

REPORTABLE (4)

CARE INTERNATIONAL IN ZIMBABWE

v

**(1) ZIMBABWE REVENUE AUTHORITY (2) DESMOND MAMINIMINI
(3) SURVIVAL HARDWARE (PRIVATE) LIMITED**

**SUPREME COURT OF ZIMBABWE
GOWORA JA, HLATSHWAYO JA & BHUNU JA
HARARE, FEBRUARY 8, 2016 & JANUARY 22, 2018**

D. Ochieng, for the appellant

E. T. Matinenga, for the 1st respondent

O. Shava, for the 3rd respondent

Judgment No. SC 76/17
Civil Appeal No. SC 257/15

1

GOWORA JA: This is an appeal against a judgment of the High Court upholding a preliminary point to the effect that the application before it was premature for want of compliance with a statutory requirement.

The appellant is a non-profit making organization duly registered in terms of the laws of Zimbabwe. It has been operating in the country as such since 1992. The first respondent is the Zimbabwe Revenue Authority, (“ZIMRA”), a body established in accordance with the provisions of the Zimbabwe Revenue Authority Act, [*Chapter 23:11*], (“the Act”) with its primary function being the assessment, collection and enforcing payment of taxes on behalf of the State in accordance with the provisions of s 4(1)(a) of the Act.

The appellant applied for and was granted a rebate on duty in terms of s 122 of the Customs and Excise (General) Regulations 2001 in respect of goods imported by it for humanitarian purposes. The first respondent formed the opinion that the appellant was abusing the rebate and caused an investigation to be conducted. During the course of the investigation the first respondent found reason to believe that the rebate had been abused. As a result it proceeded to seize the appellant's goods comprising of, wire rolls and barbed wire which were located at the premises of the second respondent.

At a meeting held between the parties it was established that the rebate had been abused by an employee of the appellant. Accordingly duty was calculated in terms of the Customs and Excise Act in the sum of USD 219 437.67. In addition, the first respondent imposed a penalty amounting to 100 per cent of the duty.

Judgment No. SC 76/17
Civil Appeal No. SC 257/15

2

A letter was subsequently addressed to the appellant advising it of the duty and penalty imposed and demanding payment of both sums. Instead of making payment as demanded, the appellant instructed its legal practitioners to respond to the letter, denying liability both on its behalf and that of its agent who had been accused of abusing the rebate. Thereafter the appellant filed an application with the High Court in terms of which it prayed for the setting aside of the first respondent's decision.

In opposing the application the first respondent raised the following preliminary points. Firstly, that the appellant had not complied with s 196 of the Customs and Excise Act,

and secondly, that it had not exhausted the domestic remedies available to it under the relevant Act and that as a consequence it was approaching the court with dirty hands.

The High Court took the view that the first preliminary point was critical to the determination of the dispute. The learned judge formed the opinion that the other points could only be dealt with if the court were to find that the appellant, (applicant in the court below), was properly before it. The court *a quo* went on to find that the appellant had failed to comply with s 196 of the Act and that hence the application was not properly before the court. It dismissed the application with costs.

This appeal is against that decision. It is contended that the court *a quo* erred in finding that there was no valid application before it. It was further contended that the appellant did not, contrary to the finding by the court, have an obligation to give notice in terms of s 196 of the Customs and Excise Act as read with ss 6 and 7 of the State Liabilities Act [*Chapter 8:14*].

It seems to me that a determination of this issue resolves the appeal. The appellant accepts that the State, a Minister, a Vice President or the President or any officer of the State cannot be sued unless notice of such suit has been given in terms of the State Liabilities Act. The provisions of the State Liabilities Act that are pertinent to the dispute read as follows:

1 Short title

This Act may be cited as the State Liabilities Act [*Chapter 8:14*].

2 Claims against the State cognizable in any competent court

Any claim against the State which would, if that claim had arisen against a private person, be the ground of an action in any competent court, shall be cognizable by any such court, whether the claim arises or has arisen out of any contract lawfully entered into on behalf of the State or out

of any wrong committed by any officer or employee of the State acting in his capacity and within the scope of his authority as such officer or employee, as the case may be.

6 Notice to be given of intention to institute proceedings against State and officials in respect of certain claims

- (1) 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.
- (2) A notice referred to in subsection (1)—
- (a) shall be given to each person upon whom the process relating to the claim is required to be served; and
 - (b) shall set out the grounds of the claim; and
 - (c) where the claim arises out of goods sold and delivered or services rendered, shall specify the date and place of the sale or rendering of the services and shall have attached copies of any relevant invoice and requisition, where available; and
 - (d) where the claim is against or in respect of an act or omission of any officer or employee of the State, shall specify the name and official post, rank or number and place of employment or station of the officer or employee, if known.
- (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.
- (4) For the purposes of this section, legal proceedings shall be deemed to be instituted by the service of any process, including a notice of application to court and any other document by which legal proceedings are commenced, in which the claim concerned is made.

