QUEST MOTOR MANUFACTURING (PRIVATE) LIMITED
versus
ZIMBABWE REVENUE AUTHORITY
and
INNOCENT CHIKUNI
and
CHABVEKA MAREKERA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 26 July 2024

Application for review

T. Mpofu, for applicant
N.B. Munyuru, for the respondents

MUTEVEDZI J: The applicant in the case seemed to have employed Winston Churchill's philosophy that when you have an important point to make, you do not try to be subtle. Instead, you must use a pile driver to hit the point home. You then return to hit it again with a tremendous whack. The applicant took no prisoners in challenging the respondents' decision on the grounds of gross unreasonableness, irrationality and absence of reasons. In the midst of it, the interpretation of what in the automotive industry is meant by the term *semi knocked down kits*, is where the dispute between the applicant and the respondents began and ended. It made the issue between them very narrow. Unfortunately, despite the circumscription of the dispute, the contestation travelled a fairly long road in the courts. It came before me as a remittal from the Supreme Court. I will detail that history shortly. First, it is important that I describe the protagonists.

[1] The applicant is Quest Motor Manufacturing (Pvt) Ltd, an entity duly incorporated in terms of the company laws of Zimbabwe. It is in the business of assembling what are known as single and double-cab automobiles as per the definition given under the Customs and Excise (Suspension) (Amendment) Regulations, 2020 (No. 228) [Statutory Instrument 45 of 2020]. The company also holds a Single and Double Cab Motor Vehicle Assembly Bond accepted under bond number RF/44/1/01/22.

[2] The Zimbabwe Revenue Authority ("ZIMRA") is the first respondent. It is a body established in terms of the Zimbabwe Revenue Authority Act, [*Chapter 23:11*] and is endowed with the primary responsibilities of assessing, collecting and enforcing the payment of taxes on behalf of the State.

[3] Innocent Chikuni is the second respondent. He is cited in the proceedings in his official capacity by dint of having, in the course of his duties on 5 January 2023, dismissed the applicant's appeal.

[4] The third respondent is Chabveka Marekera equally cited in his official capacity. He is ZIMRA's Acting Regional Manager for Forbes Border Post and Environs Region. He made the decision which is at the centre of the dispute between the parties on 28 November 2022.

The background to the dispute

[5] The applicant alleges that in the course of its business, it made an application to the first respondent on 28 September 2022. In that application, it indicated its desire to import semi-knocked down vehicles' kits for the assemblage of cars which were specified as Toyota Hilux Revo Double Cab 2 x4 WD; 2.4 MID Manual and 4 x 4 WD 2.8 High Auto transmission. The applicant, in its application to ZIMRA disclosed and enclosed the motor vehicle specifications and what is termed the SKD packing list. That catalogue described the constituent parts intended for importation. ZIMRA approved the application and granted the applicant permission to import the kits with duty for them suspended. That authority was communicated to the applicant through correspondence written by the third respondent on behalf of ZIMRA on 29 September 2022.

[6] On 4 October 2022, the applicant submitted a similar request to ZIMRA. That supplication described the applicant's intention to import and assemble Toyota Hilux Revo Double Cab 1x4 WD; 2.4 MID Manual and 5 x 4 WD 2.8 High Auto Transmission in the format of semi-knocked down kits. Once again, ZIMRA approved the application and by letter dated 19 October 2022, it informed the applicant that it could import the described Toyota Hilux Revo Double Cab model vehicles in semi-knocked down form with payment of duty suspended.

[7] On the basis of the approvals, the applicant proceeded to import into the country, the semi-knocked down kits. It did so in compliance with the specifications and packaging lists which ZIMRA and Chabveka Marekera had approved. When the kits had been docked in the country and lodged in its Bonded Warehouse, the applicant on 4 November 2022, requested the first respondent's official in charge of the Container Depot at Forbes Boarder

Post to avail himself for the inspection of the containers with the imported semi-knocked down kits. The official complied. Unfortunately for the applicant, the first respondent, following that inspection, refused to suspend the payment of duty in terms of Statutory Instrument 45 of 2020. Needless to say, ZIMRA advised the applicant that it was required to pay import duty in full for the products which had been imported under bills of entry ZWFB C19091 and C19093.

