

REPORTABLE (51)

QUEST MOTOR MANUFACTURING (PRIVATE) LIMITED
v
(1) ZIMBABWE REVENUE AUTHORITY (2) INNOCENT CHIKUNI
(3) CHABVEKA MAREKERA

SUPREME COURT OF ZIMBABWE
BHUNU JA, CHIWESHE JA AND MUSAKWA JA
HARARE: 6 NOVEMBER 2023 & 30 MAY 2024

T. Mpofo, for the appellant

N. M. Phiri, for the respondents

MUSAKWA JA: This is an appeal against the whole judgment of the High Court of Zimbabwe (“the court *a quo*”) in which a preliminary point that the appellant failed to give the requisite notice in terms s 6 of the State Liabilities Act [*Chapter 8:14*] as read with s 196 (1) of the Customs and Excise Act [*Chapter 23:02*] before instituting proceedings against the first respondent was upheld. In the event of success, the appellant prayed for an order that the instant appeal succeeds and that the matter be remitted to the court *a quo* for it to be heard afresh before a different Judge.

BACKGROUND

The appellant is a duly registered company in terms of the laws of Zimbabwe. It is a registered assembler of single and double cab motor vehicles as defined in terms of the Customs and Excise (Suspension) (Amendment) Regulations, 2020 (No. 228) [Statutory Instrument 45 of 2020]. In addition, the appellant is a holder of a Single and Double Cab Motor Vehicle Assembly Bond accepted under bond number RF/44/1/01/22.

The first respondent is the Zimbabwe Revenue Authority (“ZIMRA”) and it is the fiscal revenue collecting authority of the Government of Zimbabwe. The second respondent is Innocent Chikuni cited in his official capacity as the official who made the decision to dismiss the appellant’s appeal on 5 January 2023. The third respondent is Chabveka Marekera cited in his official capacity as the first respondent’s Acting Regional Manager Forbes Border Post and Environs Region and the decision maker relating to the suspension of duty on 28 November 2022.

On 28 September 2022, the appellant made an application to the first respondent to import and assemble the Toyota Hilux Revo Double Cab 2x4WD 2.4 MID Manual and 4x4WD 2.8 High Auto transmission in semi-knocked down (SKD) kit form. In that application the appellant enclosed the specifications of the motor vehicles and the SKD packing list showing the component parts which were to be imported. The application was a success and the authority to import on the basis of suspended duty was granted by the first respondent through the third respondent’s letter dated 29 September 2022.

On 4 October 2022, the appellant lodged an application to the first respondent to import and assemble Toyota Hilux Revo Double Cab 1x4 WD 2.4 MID Manual and 5x4 WD 2.8 High Auto transmission in SKD kit form. The application was successful and the appellant was

granted authority to import the Toyota Hilux Revo Double Cab model vehicles in SKD form and under suspended duty as set out by the third respondent's letter dated 19 October 2022. The appellant imported SKD kits in terms of the specifications and packaging lists approved by the first and third respondents. On 4 November 2022, the appellant invited the first respondent's Supervisor Container Depot, Forbes Boarder Post to its Bonded Warehouse to conduct an inspection of the containers. After the inspection was complete the first respondent made a decision to decline the suspension of duty under Statutory Instrument 45 of 2020.

Resultantly, the first respondent demanded the payment of full import duty under the bills of entry ZWFB C19091 and C19093. Disgruntled by the decision of the first respondent, the appellant lodged an appeal with the third respondent regarding the denial of the vehicle assembly suspension of duty under Statutory Instrument 45 of 2020. The appeal was dismissed by the third respondent on the basis that the appellant had allegedly imported built up motor vehicle parts as the body and the engine were on chassis and the engine could be started.

Accordingly, the motor vehicles were subject to a full payment of duty since they did not qualify to be called semi-knocked down motor vehicle kits. Aggrieved by the third respondent's decision the appellant appealed to the Commissioner of Customs and Excise. The second respondent, acting for the Commissioner of Customs and Excise dismissed the appeal. The second respondent made findings to the effect that the SKD Toyota Hilux kits that the appellant had imported were not eligible for suspension of import duty in terms of S.I. 45 of 2020. Discontented by the decision by the second respondent, the appellant then filed an application for review before the court *a quo* in terms of ss 26 and 27 of the High Court Act [Chapter 7:06] as

read with s 4 of the Administrative Justice Act [*Chapter 10:28*] and r 62 of the High Court Rules, 2021 under case number HC 366/22.

PROCEEDINGS BEFORE THE COURT A QUO

In the court *a quo* the appellant argued that it remained eligible for suspension of duty on the motor vehicle kits imported and cleared under Bill of entries ZWFBC19091 and ZWFBC19093 dated 3 November 2022. The appellant further argued that Statutory Instrument 45 of 2020 did not set out the extent to which the motor vehicle kits should be disassembled for purposes of the automatic application of the suspension of duty. Further, the appellant argued that consequent to the approval of the importation of the specified SKD kits as per the packing lists, the respondents had no jurisdiction at law to recant from its extant decision.

