review disguised as an application for a declaratur. It was held that such an application can only come as a review and nothing else. The court was invited to adopt the ale lawfully collected for the *penelll fiscus* stands to lose a large sum of money without just and sufficient cause in the circumstances.

This court is invited to adopt the well-reasoned judgement in *Affretair (Pvt) Ltd* v *M K Airlines (Pvt) Ltd* 1996 (2) ZLR 15 @ p 21-22 wherein the court reasoned that: -

> "The duty of the Courts is not to dismiss the authority and take over its functions, but to ensure, as far as humanly and legally possible, that it carries out its functions fairly and transparently. If we are satisfied it has done that, we cannot interfere just because we do not approve of its conclusion. But at the other end of the scale, if the conclusion is hopelessly wrong, the Courts may say that it could only have been arrived at by reference to improper considerations or by failure to refer to proper considerations. In these cases, we reason backwards from the effect to the cause. We say the result is so bizarre that the process by which it was reached must have been unfair or lacking in transparency."

The respondent therefore argued that the applicant has failed to establish that the administrative authority did not make the decision based on the law as laid down in that legal, in the sense that the same was made within the administrative framework of the law which empowers it to make the decision and after following due process as laid down under section 105 of the Customs and Excise (General) regulations, SI 154 of 2001.

a) Rational, in the sense that it not so wrongs as to-lead to the conclusion that it could only have been reached by a failure to apply the right criteria or by the applicant whether deliberately or not, of the wrong criteria.
b) Procedurally proper, in the sense that the appropriate procedures required by statute have been followed and that the principles of natural justice have observed.
c) Justifiable, in that the Respondent as an administrative body gave its decision supported with reasons for rejecting the applicant's application for a rebate.

As already demonstrated, the applicant failed dismally to meet the requirements

for a declaratory order. In the result, it is averred that the applicant has not established that: -

a) She is an interested person;
b) there is a right or obligation which becomes the object of the inquiry;
c) she is not approaching the court for what amounts to a legal opinion upon an academic matter;
d) there must be interested parties upon which the declaration will be binding;
e) considerations of public policy favour the issuance of the declaratory order.

No protection can be sought or gotten, in any court, against lawful conduct is not a case where one can even raise *prima facie* right. It is a case which is no right to talk about at all. Further and in all the circumstances therefore it is submitted that the application is procedurally flawed and substantively without merits and ought there dismissed with cots on the higher scale of attorney and client attorney scale.

Conclusion

Clearly as demonstrated in this case the High Court despite being empowered to interfere with lower courts or administrative authority decisions, this can only be so in cases where such decisions are irrationally and unprocedurally arrived at otherwise without which it does not interfere. The basis for declaratur is nowhere near in this particular case. The applicant went on a frolic of her own totally disregarding the issues before the court. She had gone through two administrative processes where decisions were made in terms of the law governing that functionary. It was a question of disagreeing with the decisions reached and there was nothing unlawful about it. So, from nowhere that a declaratur is sought without any basis is understandable. The case of *Cst Staley the Commissioner General of Police* (supra) is clear. Remedies of this nature can only be sought through reviews in the absence of clear grounds of declaratur being satisfied. The application before this court is wrongly placed in my view. So much has been submitted by the applicant but not anywhere close to the appropriate relief sought. I am persuaded by the respondent that this is a misplaced application and therefore it is ordered that after perusing and hearing counsel.

The application be and is hereby dismissed

No order as to costs.

KATIYO J: .....

Tadiwa and Associate, plaintiff's legal practitioners
Zimbabwe Revenue Authority Legal Services Division, defendant's legal practitioners