[8] The applicant was enraged by that unexpected volte-face. It submitted an appeal against that refusal to suspend payment of duty in terms of Statutory Instrument 45 of 2020. The appeal fell for determination by the third respondent. It was dismissed. The reason for the dismissal was that the applicant, instead of importing semi-knocked down vehicle kits had brought in its consignments, built up motor vehicle parts. It reached that conclusion mainly on the basis that the vehicle engines were attached to the chassis and that when started the engines could switch on. On that argument, the applicant was directed to pay full import duty for the 'cars.'

[9] The applicant remained unconvinced that it was obliged to pay full import duty. As per its right, it noted a further appeal to ZIMRA's Commissioner of Customs and Excise. The second respondent determined the appeal. He also dismissed it. He certified the decision that the third respondent had earlier taken that the vehicle kits which the applicant had brought into the country were not in conformity with the requirements for suspension of duty as specified in the S.I. 45 of 2020.

[10] The applicant was relentless in its quest. It upped the ante by filing an application for the review of ZIMRA's latest dismissal of its appeal. It was made in terms of ss 26 and 27 of the High Court Act [*Chapter 7:06*] as read with s 4 of the Administrative Justice Act [*Chapter 10:28*] and r 62 of the High Court Rules, 2021. The case was under case number HC 366/22.

[11] The case was set for hearing. In the ensuing arguments, the respondents raised preliminary objections. The High Court upheld the preliminary objections particularly that the applicant was required in terms of s 6 of the State Liabilities Act, to give sixty days' notice that it intended to institute legal proceedings against the second and third respondents who were all acting in their official capacities as employees of the first respondent. It also upheld the contention that despite the application before it being one for review, it qualified as civil proceedings. That in turn brought it within the ambit of s 196 (1) of the Customs and Excise Act. It therefore took the decision to dismiss the applicant's application.

[12] The applicant remained dissatisfied. It appealed against the decision of this court to the Supreme Court. By its judgment in the case of *Quest Manufacturing (Pvt) Ltd* v *ZIMRA and Others* SC 51/24, the Supreme Court held that the High Court had not adequately discussed the objection *in limine* relating to the requirement to give notice in light of the defence which had been raised by the applicant. Because of that omission, the Supreme Court said it was hamstrung from determining the correctness or otherwise of the High Court's finding on that issue. It then allowed the appeal and directed that the matter be remitted to this court for a hearing *denovo* before a different judge. That rehearing is what is before me. In essence, it means that the application is where it was before the first determination of this court.

The applicant's case

[13] The applicant's case is exactly like I have already narrated in the factual background of this dispute. There is no point in retelling it because apart from the fact that it is now coming as a remittal from the Supreme Court nothing else has changed. I have already intimated that the applicant's case is an application for review brought in terms of ss 26 and 27 of the High Court Act as read together with s 3 of the Administrative Justice Act. In brief, the applicant attacks the decision which was made by the third respondent and ultimately certified by the second respondent to cause it to pay full import duty on semi-knocked down vehicle kits as being so outrageous in its defiance of logic that no reasonable man applying his mind to the facts and the attendant law would have arrived at such a decision. It further alleged that the second respondent's decision to dismiss its appeal was so grossly unreasonable and was bedeviled with gross irregularities in that it is based on an alleged absence of new information in circumstances where he was required to adjudicate the matter on the basis of his interpretation of what the law meant by semi-knocked down vehicle kits. Instead, so the argument proceeded, the second respondent abdicated his function to decide on the live issue.