Per contra, the first respondent raised a point *in limine* that the appellant failed to comply with s 6 of the State Liabilities Act [*Chapter 8:04*], thus the application was not properly before the court. The first respondent further argued that the appellant imported built up motor vehicles instead of semi-knocked down vehicle kits and should pay full customs duty. Further, the first respondent also contended that a physical examination carried out at Forbes Border post revealed that the imported goods were built up vehicles that required the fitting of doors, seats and other interior fittings for them to be forwarded for consumption and such built up vehicles did not qualify for suspension of duty in terms of s 6 of S.I. 45/2020.

The court *a quo* held that in line with the provisions of s 6 of the State Liabilities Act, at least sixty (60) days' notice must have been given before instituting legal proceedings as

the second and the third respondents were employees of the first respondent and were acting in their official capacities.

The court *a quo* further held that despite the application being one for review the proceedings were civil and therefore s 196 (1) of the Customs and Excise Act applied. Consequently, the point *in limine* raised by the respondents was upheld and the application for review by the appellant was dismissed with costs. Aggrieved by the decision of the court *a quo*, the appellant noted an appeal to this Court based on the following grounds of appeal:

“The court *a quo* grossly erred at law and misdirected itself by;

1. Upholding the respondents’ preliminary point and disregarding the application *a quo* on the basis that notice was required in terms of s 6 of the State Liabilities Act [Chapter 8:14] in the circumstances where the proceedings before the court *a quo* were a review which was not premised on a claim for money, whether arising out of a contract, delict or otherwise; or the delivery or release of any goods, as required by the provision upon which the court *a quo* relied.
2. Finding that the decision of the respondents was a lawful decision at law and therefore one that was subject to notice in terms of s 196 of the Customs and Excise Act [Chapter 23:02].
3. Dismissing the application *a quo* instead of striking it off the roll, in its disposition of the matter in view of the court *a quo*’s effective reasoning that the review application before it was effectively fatally defective for want of the 60-days’ notice.
4. Failing to interrogate whether the decision made by the first respondent’s officer(s) was one taken lawfully therefore a valid decision of an agent of the State.”

APPELLANT'S SUBMISSIONS

At the hearing of the appeal counsel for the appellant's main thrust was that the court *a quo* failed to consider a material authority placed before it. He submitted that if a material contention is placed before a court, it creates an obligation on the court to deal with that contention. He submitted that the court *a quo* misdirected itself by failing to relate to all contentions placed before it. Counsel further submitted that an application for review ought to be instituted within 8 weeks and that s 196 of the Customs and Exercise Act [*Chapter 23:02*] provides that 60 days' notice has to be given before proceedings are instituted. He averred that if an application for review was to fall within the premise of the Customs and Excise Act [*Chapter 23:02*], it meant that the application would be instituted out of time and the appellant would seek condonation first.

Further, Mr *Mpofu* submitted that ss 196 and 197 of the Customs and Excise Act related to action proceedings and that the provisions are limited to suits brought against an official of ZIMRA and not ZIMRA itself. It was also Mr *Mpofu's* submission that the claim by the appellant was not for delivery of goods as stated in section 6 of the State Liabilities Act [*Chapter 8:14*] as the goods in question were in bond and therefor, in the hands of the appellant. He argued that the application for review was urgent and for that reason it had to be brought within 8 weeks thus there was no need for notice as per s 7 (c) of the State Liabilities Act.

RESPONDENTS' SUBMISSIONS

Mr *Phiri*, counsel for the respondents submitted that although the appellant had previously conducted itself in accordance with the provisions of the Customs and Exercise Act, after a determination by the second respondent the appellant then decided not to be bound by the Customs and Excise Act. He stressed that the appellant was bound by s 196 of the Customs and

Exercise Act and, thus, the appellant erred by approaching the court *a quo* in terms of s 26 and 27 of the High Court Act.

It was Mr *Phiri's* further submission that taking into account the literal statutory interpretation of s 196 of the Customs and Excise Act, the application for review that was before the court *a quo* was subject to the sixty-day notice. He contended that the appellant ought to have complied with the peremptory statutory provisions before instituting proceedings against the respondents. Counsel submitted that under r 62 (4) of the High Court Rules, 2021 the appellant could be condoned after showing good cause for failing to abide by the rules of the court.

Mr *Phiri*, however, conceded that the court *a quo* erred in dismissing the application and submitted that *it* ought to have struck the matter off the roll for non-compliance with the provisions of s 196 of the Custom and Excise Act.