The appellant does not contend that the suit that it seeks relief on does not fall within the category of suits to which notice is required to be given under the Act. The contention made, however, is that in the circumstances of this case, such notice is not required by virtue of the first

respondent's status as a corporate entity. It is also argued that the first respondent, not being "the State" by definition, there is no requirement for it to be given notice in accordance with the provisions of the Act.

The appellant also accepts that in terms of the Customs and Excise Act notice to institute proceedings is required and a failure to give such notice would result in a would be litigant being non suited. Section 196 which provides for the notice is in the following terms:

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*].
[Subsection amended by Act 17 of 1999]
- (2) Subject to subsection (12) of section *one hundred and ninety-three*, any proceedings referred to in subsection (1) shall be brought within eight months after the cause thereof arose, and if the plaintiff discontinues the action, or if judgment is given against him, the defendant shall receive as costs full indemnity for all expenses incurred by him in or in respect of the action and shall have such remedy for the same as any defendant has in other cases where costs are given by law.

Despite this acceptance of the law, the appellant contends that the court *a quo* erred in upholding the point *in limine* in that it accorded to the first respondent a protection it did not enjoy in terms of the law.

The first respondent's powers and functions are set out in the Revenue Authority Act, the pertinent provisions of which read:

PART II

ZIMBABWE REVENUE AUTHORITY

3 Establishment of Zimbabwe Revenue Authority

There is hereby established an authority, to be known as the Zimbabwe Revenue Authority, which shall be a body corporate capable of suing and being sued in its own name and, subject to this Act, of performing all acts that bodies corporate may by law perform.

4 Functions 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; and
- (b) to advise the Minister on matters relating to the raising and collection of revenues; and
- (c) to perform any other function that may be conferred or imposed on the Authority in terms of this Act or any other enactment.

(2) For the better exercise of its functions, the Authority shall have the power, subject to this Act, to do or cause to be done, either by itself or through its agents, all or any of the things specified in the Second schedule, either absolutely or conditionally and either solely or jointly with others.

Judgment No. SC 76/17
Civil Appeal No. SC 257/15

6

It is not in dispute that the appellant applied for and obtained from the first respondent a rebate under s 122 of the Customs and Excise General Regulations S.I 154/01 in respect of certain items imported by it on humanitarian grounds. Such rebate may be granted by the Commissioner in terms of regulations made under Part XI of the Customs and Excise Act. Section 120 of the same reads;

PART XI

REBATES, REFUNDS AND REMISSIONS OF DUTY

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

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

- (a) the suspension of any of the duties appearing in the customs tariff, the excise tariff or the surtax tariff;

- (b) the granting of a drawback, rebate, remission or refund of duty.
- (2) Any suspension, rebate, remission or refund referred to in subsection (1) may be made or granted with retrospective effect if it is deemed expedient so to do.
- (3) The Commissioner may in his discretion—
- (a) remit duty on any single consignment of goods where the free on board value of the consignment does not exceed a prescribed amount;
 - (b) under such conditions as he may specify, remit all or part of the duty due on goods temporarily imported in terms of section *one hundred and twenty-four* which have been seriously damaged by accident or circumstances beyond the control of the importer.

The appellant acknowledges that in terms of the regulations the discretion to afford a rebate is vested in the Commissioner. The Commissioner is appointed in terms of the Zimbabwe Revenue Act, specifically s 5 thereof which provides:

Judgment No. SC 76/17
Civil Appeal No. SC 257/15

7

5 Board of Authority

- (1) The operations of the Authority shall, subject to this Act, be controlled and managed by a board to be known as the Revenue Board.
- (2) The Board shall consist of—
- (a) the Secretary of the Ministry responsible for finance; and
 - (b) the Commissioner-General; and
 - (c) not more than eight other members appointed, subject to subsection (3), by the Minister after consultation with the President and in accordance with such directions as the President may give him or her.
- (3) Members referred to in subsection (2)(c) shall be appointed for their knowledge of and experience in finance, commerce, economics, taxation, human resource management or law.

The Commissioner General is undoubtedly an employee of the Zimbabwe Revenue Authority and when he performs the functions bestowed upon him by the various statutory provisions that govern the assessment and collections of revenue on behalf of the State he does so as such employee. The definition section of the Customs and Excise Act defines the Commissioner in the following terms:

“Commissioner” means—

- (a) the Commissioner in charge of the department of the Zimbabwe Revenue Authority which is declared in terms of the Revenue Authority Act [*Chapter 23:11*] to be responsible for assessing, collecting and enforcing the payment of duties in terms of this Act; or
- (b) the Commissioner-General of the Zimbabwe Revenue Authority, in relation to any function which he has been authorised under the Revenue Authority Act [*Chapter 23:11*] to exercise.