[14] The applicant insisted on and amplified these arguments at the hearing. It persisted that the respondents' decisions were reviewable on the basis of gross unreasonableness. Counsel added that the law requires that before a subject of the state can suffer an invasion of his/her/its rights the decision taking away those rights must be reasonable. Yet in this case, there was no valid decision by ZIMRA. All there was, is a letter written to the applicant. It constitutes the entire decision. What is worse, so counsel went on, is that the letter does not identify anything. It does not single out or attempt to articulate the issues for

resolution despite the applicant not only having categorically set out its gripe with the initial decision by the third respondent but also provided reference points to aid in the issues for determination. The entirety of the third respondent's decision was as follows:

> "After a careful consideration of the facts and your submissions, I did not find any new information that warrants a deviation from the Regional Manager's decision. In view of the above, I regret to advise that you that your appeal was not successful in this instance and the decision by the Regional Manager still stands. If you are not satisfied by this decision, you may approach the courts for recourse."

[15] As can be shown, so Mr *Mpofu* for the applicant protested, the second respondent used an entirely wrong test. He was looking for new information in circumstances where he was obligated to deal with the record of the case which had been dealt with by the third respondent to determine the correctness and legality of the decision which had been taken. What made everything more unpalatable was that the initial decision itself did not constitute a decision at law because it also failed to deal with the issues put into contestation. That on its own was a gross irregularity. There were no reasons for the decision. A decision-maker cannot store his/her reasons for the decision taken in his/her mind. There is a statutory obligation for ZIMRA to deal with grievances brought before it by a tax payer. The decision being impugned failed to meet that standard.

[16] The applicant further argued that it did not blindly import the SKD kits. Instead, it had relied on an earlier approval by the respondents. That approval was based on the packing list which applicant had provided to ZIMRA. At importation, the applicant said it had not departed from that packing list by an inch. It had foretold the respondent what it wanted to import. It wanted ZIMRA to confirm that it could do so and that its cargo would be covered by the rebate under SI 45/2020. ZIMRA gave those guarantees and certifications. After the kits had been imported it suddenly turned around and reneged on its approval. It was estopped from doing so because it does not allege that there had been a variation.

[17] A further argument by the applicant was that the occasion which brewed this disagreement was not the first time that the applicant had imported SKD kits using the same method. It had previously done so and the rebate had been granted. As such, the applicant had been induced by ZIMRA to import. Yet in it the challenged determinations, ZIMRA alleges that it had carried out a post-clearance audit of the kits. Counsel insisted that such a procedure did not apply because post-clearance audits are provided for in terms of s 223 A of the Customs and Excise Act. The section deals with that person who walks through

customs and makes a false or erroneous declaration. The law provides that the person can be followed after clearance and be forced to pay the correct duty. The section does not apply in instances where a prior application for clearance is made and the tax payer has not misled the tax authority.

[18] The applicant rounded off its arguments by stating that what is in issue here is simply the definition of an SKD. Mr *Mpofu* insisted that the respondent accepts that in terms of the statutory instrument, SKD kits do not pay duty. He added that for ZIMRA to claim that what had been imported were not SKD kits but completely built-up units (CBUs) is a conclusion of fact. But for that conclusion to be arrived at it, ZIMRA had to show the work tools it had employed for that purpose. It had to have an objective standard to do so. The decision could not be an arbitrary one.

The respondents' case

[19] The first respondent, in its opposition, through the opposing affidavit filed on its behalf by one *Alick Mubvuviwa Mutandiro* who indicated that he was the Acting Commissioner Customs and Excise Division raised the preliminary objection that the applicant had failed to comply with s 6 of the State Liabilities Act [*Chapter 8:04*] and s 196(1) of the Customs and Excise Act [*Chapter 23:02*] both of which required the applicant to give notice of its intention to sue the respondent. For that reason, the applicant's application was not properly before the court and ought to be dismissed.

[20] On the merits, *Mutandiro* maintained the first respondent's contention that it had given the applicant reasons why its cargo did not qualify for suspension of duty under SI 45/20 because instead of importing SKD kits, the applicant had imported semi-knocked down vehicles. In any case, so the argument went, as the Acting Commissioner Customs and Excise, he was endowed with authority to carry out a post clearance audit in order to satisfy himself of the accuracy of any declaration and to correct such declaration if it contained any errors or misrepresentations. That process remains legitimate as long as it is carried out within six years of the entry of such products into the country. The applicant was therefore not entitled to rely on transactions which had not gone through the post audit clearance in terms of the law.

