

CONSILIA CHINANZVAVANA
versus
THE COMMISSIONER GENERAL OF THE ZIMBABWE REVENUE AUTHORITY
and
THE ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 27 September, 18 & 26 October 2022

Opposed Application

BT Kazembe, for the applicant
T L Marange, for the respondents

TAGU J: This is an application for spoliation. The facts being that on the 18 December 2020 the applicant and some family members drove from Banket to Dzivarasekwa where there was a wedding in a Mazda BT50 motor vehicle Chassis number MM6UROYIL0015466, Engine number P5AT2827949 Registration number AFK7658. On 19 December 2021 as applicant was driving the said vehicle, and at Nyabira tollgate, along Lomagundi Road, about 35km from the Harare city centre, applicant was advised by the attendant that second respondent had provided the Zimbabwe National Road Authority (ZINARA) with the number of vehicles that would not be allowed to pass and that were red flagged by the second respondent. She was directed to drive to Nyabira Police Station a mere 3km from the tollgate where the vehicle was seized by the second respondent. She contended that the seizure was unlawful and without her consent hence the present application for spoliation.

The respondents are opposing the application. They filed their Notice of Opposition which was deposed to by one PHILBERT MUCHECHETERE, employed by the second respondent as a station Manager based at Kurima House, Harare.

Both applicant and respondents raised preliminary objections.

The applicant raised a preliminary objection, wherein she challenged the authority of the respondents' representative who deposed to the Opposing Affidavit. Applicant's submission was

that non-attachment of a resolution is not per se fatal but in this case the deponent did not state where he derived his authority from. Applicant prayed that the Notice of Opposition be struck out and the matter be treated as unopposed. See *Madzivire & Ors v Zvarivadza & Ors* 2006 (1) ZLR 514.

In response counsel for the respondents relied on Rule 58(4) of the Rules of the High Court, 2021 where it provides that-

- “An affidavit filed with a written application-
- (a) shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein, and....”

It was argued that the deponent had authority and there was no need for a resolution. See *BAUXIM Logistics (Pvt) Ltd v Zimbabwe Revenue Authority* HH 138/22 which cited with approval *Newman Chiadzwa v Herbert Paulkner* 1991 (2) ZLR 33 where GUBBY CJ (as he then was) stated:

“What a deponent must do in order to effectively counter any such doubt is to set out facts which will justify the court in coming to the conclusion that the averments in the summons are within his knowledge ...some facts which shows an opportunity on his part to have acquired such personal knowledge.....”

In *BANCABC v PWC Motors (Private) Limited & Others* HH 123/13 MATHONSI J (as he then was) stated that;

“I am aware there is authority that a company official must produce proof of authority to represent the company in the form of a company resolution.....”

“However, it occurs that that form of proof is not necessary in every case as each case must be considered on its own merits.”

In the present case the deponent to the respondents’ Notice of Opposition stated as follows-

“I am employed by the Zimbabwe Revenue Authority as the Station Manager Harare Port based at Kurima House, Harare. It is in that capacity that I am duly authorized to depose to this affidavit for and on behalf of the respondents.

The facts I deposed to, are to the best of my knowledge and belief true and correct, save where the context indicates otherwise.

In so far as I make legal submissions, I make such on the advice of my legal advisors, which I believe and accept to be true and correct.”

The deponent in this case has been able to set out some facts upon which the averments he made are within his knowledge and the basis of the authority he had to represent the respondents.

The fact of the matter are that a resolution is not required. I will dismiss the applicant's point *in limine*.

The respondents raised two points *in limine*. The first one being improper joinder and citation of the Commissioner General of the Zimbabwe Revenue Authority (first respondent). The contention being that there was no first respondent in this matter since the first respondent is not a legal person with the rights to sue or be sued. I will not waste much time on this point as the counsel for the applicant conceded and withdrew the claim against the first respondent during hearing of the matter.

The second point *in limine* was non-compliance with section 196 (1) of the Customs and Excise Act [Chapter 23:02] by the applicant. The applicant submitted that it being an application for spoliation, the need to give Notice of action in terms of section 196 of the Customs and Excise Act [Chapter 23:02] falls away.

Section 196 (1) of the Customs and Excise Act [Chapter 23:02], (the Act) provides as follows:-

“196. Notice of action to be given to the 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 terms of the State Liabilities Act [Chapter 8.15].”

The above mentioned provision is a peremptory provision if one considers the use of the word “shall” which must be adhered to. It is trite that failure by the applicant to adhere to the provision and failure to issue notice and waiting out the notice period is fatal to the applicant's application. For that reason there will be no application before the court.

In the case of *Machacha v ZIMRA* HB 186, NDOU J explained the reason for the need to give the required notice of intention to sue. The learned judge stated:

“The applicant ignored this provision at his own peril. The primary objective of the provision is provision of timely opportunity to the Zimbabwe Revenue Authority (“ZIMRA”) to know and therefore to investigate the material facts upon which its actions are challenged and to afford ZIMRA opportunity of protecting itself against the consequences of possible wrongful action by tendering early amends as envisaged by the Act – *Ebrahim v Controller of Customs* 1985 (2) ZLR 1 (SC); *Building and Engineering Supply Co. (Pvt) Ltd v Controller of Customs* 1988 (1) ZLR (HC) and *Car Rental Services (Pvt) Ltd v Director of Customs and Excise* 1988 (1) ZLR 402 (SC). The failure to give this notice is fatal as the applicant is effectively barred from instituting proceedings for recovery of the motor vehicle unless of course if the Commissioner is prepared to waive or extend the period...”

Also in the case of *Betty Dube v ZIMRA* HB-2/14, the Honourable Justice KAMOCHA had this to say:

“These provisions expressly and directly prohibit any litigation against the State, Commissioner or any officer, for anything done or omitted to be done by the state and named officials under the Customs and Excise Act or any other law for that matter relating to customs without the requisite notice being given...She has instituted proceedings to be declared as qualified for the immigrant’s rebate in respect of the goods detained by the officers contrary to the prohibition of the law. That is void and of no effect. INNES CJ stated in *Schierhout v Minister of Justice* 1926 AD 99 at 109 that:-

‘It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect.’”

The provisions of s 196(1) of the Customs and Excise Act [*Chapter 23:02*] and the plethora of authorities cited above are clear. The application of s 196 (1) of the Customs and Excise Act is settled in this jurisdiction as can be evinced by a plethora of case which have affirmed the said position. In this case the fact that applicant is seeking a spoliation order does not allow her to disregard the law. She ought to comply with the law first before seeking refuge in a court of law. The fact of the matter remains that the present application for spoliation is a civil proceeding and is not exempt from the application of s 196 (1) of the Customs and Excise Act. Before suing for the recovery of the vehicle applicant is mandated to comply with requirements set under s 196. The provision is peremptory hence the issue of the required notice cannot be waived. The applicant’s case must suffer a still birth for failing to comply with the law.

IT BE AND IS HEREBY ORDERED THAT:

1. The application is struck of the roll.
2. There is no order as to costs.

Tendai Biti Law, applicant’s legal practitioners
Zimbabwe Revenue Authority Legal Services Division, respondents’ legal practitioners