

CHENJERAI MASAKA

Versus

COMMISSIONER CUSTOMS AND EXCISE (N.O)

And

REGIONAL MANAGER REGION 1

CUSTOMS AND EXCISE (N.O)

And

ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE

BACHI-MZAWAZI J

CHINHOYI, 19 & 24 June 2023

Opposed Matter

BACHI MZAWAZI J: Applicant filed an application for the review of the decisions made by the 1st and 2nd respondents who are employees of the third respondent under case HC 222/22. Through ignorance or inadvertence, he failed to cite the employer, 3rd respondent. After realising this omission, he has approached this court seeking the joinder of the 3rd respondent to his suite. The application is opposed.

The application is premised on the fact that for the effective resolution of the matter and finality to litigation it is crucial to join the 3rd respondent to the main suit for review in case HC 222/22.

The common cause facts are that a vehicle, Isuzu KB single cab registration number DZT 234L with a venter box trailer registration number BKZ 2257L with temporary import permit reference number ZWBBPV17711 of 29.05.2022 issued in the name of a South African national, Mteki Zotha found its way across the border between two countries into Zimbabwe. The vehicle was in the custody and possession of the applicant.

It is applicant's version as renditioned by the Revenue Officer, Tsitsidzasho Nhamo, in his opposing affidavit that applicant and a South African national Mteki Zotha crossed the border post of the two countries together. The foreign national then obtained or legally facilitated the issuance of the temporary import permit using his South African residence permit. Mteki then fell ill and had to return to South Africa leaving the applicant in charge of the vehicle.

Somehow, the applicant got embroiled with the police for overloading. He claims that they took the copy of the import permit belonging to Mteki Zotha during that encounter. He then failed to recover the documents on the basis that the police may have mistakenly given them to another driver at the road block.

The loss of this important document led the applicant to approach, the department of the above mentioned deponent of the respondents affidavit, a revenue officer at the Zimbabwe Revenue Authority Customs Office at Chinhoyi on the 31st of May 2022. He was requesting for a new temporary import permit for the vehicle in question to enable lawful driving in Zimbabwe.

It is this incident, and the explanation already highlighted given to Nhamo that raised a red flag. The Revenue Officer suspected foul play and concluded that the vehicle had been imported into the country in contravention of the temporary import permit regulations. This was premised on the fact that he was a resident in Zimbabwe and had no South African permit. Therefore, the vehicle had been imported under false declaration and without duties being paid in contravention of the Customs and Exercise Act, which provides for seizure of such articles, items and or goods.

The officer subsequently informed the applicant of the misfeasance and her intention to seizure the vehicle. She then issued a seizure notice number 01153K of 31 May 2022.

The application for review was premised on the decisions made by the 1st and 2nd respondents although it is not clear as to when the 1st respondent confirmed the seizure. The applicant also challenged the legality of the seizure.

In its opposition the 1st respondent raised several preliminary points. One of them being the inaccurate citing or description of the offices of the 1st and 2nd respondent. The second, is that the two officials even if it is accepted, were correctly cited need not have been sued but the 3rd respondent. Thirdly, that because of these irregularities, the application in

case HC 222/22 was a legal nullity, therefore a joinder cannot be made to a non-existing parties.

They argue further that, the application for rescission is bound to fail as the time limit upon which to launch such application was not complied with both in terms of s 193 of the Customs and Exercise Act and the rules of this court under rule 62 (4) of the 2021. They thus, submit that the application for review was filed out time. Therefore, since no application for condonation was made it will not succeed. They relied on the case of *Kennedy-v-Mazongororo Syringes (Pvt) Ltd 1996 (2) ZLR 565 (5)* amongst others.

For the sake of finality to litigation the court with the concurrence of both parties found it prudent to deal with both the points in limine and the merits at the same time in the judgment.

As it where, the only issue for consideration is whether or not the applicant has made a case for an application for joinder?