The purpose of the Customs and Excise Act is **to provide for the imposition, collection and management of customs, excise and other duties, the licensing and control of warehouses and of premises for the manufacture of certain goods, the regulating, controlling and prohibiting of imports and exports, the conclusion of customs and trade agreements with other countries, and forfeitures, and for other matters connected therewith.** (my emphasis)

It is not suggested by the appellant that the Commissioner-General, upon whose discretion the appellant relies for the grant of the rebate, is not appointed in terms of the Customs and Excise Act. From the definition provided in the Customs and Excise Act itself it is evident that the commissioner is in charge of the “department of the Zimbabwe Revenue Authority

which is declared to be responsible for the assessment, collection and enforcement of duties” in terms of the Customs and Excise Act.

Clearly for purposes of performing its obligations under the various statutes providing for the collection of revenue the first respondent acts as an agent of the State. The appellant accepts that position. It however contends that the first respondent is not an officer as defined in the two impugned sections of the State Liabilities Act as well as the Customs and Excise Act and that to that end the protection availed to natural persons is not available to it.

Sections 3 and 4 of the Revenue Authority Act clearly establish the role that the first respondent plays in the collection of revenue as an agent of the state. An agent by definition is a party that acts on behalf of another and whose conduct binds the principal. Once the appellant accepts that the Commissioner is the person bestowed with the authority and power to grant or remove the rebate in terms of the regulations, the appellant must by necessary implication, accept the legality of the extension to the first respondent of the protection afforded to the State and its officials under s 196 of the Customs and Excise Act and the State Liabilities Act. It would be absurd in my view, to accord greater importance to the position of the Commissioner than that of the Authority itself. It matters not that it is not a natural person. When the commissioner does anything under the Customs and Excise Act, he so does in terms of the authority bestowed upon him as an employee of the first respondent. I am fortified in this view by the comments of GARWE JP (as he then was) in *Tregers Industries (Pvt) Ltd v Zimbabwe Revenue Authority* 2006 (2) ZLR 62 (H), at p 67B-F to the following effect:

“It is the Authority which in terms of s 4 is charged with the responsibility of, inter alia, collecting and enforcing the payment of all revenues. In terms of s 19 of the Revenue Authority Act, it is the board of the Authority which appoints the Commissioner-General of the Authority. However, in terms of s 3 of the Value Added Tax Act, it is the

Commissioner-General of the Authority who is responsible for carrying out the provisions of the Act. Section 5 of the same Act provides that the Commissioner-General may, subject to the Revenue Authority Act, delegate functions to officers in the employ of the Authority. That the Commissioner-General acts under the control of the Board of the Authority there is no doubt. Section 19(4) of the Revenue Authority Act provides that the Commissioner-General shall be responsible, subject to the Board's control, for supervising and managing the authority's staff, activities funds, etc. As already noted, s 5 of the Revenue Authority Act provides that the operations of the authority shall be controlled and managed by the Revenue Board and s 19 (40) makes it clear that the Commissioner-General's position is akin to that of a chief executive in a company. He is appointed by the Board of Authority, which Board also appoints commissioners and other officers and members of staff. Although there is specific reference in the Value Added Tax Act to the Commissioner-General being responsible for carrying out the provisions of the Act, it is clear that such responsibility is subject to the control and management of the Authority through the Revenue Board. At the end of the day, it is the Authority that is specifically given the power to sue and be sued."

The conclusions reached by the learned judge in the above authority accord with the provisions contained in the statutes that are concerned with the fiscal arrangements provided for therein. In *Machacha v Zimra* HB 186/11, 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 conduct by tendering early amends as envisaged by the Act."

In *Ebrahim v Controller of Customs and Excise* 1985(2) ZLR 1(S), this court had to consider the purpose of s 178 of the Customs and Excise Act [*Chapter 177*], the precursor to the current Customs and Excise Act [*Chapter 23:11*]. After considering various authorities from the South African courts the court said:¹

¹ At p7B-E

“In Administrator, Transvaal v Husband 1959(1) SA 392(AD) MALAN JA, when considering a section similar to our s 178(2), said at 394A-D

‘In considering whether this letter is a compliance with sec 99(a), it should be borne in mind that the primary object of the provision is to ensure that the Administration shall be apprised, within reasonable time, of an intention to hold it liable in damages sustained as a result of the default or negligence of any officer acting in the course of the execution of his duty in circumstances described in the sub-section. The Administration will thus be able to investigate the circumstances and be placed in a position to determine whether it should settle the claim or prepare to resist it.

