JACK KEMBO
and
KUDAKWASHE KWIRIRA
and
BLESSING MUTEMARINGA
and
OBERT MUGASA
versus
THE COMMISSIONER GENERAL OF TAXES

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 14 February 2013 & 16 July 2014

Mrs T. Chiguvare, for the applicants
T. Tandi, for the respondent

ZHOU J: This is an application by the three applicants for the respondent to be ordered to release 230 bales of second hand clothes which were seized from them by officials of the Zimbabwe Revenue Authority. The application is opposed by the respondent. The facts which underlie the dispute between the parties are as follows:

The applicants were charged before the Magistrates Court with the offence of importing goods without entry being made and without paying duty and, in the alternative, smuggling goods into the country in contravention of s 38(1) as read with s 174(1)(e) and s 182(1) of the Customs and Excise Act [*Cap 23:02*]. The allegations against the applicants were that they had smuggled goods, being second hand clothes, from Mozambique, through an undesignated entry point. On 19 October 2010 the Magistrates Court found the applicants not guilty of the offences alleged. The goods which had been seized by the respondent's officials were, however, not released to the applicant. The applicants' case is that they are now entitled to the release of the goods following their acquittal.

In opposition, the respondent objected *in limine* to the hearing of the matter on the merits on the grounds that,

(1) the applicants failed to give notice as required by the provisions of s 196(1) of the Customs and Excise Act [*Cap 23:02*], and,

(2) that the applicants' claim had prescribed by the time the court application was instituted as there was a failure to make the claim within three months from the date when the notice of seizure was issued.

On the merits, the respondent submitted that the goods in dispute were properly seized by the officials of the Zimbabwe Revenue Authority, and the applicants are not entitled to them notwithstanding their acquittal by the Magistrates Court. The respondent queried the authenticity of the receipts which were produced by the applicants before the Magistrates Court.

Section 196(1) of the Customs and Excise Act provides as follows:

> "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 [*Cap 8:14*]."

Section 6 of the State Liabilities Act [*Cap 8:14*] provides that such notice must be in writing, and must set out, among other things, the grounds of the claim. The applicants state in their answering affidavit that notice of intention to institute proceedings was given through a letter from their legal practitioners dated 29 March 2011. Despite reference to such a letter as annexure "A", the document is not attached to the answering affidavit. When the applicants filed their heads of argument they attached a letter written by one S. Chikunguwo dated 20 October 2010 as the notice of intention to institute the proceedings. The letter is annexure "D" to the heads of argument. The production of that letter contradicts the assertion in the answering affidavit as to the notice which was given to the respondent of the intention to institute the proceedings. The applicants also annexed to the heads of argument two other letters marked annexures "B" and "C". The respondent equally made reference to annexures "H", "I", "J", "K", "L", "M", "N", "O", "P", and "Q" to its heads of argument, even though those were not attached. There seems to be a common misunderstanding on the part of both parties as to the nature of heads of argument. Heads of argument are not an affidavit. They are a summary of the legal arguments to be made on behalf of a party based on the evidence adduced through the affidavits in a court application. It is, therefore, improper for a party to seek to adduce evidence through heads of argument. In the instant case the notice to institute the proceedings, if ever it existed, should have been alleged in and adduced through the founding affidavit as it is a prerequisite to the validity of the proceedings.

The applicants have failed to show that they complied with the requirements of s 196(1) of the Customs and Excise Act. The application is, therefore, not properly before the court as it was not validly instituted.

Having found that the application is improperly before this Court, it is not necessary for me to inquire into the other grounds of defence raised by the respondent.

In the result, it is ordered as follows:

1. The application be and is hereby struck off the roll.
2. The applicants shall pay the costs.

Muvirimi & Associates, applicants, legal practitioners
Kantor & Immerman, respondent's legal practitioners