

NICHOLAS MAPISA
versus
ZIMBABWE REVENUE AUTHORITY
and
THE COMMISSIONER GENERAL ZIMBABWE REVENUE AUTHORITY
And
THE REGIONAL MANAGER ZIMBBWE REVENUE AUTHORITY
(PLUMTREE BORDER POST)

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 23 November 2021 & 2 February 2022

Opposed Court Application

Mr Vengesai for the appellant
Mr T.L. Marange for the respondent

ZISENGWE J: The applicant is a Zimbabwean national who was previously resident in the neighboring country of Botswana having been so resident there for some fifteen years. He is aggrieved by the forfeiture and disposal by the 1st respondent of one of the two motor vehicles he was desirous of bringing into Zimbabwe upon his relocation from Botswana in October 2017. He claims that this motor vehicle (a Toyota Coaster Minibus with Registration No. B 571 BEB) (hereinafter referred to as the “motor vehicle”) was improperly, irregularly and corruptly disposed of by official of the 1st respondent stationed at Plumtree boarder post (the border post).

He had been forced to temporarily leave the motor vehicle at the border post in the custody of the 1st respondent’s officials owing to his failure to immediately meet the duty payable. The idea was therefore for him to return and pay off the required duty before retrieving the motor

vehicle and bringing it into the country. According to him, the failure by the 1st respondent to furnish him with prior notification of its intention to dispose of the motor vehicle rendered such disposal irregular and unlawful under the Customs and Excise Act [*Chapter 23:02*].

Applicant therefore seeks a declaratory order in the following terms;

1. The disposal of the applicant's vehicle, Toyota Coaster, Registration No. B 571 by the respondents is declared unlawful and wrongful.
2. The auctioning of the applicant's vehicle by the respondents to whoever bid for it is declared unlawful and wrongful.
3. The respondents are ordered to recover the applicant's vehicle and allow him to pay duty as previously calculated at \$4 300.00.
4. The respondents are ordered to pay costs of suit on an attorney-client scale, jointly [or] severally, [the] one paying the others to be absolved.

The 1st respondent, (the Zimbabwe Revenue Authority ("ZIMRA")) is the statutory body mandated with the collection of revenue on behalf of the State. Part of this responsibility involves levying duty on imported goods. It performs the latter duty in terms of the Customs and Excise Act [*Chapter 23:02*] ("the Act"). The second and third respondents are its Commissioner General and the Regional Manager (Plumtree Border Post) respectively, cited in their official capacities.

The application stands opposed by the respondents who deny any impropriety on its part in the disposal by way of customs rummage sale of the motor vehicle. Through an affidavit deposed to by the 1st respondent's Acting Regional Manager – William Gadzikwa it was averred that the 1st respondent did no more than what it was legally permitted to do in the now contested disposal. According to him, this was after the applicant had failed to have the motor vehicle cleared within 60 days after he left it at the border post as stipulated in section 39 of the Act.

The respondents however initially raised two preliminary points which in their view were potentially dispositive of the matter. The first related to the alleged misjoinder of the 2nd and 3rd respondents and the second related to the apparent failure on the part of the applicant to give notice to sue ZIMRA as required in terms of s 196(1) of the Act.

The first point *in limine* was soon abandoned by the 2nd and 3rd respondents leaving the one relating to the non-compliance with the provisions of s 196 of the Act. The withdrawal of the point

in limine in respect of the misjoinder of the 2nd and 3rd respondents was apparently predicated on a realization that their misjoinder would in any event not defect the applicant's cause of action.

The abandonment of the point *in limine* in respect of the alleged misjoinder of the 2nd and 3rd respondents and the persistence on the part of the respondents on the sole remaining point (i.e. that of the non-compliance with s 196) elicited a somewhat curious response from applicant's counsel. Counsel then abandoned the application against the 2nd and 3rd respondents. In his opinion, the requirement to give notice under s 196 of the Act is only applicable if the contemplated suit is against an *officer* of the 1st respondent. An excision therefore of the 2nd and 3rd respondents, so the argument goes, renders the application against the 1st respondent without the sixty days' prior notification legally valid.

In the alternative it was argued that failure to give notice is not fatal to the application as the mischief behind the giving of such notice is merely to enable the respondents to prepare for the contemplated suit.

Section 196(1) of the Customs and Excise Act reads;

"196. Notice of action to be given to 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 provisions of s 196(1) of the Customs and Excise Act are clearly peremptory. They admit of no doubt that the giving of notice is a condition precedent to the institution of any claim against either the State or any officer of the 1st respondent.

The contention that the section is inapplicable in a civil suit against ZIMRA cannot be sustained. The inclusion of the term the *State* in my view includes the 1st respondent. This much is clear *inter alia* from section 4(1) (a) of the Revenue Authority [Chapter 23:11] the Act that creates ZIMRA provides as one of its key functions as follows:

"4. Function and Powers of Authority

(1) The functions of the Authority shall be –

- (a) to act as **an agent of the State** in assessing, collecting and enforcing the payment of all revenues.*
- (b)*
- (c)"*

The use of the word “state” in s 196(1) of the Act, is neither superfluous nor erroneous as it refers ZIMRA in its capacity as an agent for the state. The contention therefore that ZIMRA as a body is excluded from the entities or persons in respect of whom 60 days’ notice is required before the institution any civil action against them cannot be sustained. In any event ZIMRA as an artificial person can only not through its Commissioner or other officers. Put differently the conduct of ZIMRA’s officers in the official discharge of their duties is imputed to ZIMRA. This explains why in the present case the applicant sued ZIMRA for the alleged misconduct of the 3rd respondent in the discharge of his official duties. The last gasp attempt to withdraw the application against the 3rd respondent would effectively emasculate the application as there must be some conduct in the context of this application on the part of the 1st respondent’s officers that is then attributed to the 1st respondent itself.

The alternative argument can also hardly find traction. The provisions of s 196(1) of the Act are evidently peremptory. There is nothing in s 196(1) suggestive of any discretionary powers on the part of the court to dispense with the giving of notice. Should that have been the intention of the legislature, such would have been the wording of the section. (cf s 6(3) of the State Liabilities Act which specifically provides as follows;

- (3) *The court before which any proceedings referred to in subsection (1) are brought may condone any failure to comply with that subsection where the court is satisfied that there has been substantial compliance therewith or that the failure will not unduly prejudice the defendant.)*

The cases of *Betty Dube v ZIMRA* HB 02/2014 and *Machaka v Zimbabwe Revenue Authority* HB 186-11 relied on by the respondents correctly capture the peremptory nature of the notice in terms of s 196(1) of the Act and the rationale behind the giving of notice. In the latter regard the following was said in the *Machacha* case;

“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 to know and therefore 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. The failure to give notice is fatal as the applicant is effectively barred from institution proceedings for recovery of the motor vehicle. On this point alone the application should be dismissed without even considering the merits of the case.”

I respectively associate myself with the above interpretation of s 196(1) and the implications of failure to comply with the same.

Accordingly the point in limine based on s 196(1) of the Act raised by the respondents is hereby upheld and the application is hereby dismissed with costs.

A handwritten signature in black ink, appearing to read 'Zisengwe J.', written in a cursive style.

ZISENGWE J.

Mugiya & Muvhami Law Chambers, applicant's legal practitioners