[21] In the succeeding paragraphs of the founding affidavit, the point was repeatedly stated that the applicant had imported built up vehicles instead of semi-knocked down kits as stated in its papers which had been approved by the first respondent prior to importation.

He argued that in terms of R 2(a) of SI 203/2022, an engine on a chassis was classified as a vehicle.

[22] The second and third respondents filed supporting affidavits vouching for the averments which had been deposed to by *Mutandiro* sought to controvert the allegations made by the applicant. He insisted that the decision by the first respondent remained a valid decision. That it was a letter written by a tax expert and not by a legal practitioner did not and could not detract from its essence. In paragraphs two and three of it, the premises upon which the decision was made was indicated.

[23] Counsel added that exemption from paying duty is based on the law. That same law provides the definition of SKD kits. The kits which the applicant imported, therefore, had to be in compliance with the tariff codes. In the letter to the applicant communicating the decision, the third respondent specified that the alleged SKD kits brought in by the applicant did not comply with the provisions of the SI 45/20. Further, they averred that a physical examination had been conducted. It showed that the imports were bodies on engines which could be started and could move. In reality they were SKD vehicles. In the end, the reasons given were sufficient to justify the decision which was taken.

[24] Mr *Munyuru* made the further argument that it was not necessary to refer to an international definition of an SKD because SI 45/20 defined it. That definition, so he insisted, illustrated that what was declared and what was ultimately imported are two different things.

The issues for determination

[25] There are two issues which fall for my decision in this application. The first relates to the preliminary objection. It is whether or not the application for review before me must comply with the provisions of s 196(1) of the Customs and Excise Act (the Act) and s 6 of the State Liabilities Act (SLA). The second, which is entirely dependent on a finding that the notice indicated above was not a requirement, would be whether or not the first respondent's decision to deny the applicant the suspension of payment of duty in terms of SI 45/20 was invalid by reason of gross unreasonableness. Naturally, I start from the preliminary objection because if I uphold it, it would be dispositive of this application.

The notices

[26] Section 196 (1) of the Act is couched 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 [*Chapter 8:15*]."

In turn, the SLA, in s 6 provides that:

"6. Notice to begiven of intention to institute proceedings against state or 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

(ii) ….

(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 (60) days before the institution of the proceedings."

[27] The first issue I note from the two provisions is that the notice which must be given under the Act must be in terms of the SLA. The phrase *'in terms of'* is usually employed loosely with little regard given to its implications. If it is used in a statute however, it cannot be taken for granted. When a law must be read in terms of another, I understand the phrase to mean that that law must be seen from the perspective of the one in terms of which it must be read. It ought to be discussed or interpreted from the viewpoint of that other law. In this case, for instance, I note that the giving of notice as provided for under s 6 of the Customs and Excise Act must be done with regard to the SLA. As I see it, the notice which is required to be given is the same under the two enactments. Section 196(1) prohibits the institution of civil proceedings under the Act until sixty (60) days' notice is given in terms of the SLA. The notice required under SLA is sixty days. The proceedings contemplated under the Act can therefore only be instituted after sixty days' notice has been complied with. That is a given.

[28] Section 196(1) of the Act does not require the giving of notice for every proceeding under the Act. It is only required for *civil proceedings*. I therefore hasten to state that the disputation between the parties as already outlined revolves around the portrayal of the application for review before the court as a civil proceeding. The applicant is adamant that an application for the review of an administrative body's administrative decision is not a civil proceeding. The respondents contend that it is.

