TINASHE MUTENHE BVONGODZE

Versus

ZIMBABWE REVENUE AUTHORITY

And

ZIMBABWE ANTI CORRUPTION COMMISSION

IN THE HIGH COURT OF ZIMBABWE
MANGOTA J
BULAWAYO 1 OCTOBER 2024

JUDGMENT

D. Kossam for the applicant
Ms T.E Kamema for the 1st respondent
Ms N. B. Munyuru for the 2nd respondent

MANGOTA J

I heard this application on 16 July, 2024. I, on the strength of the preliminary point which the first respondent raised, struck it off the roll with costs. I did so by way of an *ex tempore* judgment.

On 17 July, 2024 the applicant wrote requesting reasons for my decision. These are they:

The applicant, who is a member of the Zimbabwe Republic Police and therefore an employee of Government, successfully applied to import a motor vehicle into Zimbabwe in terms of Statutory Instrument 124/22 as read with Public Service Commission Circular number 2/22. He, following the success of his application, imported a Toyota Passo motor vehicle with chasis number KGC30-0190268. At entry of the car into Zimbabwe, the first respondent cleared the motor vehicle at all its check points, according to the applicant.

On 12 October, 2023 the first respondent, the applicant states, confiscated the motor vehicle on the allegation that the applicant fraudulently imported it into the country. The confiscated motor car constitutes the applicant's cause of action. He accuses the first respondent of bias, malice and/or corruption in the decision which it made. He also alleges gross irregularity in the decision of the first respondent. He, accordingly, is reviewing the decision of the first

respondent which, he insists, must be set aside and the vehicle returned to him pending investigations by the second respondent of allegations which are levelled against him.

The first and the second respondents filed notices of opposition to the application. The second respondent, however, filed its papers outside the *dies.* It did so when it was barred. It did not apply to unbar itself. Nor did it apply for condonation for late filing of notice of opposition. The half- hearted attempt by counsel for it to uplift the bar hit a brick-wall. He applied orally in terms of Rule 39 (4) (b) of the rules of court, to remove the bar. He, unfortunately for the second respondent, ran short of reasons as to why it filed its notice of opposition outside the *dies*. Nor could he advance any reasons as to why the party whom he represented did not apply for condonation. The second respondent remains barred and the notice of opposition which it filed outside the *dies* does not therefore carry the day, so to speak. I remain constrained to consider it as part of the current application. In taking the view which I have taken, I remain alive to the provisions of Rule 39 (4) (b) of the High Court Rules, 2021 which states that the party barred shall not be permitted to appear personally or by legal practitioner in any subsequent proceedings in the action or suit except for purposes of applying for the removal of the bar.

The second respondent's continued bar leaves the applicant and the first respondent ("the respondent") in the equation. The respondent is an administrative authority. It is established in terms of the Revenue Authority Act (Chapter 23:11). Its duties are, among others, to administer and collect revenue for Government in terms of the Customs & Excise Act, the Income Tax Act and the Value Added Tax which are respectively referred to as Chapters 23:02; 23:06 and 23:12.

The *in limine* matter which the respondent raises is that the applicant did not comply with Section 6 of the State Liabilities Act (Chapter 8:04) as read with Section 196 (1) of the Customs & Excise Act. The respondent did not raise its *in limine* matter which, in essence, is a point of law in its notice of opposition. It raised the same in its Heads. The matter which it raised is properly before me. It resonates well with the decision of the court which was pleased to enunciate in *Gold Driven Investments (Pvt) Ltd* v *Tel-one (Pvt) Ltd,* SC 9/2013 that a question of law can be raised at any stage of the proceedings provided that it does not occasion prejudice to the other party.

The question which begs the answer is whether or not the preliminary point which the respondent raised falls into, or out of, the qualification of the court's above-mentioned *dictum*. Put simply, the question is: does the preliminary point prejudice the applicant. That it is a point of law more than it is one of fact requires no debate at all. It can, as such and at law, be raised at any stage of the proceedings except where it remains prejudicial to the other party, *in casu* the applicant. Whether or not it is prejudicial to the applicant remains a matter of deductive logic and good reasoning and no more than that.

The respondent, as is observed, filed its Heads on 22 January, 2024. It, in all probability, served the same on the applicant. If it did not do so, the applicant who was only very much aware that the second respondent was barred for failing to file its Heads within the *dies* would have applied that his application be placed on the unopposed roll. He did not do so because he was aware that the respondent was/is properly before the court. He, it is my view, saw the respondent's *in limine* matter well before the date that the application was scheduled to be heard. He, for reasons which are best known to himself, made up his mind not to challenge the preliminary point which the respondent raised. He was/is very much alive to the meaning and import of the *in limine* matter. Nothing prevented him from filing supplementary Heads with a view to rebutting what the respondent raised. He cannot, under the circumstances of the case, claim that the preliminary point remains prejudicial to him. It does not.