ISSUE FOR DETERMINATION

In light of the above, the preeminent issue arising for determination is whether or not the application for review before the court *a quo* was subject to the provisions of s 196 of the Customs and Excise Act.

The critical issue for determination relates to the nature of the proceedings that were before the court *a quo*. In its reasoning, the court *a quo's ratio decidendi* was founded on the premise that the appellant had not provided the requisite notice as stipulated in terms of s 196 (1) of the Customs and Excise Act as read with s 6 of the State Liabilities Act.

The starting point in determining this issue is s 196 of the Customs and Excise Act.

The provision reads:

“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*].” (Emphasis added)

It is evident that the preliminary point relied upon by the respondents in the court *a quo* rested on the characterisation of the proceedings instituted by the appellant as civil proceedings. The term “civil proceedings” is, however, not defined in the Customs and Excise Act. It is needless to emphasise that the essence of the preliminary point in the court below was dependent on a positive finding that the proceedings in question were, indeed, “civil proceedings” within the context s 196 (1).

Therefore, it follows that once the nature of the proceedings became a sticking point in the determination of the preliminary point, the court *a quo* was obliged to make a finding on the issue raised by the appellant.

Given that the characterisation of legal proceedings as civil, criminal or otherwise is not always clear cut, a court hearing a dispute involving a question as to whether or not proceedings are civil in nature must make the necessary findings based on the circumstances of the case. It is not possible for a court to characterise proceedings as civil without having sufficient regard to several criteria from which that conclusion can be made.

Whilst a reading of s 196 (1) of the Customs and Excise Act on its own does not reveal any ambiguity, it is s 6 (1) of the State Liabilities Act that triggers the need to interrogate

the nature of civil proceedings referred to in s 196 (1). Section 6 (1) of the State Liabilities Act provides that:

“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.”

It is on account of the above provision that regard must have been directed to the substance of the proceedings and not only to their form. The procedural history of the proceedings is also a relevant indicator. The matter was not determinable simply on the basis of whether or not it constituted civil proceedings.

A proper determination of the factual and contextual circumstances should have been made. As said by DE KLERK J in *Buchner & Anor v Johannesburg Consolidated Investment Co Ltd* 1995 [1] SA 215 (T) at p 217 C-D:

“The phrase in which the grounds for the claim against the appellants are set out in that paragraph, reads:

‘The defendants are liable to reimburse the plaintiff pursuant to the provisions of an agreement between the plaintiff and the defendants dated 26 June 1987.’

This is an expression of the respondent's opinion, of its conclusions, as to the facts of the matter and as to the legal consequences of those facts. The relevant facts which must be set out are not only that a contract was concluded, but also that certain terms were agreed upon in that contract. *The conclusion that the appellants are liable can only be reached or justified if those terms support the conclusion set out in the summons.*” (Emphasis added).

Likewise, a litigant expressing an opinion that proceedings are civil or otherwise in nature must point to the relevant facts and circumstances supporting his or her opinion. It is only through reference to such facts that a proper determination can be made regarding whether the proceedings *a quo* were civil proceedings in terms of s 196 of the Customs and Excise Act.

In its judgment, the court *a quo* held as follows:

“I did not hear applicant argue that these proceedings are not civil proceedings. Despite this being a review application, these proceedings are civil proceedings arising from the conduct by respondents. I am in agreement with respondent's submission that these certainly are not criminal proceedings.”

The finding by the court *a quo* was made against the backdrop of a contention that the proceedings *a quo* did not fall under s 196 (1) of the Customs and Excise Act. In reaching its conclusion, the court *a quo* did not relate to a case that was cited by the appellant. In the appellant's heads of argument before the court *a quo*, reliance was placed on an authority of the High Court which, as was argued *a quo*, held that s 196 (1) did not apply to review proceedings. This proposition was made in the case of *DDT Engineering & Logistics v Regional Manager, Zimbabwe Revenue Authority Beitbridge & Ors* HB-241-22.

As pointed out, the court *a quo* did not relate to the applicability or otherwise of the authority that was cited by the appellant. It did not consider the import of the judgment in reaching its conclusion regarding the preliminary objection raised by the respondents. It also did not consider in what way the proceedings before it fell within s 196 (1) notwithstanding the decision in *DDT Engineering & Logistics v Regional Manager, Zimbabwe Revenue Authority Beitbridge & Ors supra*. It is this omission that forms the basis of the appellant's case before this Court.

Mr *Mpofu*, on behalf of the appellant, submitted that the decision in *DDT Engineering & Logistics v Regional Manager, Zimbabwe & Ors supra* was at variance with the court *a quo*'s determination and as such was deserving of consideration in the court *a quo*'s judgment. On the other hand, the respondents urged this Court to rely on the literal interpretation of s 196 of the Customs and Excise Act. Nonetheless, the respondents' position does not detract from the fact that there exists a live issue of whether review applications fall outside the scope of the aforementioned provision as read with s 6 of the State Liabilities Act.