[29] The term "civil proceedings" is defined in the Civil Evidence Act [*Chapter 8:01*] as follows:

> "**2 Interpretation**
> (1) In this Act—
> "civil proceedings" means proceedings which are not criminal in nature and which are before the Supreme Court, the High Court, a magistrates court or any other court to which the strict rules of evidence apply;"

In the same breath, s 2 of the High Court Act [*Chapter 7:06*] and the Oxford Reference define civil proceedings as any action, cause or matter before a court which is not a criminal case. [1] In the case of *Twotap Logistics (Pvt) Ltd* v *Zimbabwe Revenue Authority* SC 3-23 at p. 6. 'civil proceedings' were described as an all-embracive term. The test for assessing whether or not a matter falls under civil proceedings was also set in the case of *Bull* v *Attorney General* & *Anor* 1987 (1) ZLR 36 (SC) at p. 40 where the Supreme Court remarked as follows:

> "But the form of the procedure adopted and the nature of the relief sought does not, in my view, determine the character of the proceeding as either civil or criminal. It is the essential subject matter of the proceeding which does so. The question is whether in substance the proceeding is civil or criminal, and what is relevant to the answer is the forum in which the subject matter in dispute in the subsequent proceeding first arose. One must be wary of allowing the form of a subsequent proceeding to disguise or transform the nature of the original proceedings. See *Sita & Anor* v *Olivier NO & Anor* 1967 (2) SA 442 (AD) at 449C-E; *S* v *Mohamed* 1977 (2) SA 531 (AD) at 539 in fine–540A."

Given the above authorities, the temptation to bracket "civil proceedings" as used in s 196(1) of the Act to also include applications for review that are civil in nature is heightened. But I do not think it is a definition simpliciter.

[30] Mr *Mpofu* commended the court to several authorities such as *Natal Joint Municipal Pension Fund* v *Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 19; *Old Mutual & Ors* v *Moyo* (A5041/19) [2020] ZAGPJHC 1, *University of Johannesburg* v *Auckland Park Theological Seminary & Anor* [2021] ZACC 13 and *Zambezi Gas (Private) Limited* v *N.R Barber & Anor* SC-3-2020. The major take away from all of them being that, standing on their own, words may have little meaning if any. He argued that the court must always be alive to the fact that words derive their meaning from their surroundings. Their interpretation therefore is dependent on a consideration of their entire text, context and purpose. For that reason, counsel advocated for an approach

[1] Oxford Reference, s.v. "civil proceedings". Accessed on 23 July 204. Available at: https://www.oxfordreference.com/.

which took into account a combined reading of the provisions of s 196(1) of the Act and those of s 196(2) which provides that:

> "Subject to subsection (12) of section 193, any proceedings referred to in subsection (1) shall be brought within 8 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."

[31] The court was also referred to the case of *DDT Engineering v Regional Manager, Zimbabwe Revenue Authority Beitbridge and others* HB 241/22 for the proposition that s 196(1) of the Act does not apply to applications for review. In that case, the argument was whether or not an application for review amounts to 'civil proceedings.' The court in a sweeping one liner found that it did not. I will deal with the aspect later. I came to the same conclusion but for entirely different reasons.

[32] My view is that, put simply, the proceedings which are visualized by section 196(1), are those which in terms of section 196(2) shall, on one hand, be instituted within eight (8) months of the arising of the cause of action lest they prescribe. On the other hand, an application for review such as the one before the court, must, in terms of r 62(4) of the High Court Rules, 2021 be brought within eight (8) weeks of the termination of the suit, action or proceeding in which the irregularity or illegality complained of is alleged to have occurred. In my view, if applications for review of proceedings of inferior tribunals to the High Court were included under s 196(1) of the Act it would follow that in each of them, the applicant would be required to apply for condonation for the late noting of the application. They would invariably be filed out of time due to the sixty days' notice requirement which bars their institution before the expiration of two months. Put in another way, a review application in terms of the High Court Act cannot be brought **after** two months and a review in terms of s 196(1) of the Act cannot be brought **before** the expiry of two months. The provisions are therefore mutually exclusive. The only conclusion which can be drawn from the acrimony between the provisions is that s 196(1) did not contemplate applicants seeking the review of ZIMRA, its commissioner and other employees' decisions to be covered under it. In *Twotap Logistics (Pvt) Ltd* v *ZIMRA* (*supra)* the Supreme Court cited with approval the dicta in the case of *Thandakile Zulu* v *ZB Financial Holdings (Private) Limited* SC 48/18 where it was held thus:

> "The rules of statutory interpretation dictate that the words of a statute shall be given their ordinary grammatical meaning unless doing so leads to an absurdity. In the case of *Venter* v *Rex* 1907 TS 910, INNES CJ said the following:
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> '…….it appears to me that the principle we should adopt maybe expressed somewhat this way: that when to give plain words of a statute their ordinary grammatical meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it could lead to a result contrary to the intention of the legislature, or as shown by the context or by such other consideration as this Court is justified in taking into account, the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the intention of the legislature."