The approach to the interpretation of the sub-section ought, consequently, not to be technical and a notice should be held not to be a compliance with the sub-section only if it fails to set out a cause of action or if it is so wanting in particularity that it is deficient in essentials and, as a consequence, hampers the Administration in a proper investigation of the complaint. While it may be desirable to have a more or less full statement of the facts relied upon, a bald statement of the essentials, in my opinion, suffices provided, however, that there has been substantial compliance with the requirements of the sub-section.’

That approach has my complete approval.”

Judgment No. SC 76/17
Civil Appeal No. SC 257/15

11

From the above authorities it becomes clear that it is not just the failure to give notice that a court can take cognizance of. The failure to provide sufficient detail on the cause of action in compliance with the requirements of provision may also result in the court declining to hear the plaintiff or applicant as the case may be. This is primarily to do with the purpose underlying the need for notice which is to give the revenue collector sufficient facts to allow an investigation within reasonable time to make a decision on whether to settle the matter or defend the claim.

In terms of the Customs and Excise Act the responsibility for the assessment, collection and enforcement of duties is that of the Authority. It stands to reason therefore that it is the party upon whom the required notice should be served. Any other construction would lead

to an absurdity. It is the party in terms of the Act with the power to sue and be sued. In *Tregers Industries v Zimbabwe Revenue Authority (supra)*, GARWE JP (as he then was) said:²

“See also *Maradze v Crmn, PSC & Anor* HH 223/98. In the case, SMITH J remarked at pp 7-8 that it was not appropriate to cite the Chairman of the Public Service Commission as a party unless the allegation is that he personally acted in a manner which necessitated recourse to the courts.

I agree with the sentiments expressed in the cases cited above. Ordinarily there is no basis for citing the Commissioner-General as a party in a matter handled by employees of the authority. I am fortified in this view by the provisions of the Value Added Tax Act [*Chapter 23:12*] as well as the Revenue Authority Act [*Chapter 23:11*]. The latter Act provides in s 5 that the operations of the Zimbabwe Revenue Authority (ZRA) shall, subject to the Act, be controlled and managed by a board which shall consist of the Secretary for Finance, the Commissioner-General of ZRA and other members appointed by the Minister after consultation with the President.”

The fact that it is the authority itself that has been empowered to sue and to be sued will also justify why a finding that it enjoys the same protection as afforded to individuals is a correct finding. The State collects revenue through the agency of the first respondent. The agency relationship between the State and the first respondent is *sui generis*, and by virtue of the provisions of s 3 of the Revenue Authority Act the first respondent is accorded the status of a legal persona. Thus, despite acting as an agent for the state it is capable of suing and being sued in its own name. Its existence as a corporate entity does not detract from the need for due compliance with the provisions of the statutes which govern its operations.

A construction of the body of statutes concerned with matters of revenue assessment, collection and enforcement requires a purposive approach from the courts as a whole. The purpose of the statutes as a whole should be the guiding factor in the determination of the enquiry. In *Ebrahim v Controller of Customs & Excise (supra)*, DUMBUTSHENA CJ concurred

² At p 66E-F

with *Osler v Johannesburg City Council* 1948(1) SA 1027, that the primary purpose of notice was to give the defendant an opportunity to avoid litigation. The author G Devenish in his book *Interpretation of Statutes* (Juta 1992) at p 33 describes the Purposive Rule of Interpretation as:

“The purposive approach requires that interpretation should not depend exclusively on the literal meaning of words according to the semantic and grammatical analysis The interpreter must endeavor to infer the design or purpose which lies behind the legislation. In order to do this, the interpreter should make use of an unqualified contextual approach, which allows an unconditional examination of all internal and external sources ... words should only be given ordinary grammatical meaning if such meaning is compatible with their complete context.”

In casu, the first respondent is the body which is now conferred with the assessment, collection and enforcement of taxes which include customs duties. In the light of the purpose of s 196 of the Customs and Excise Act, it would be remiss of this court to find that the provision applies to the State and not to the first respondent, which is the appointed agent for the collection of taxes. Such an interpretation would be absurd due to the fact that under the law the State is not the responsible entity for collection of taxes. It does so through an agent. It therefore follows that the right the State derives from the provision is conferred upon the first respondent.

I find no misdirection on the part of the High Court. There is no reason to interfere with its decision.

Accordingly, the appeal be and is hereby dismissed with costs.

HLATSHWAYO JA:

I agree

BHUNU JA:

I agree

Wintertons, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners

Judgment No. SC 76/17
Civil Appeal No. SC 257/15