It is trite that this Court generally cannot entertain novel issues on appeal. This was highlighted in the case of *Guwa & Anor v Willoughby's Investments (Pvt) Ltd* 2009 (1) ZLR 368 (S) AT P 382G-383A where it was held that:

“It is clear from these provisions that the Supreme Court is a creature of statute and that it derives its jurisdiction specifically from the Supreme Court Act and other legislative provisions. In other words, although it is the highest court in the land, its powers are regulated strictly by statute. It is not a court of first instance. It has no original jurisdiction but only appellate, since it was created by statute purely as a court of appeal.”

As articulated in the above authority, it is apparent that this Court cannot make a pronouncement on this issue in the first instance. A determination of the legal and factual issues arising from the preliminary point raised *a quo* is one that must be made in the first instance by the court *a quo*. Not making the determination would not only be irregular but would, in practical terms, deprive both parties of the appellate mechanism, given the apex role of this Court in non-constitutional matters.

To further highlight the conundrum that the court *a quo*'s failure to consider the authority relied upon by the appellant creates, reference is also made to the case of *Gwaradzimba v C. J. Petron & Company (Proprietary) Ltd* SC–12–16:

“In the present case, the substantive issue that was determined by the court *a quo* did not dispose of the matter. The question still remained whether the application was, in the first instance, properly before the court. This was not an issue that the court *a quo* could ignore or wish away. The court was obliged to consider it and decide whether the matter was properly before it. It was, in short, improper for the court to proceed to determine the substantive factual and legal issues without first determining the propriety or otherwise of the application itself. If the court, as it appears to have done, tacitly accepted that the matter was properly before it, then reasons for such tacit acceptance should have been given...In the circumstances, it seems to me that the most appropriate course would be for this matter to be remitted to the court *a quo* for a determination whether, in the first instance, the application was properly before it, and, if so, whether the decision of the appellant denying leave is, on the facts and the law, sustainable.”

Similarly, in the present case the court *a quo* could not competently uphold the preliminary point raised by the respondents without considering the authority relied upon by the appellant. This is particularly relevant given that the judgment relied upon emanated from a court of similar jurisdiction. In the circumstances, it becomes clear that given the failure of the court *a quo* to relate to the case of *DDT Engineering & Logistics v Regional Manager, Zimbabwe & Ors* (*supra*), its determination of the preliminary point cannot hold on appeal.

In light of the above, our view is that the court *a quo* did not properly ventilate the preliminary point raised, particularly the defence raised by the appellant. The failure of the court *a quo* to do so has left this court without a basis to assess the correctness or otherwise of the finding on the preliminary issue. It is in the interests of justice that the contentions by the parties be fully ventilated and that a determination be made as to whether the review proceedings instituted could legally and factually be classified as civil proceedings under s 196 of the Customs and Excise Act.

For clarity, the court *a quo* needed to articulate why it specifically considered the proceedings before it to be civil within the context of s 196 (1) of the Customs and Excise Act as read with s 6 (1) of the State Liabilities Act.

On the basis of the above, our view is that the first ground of appeal has merit and is dispositive of the appeal.

For completeness, given the concession by counsel for the respondent that the court *a quo* erred in dismissing the matter instead of striking it off, it becomes unnecessary to belabor this point. That concession was properly made.

DISPOSITION

In the present case, it is proper that the issue relating to the nature of the proceedings be fully canvassed in the court *a quo*. A determination in the first instance on appeal would be contrary to the established practice. The approach this court is adopting is also consistent with both the law and precedent. This is highlighted in terms of s 22 (1) (b) (iv) of the Supreme Court Act [Chapter 7:13] which states that:

“22 Powers of Supreme Court in appeals in civil cases.

(1) Subject to any other enactment, on the hearing of a civil appeal the Supreme Court—

...

(b) may, if it thinks it necessary or expedient in the interests of justice—

...

(iv) having set aside the judgment appealed against, remit the case to the court or tribunal of first instance for further hearing, with such instructions as regards the taking of further evidence or otherwise as appear to it necessary;”

The power of remittal is further buttressed by the case of *Gwaradzimba v C. J. Petron & Company (Proprietary) Ltd* SC supra. In light of that authority, a remittal is merited to enable a proper consideration of the preliminary point raised and of the authorities relied on by the parties with respect to the point.

As to costs, we do not see any reason why they should not follow the result.

In the result, this Court makes the following order:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is set aside.
3. The matter is remitted to the court *a quo* for a hearing afresh before a different judge.

BHUNU JA : I agree

CHIWESHE JA : I agree

Rubaya & Chatambudza, appellant's legal practitioners

Muvingi & Mugadza, respondents' legal practitioners