That the preliminary point is not prejudicial to the applicant is evident from the fact that he was ably legally represented on the date that the application was heard. The respondent raised the same point during submissions and, unfortunately for him, counsel for him misunderstood the point which was the subject of debate in a very dismal manner. He submitted, on the same point, in the following words:

" In regard to the first respondent's preliminary point, counsel is mistaken. She is taking the action, and referring it to the application, procedure. This is an application for review. No notice is required. What is required to be complied with is the 8-week period. No money is being claimed. We are inviting the court to review the decision of the first respondent. The notice has no place in this application. The preliminary matter is misplaced and must therefore be dismissed".

The above-quoted words emanate from a legal practitioner who, wittingly or unwittingly, misconstrued the law in a manner which is difficult to condone let alone accept. This is a case

where the applicant cannot fail to, as it were, suffer for the sins of his legal practitioner. He made his own bed of thorns and he should not, therefore, fail or fear to lie upon it. He blames no one else but himself for his choice of a legal practitioner who, to all intents and purposes, appears to have suffered from serious dereliction of duty.

I reiterate that he appears to have suffered from dereliction of duty because of two pertinent reasons. The first is that, in persisting with the misconstruction of the law as he is doing, the *in limine* matter which the respondent raised remains without any opposition and therefore valid. The second is that he did not take the trouble to read and appreciate the meaning and import of Section 6 of the State Liabilities Act as read with Section 196 (1) of the Customs & Excise Act. If he had made the effort to read as well as digest the two pieces of legislation, as he should have done, he would not have allowed himself to reason at a tangent with the law as he is doing. He would, in short, have realized that the law, as stipulated in the two pieces of legislation, is not only mandatory but is also applicable to proceedings which fall into the realms of an action or an application without any variation.

The law, as is stipulated in the two Acts of Parliament, is clear and straightforward. It boasts of a commanding language as well as character. It states in unequivocal terms that, before a person sues the Government or any of its institutions, including its officers, he (includes she) must serve notice of his intention to sue the defendant or the respondent, as the case may be. The notice, the law states, must give the defendant/the respondent a grace period of 60 days within which the latter has to weigh its options to given in to the plaintiff's or the applicant's demands or to defend the same. The notice which is a *sine qua non* aspect of the suit must be served regardless of whether the suit is in the form of an action or an application. Section 6 of the State Liabilities Act, for instance, provides as follows:

"…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) ……;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 sub-section (2) at least sixty days before the institution of the proceedings".

In suing the respondent as he did, the applicant sued an institution of Government. He did so without having served upon it the requisite 60-days notice. His suit is therefore of no moment. The argument which counsel for him raised during submissions is misplaced. It is a misplaced argument for him to suggest, as he is doing, that service of notice upon the respondent is not required where, as *in casu*, the application is one for review. Given that the applicant is moving me to release the motor vehicle to him, service of notice upon the respondent remains pertinent. It is pertinent from a reading of paragraph (b) of Section 6 of the State Liabilities Act. The primary objective of the provision, as was aptly stated in *Machacha* v *ZIMRA,* HH-186-11, is provision of timely opportunity to the Zimbabwe Revenue Authority (ZIMRA) to know and therefore investigate the material facts upon which its actions are challenged and to afford ZIMRA an opportunity of protecting itself against the consequences of possible wrongful conduct by tendering amendments as envisaged by the Act.

Subsection (1) of Section 196 of the Customs & Excise Act is more apposite to the subject-matter which is under consideration than Section (6) of the State Liabilities Act is. It, however, blends well with the State Liabilities Act. It reads:

"No civil proceedings shall be instituted against the State, the Commissioner or any 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".

The applicant, it has already been observed, failed to comply with the requisite 60-days notice. He should have served the same upon the respondent. He served none upon the respondent which, on the strength of the observed failure, insists that the application is fatally defective. I agree. I, in the mentioned regard associate myself with the view which the court was pleased to take in *Care International Zimbabwe* v ZIMRA, SC 76/2017 wherein, remarking on the same subject-matter, it stated as follows:

"Failure to give the notice was,....., fatal. There is therefore no proper application before the court and,..... upholding this point in limine means that the court cannot proceed to do anything

else. I liken this position to a situation where, in an urgent application, the court, upon making a finding that there is no urgency, cannot proceed to the merits".

I cannot, in view, of the applicant's failure to comply with clear provisions of the law proceed to deal with the merits of this application. As the respondent correctly submits, the applicant's failure to give the requisite notice is fatal. He is, accordingly, barred from approaching the court. He has no right of audience until he complies with the law. The application is, in the premise, struck off the roll with costs.

Liberty Mcijo & Associtates, applicant's legal practitioners

Zimbabwe Revenue Authority Legal Division, 1st respondent's legal practitioners

Muvingi and Mugadza Legal Practitioners, 2nd respondent's legal practitioners