A joinder literally denotes the joining together of several lawsuits with a common cause of action or several parties who may have an interest in the legal issues and factual situation and may be adversely affected by the outcome of a decision that made in their absence.

This principle is provided for statutorily in rule 32 of the High Court Rules of 2021. A plethora of decided cases has also enunciated situations whereby the concept of joinder on nonjoinder applies. See *Sibanda-v-Stevenson & Anor HH 474/18, Building Electrical & Mechanical Corp Salisbury-v-Johnson 1930 (4) SA 305*.

In *casu*, the two parties cited in the court application for review, case HC 222/22 are functionaries or representatives of a body corporate which acts through them Zimbabwe Revenue Authority. It is a known fact that the 2nd respondent made a decision to confiscate the applicant's vehicle or that had been brought by the applicant, relying on her interpretation of their governing laws. It is also on record that the 1st respondent then endorsed that decision as sanctioned by his officer to be the next authority in line overseeing such processes. Again, it is not being contested that if one aggrieved by decisions of quasi-judicial functionaries has the review procedure to a court of law open to him or her. For as long as it is within the terms of rules.

However, it cannot be overstated that the employer and the party which is represented by these office bearers has a legal or factual interest, in their official functions. It can also not be underplayed that any decision made affects and binds the represented party, the employer. Evidently, it is of necessity that they are made party to the proceedings if a party to the proceedings so requests through an application.

Rule 32 (12) of the 2021 High Court rules reads;

“At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either on its own motion or an application

- a)
- b) Order any person ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the course or matter may be effectually and completely determined and adjudicated upon, to be added as a party.

The literal interpretation of the rule on “an application” connotes an application such as the one placed before this court by the applicant. The appellate court in *Timba-v-Chief Elections Officer & 5 others SC9/14*, took the issue of joinder a further stop and highlighted that for joinder to be essential the parties to be joined must have a direct and substantial interest. I need not over stretch the point that as already extrapolated, the applicant has managed to demonstrate that the 3rd respondent has a real and direct interest in the suit in HC 222/22.

Herbstein and Van Winsen 8 in the ‘Civil Practice of Higher Courts’ had the liberty to define a direct and substantial interest as follows;

“A direct and substantial interest has been held to be ‘an interest’ in the right which is the subject matter of the litigation and not merely a financial interest, it is a legal interest in the subject matter of the litigation, excluding an indirect commercial interest only. The possibility of such an interest is sufficient, and it is not necessary for the court to determine that it in fact exists.”

In that regard the issue of joinder in the current case is resolved.

Contrary to the submissions by the 1st respondent that it’s only the 3rd respondent who was supposed to be sued and not the 1st and 2nd respondent. The court find this averment absurd if not preposterous. Body corporates as non-juristic persons act through humans. For the injured person’s tentacles to spread to the mother body it has to incorporate those who effected the injury in a representative capacity to answer to the claim. As such nothing turns on this argument.

The court is also of the view that though the applicant did not know the exact titles of the persons he sought to sue he knew their offices. The persons in turn identified themselves and assumed responsibility by deposing to opposing affidavits. In that regard, the course and interests of justice cannot be defeated by that insignificant error which does not go to the root of the matter. As such, the parties are not non-existent but in existence.

The other points in limine on prescription, material disputes of fact and non-compliance 62 (4) of the High Court rule 2021, are critical issues but are the fodder for the application for review. Dealing with those will not only pre-empt that application but will be an unnecessary venture into the territory of another court or hearing.

As a result, the application for joinder succeeds.

Thus, it is ordered that;

- a) The 3rd respondent be and hereby co-joined to the main application under case number HC 222/22.
- b) The 3rd respondent is hereby given leave to file its notice of opposition to the main application within (10) days of this order.
- c) Each party to pay its own costs.

Mangwana and Partners, Applicant Legal Practitioners

Zimbabwe Revenue Authority Legal Services Division, Respondents Legal Practitioners