[33] It is difficult to imagine that the legislature intended that for every review application where the decisions of state officials are challenged under the Act, the applicant had to first seek condonation after deliberately or rather having been forced to fall outside the timelines provided in the rules of court. Parliament is not expected to give a remedy with one hand which it immediately takes away with the other. There is a reason why review proceedings are required to be instituted within such limited timeframes. The argument here is not that review proceedings are not civil proceedings. They could be. The question is whether or not they are covered under s 196(1).

[34] I accepted earlier that the term civil proceedings is an all-encompassing phrase. It follows that there is all kinds of civil proceedings which can arise from the Customs and Excise Act. Those like the applicant argued include appeals from decisions of ZIMRA or its officials. Such appeals lie to the Fiscal Appeals division of this court. It certainly was not the contemplation of s 196(1) of the Act that before filing any such an appeal the appellant had to render the notice required by that provision. Reading it to say so, would result in a clear absurdity.

[35] What must not be ignored is the reason why in the first place, the notice is required to be given. In the case of *Care International in Zimbabwe* v *Zimbabwe Revenue Authority and Anor SC* 76/17 the Supreme Court related with approval to the findings of NDOU J in which he articulated the purpose of the notice in *Machacha* v *Zimra* HB 186/11 in the following manner:

> "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."

The Supreme Court then added that s 196(1) of the Act is concerned with the protection of the Fiscus. It further referred, in *Care International*, once more with approval, to the case of *Ebrahim* v *Controller of Customs and Excise* 1985 (2) ZLR 1 (S). In that case, the Supreme Court also had occasion to consider the purpose of s 178 of the Customs and Excise Act [*Chapter 177*], which preceded the current Customs and Excise Act [*Chapter 23:11*] and stated that:

> "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."

[36] I would add that the notice is therefore required to ensure that the state, in the broad sense of including its officials acting on its behalf, is not ambushed with a suit that would make it liable for a violation of the law and possibly saddle it with payment of damages in circumstances where it could have preempted that by settling the matter under disputation. In this case, where the dispute started with a hearing before a regional manager, and was escalated to the commissioner before reaching this court, there cannot be any apprehension of an ambush. The first respondent is and has for a long time now been aware of the contestations between it and the applicant. That certainly is what always happens with applications for review. They are meant to deal with the regularity of decisions which would already have been taken. It is for that reason that the s 196(1) notice would be of irrelevance. It is on the same basis that the statutory notice is not required when filing an appeal against ZIMRA's decisions to the Fiscal Appeals Court.

[37] In the case of *Kirsten* v *Registrar-General of Zimbabwe & Ors* 2019 (3) ZLR 1275 (H), this court added another dimension to the authorities which explain the objective of giving notice to the state, its institutions and officers acting in their official capacities before suing them. It cautioned that the notice is not given in all manner of cases. Instead, the requirement applies to only those cases where either the public treasury or its asset register would be specifically affected. Section 6 (1) (a) and (b) of the SLA specifically requires the giving of notice for claims for money, whether arising out of contract, delict or otherwise, or the delivery or release of any goods. It specifies so, because such claims

would have the potential to depreciate the State's purse. I therefore view that purpose as the reason why the application before me would not constitute a direct threat to the health of the fiscus. It would consequently not require the giving of notice before it is filed.

[38] Finally, I must state that in their heads of argument on the preliminary point, the respondents' counsel chose not to cite even a single authority for his argument. It was only at the hearing that he referred the court to *Care International* which the applicant had also cited. I have given due consideration to that authority and the various others related to. They appear distinguishable from the dispute before me. Those authorities largely dealt with the purpose of giving the s 196(1) notice, the requirements for giving valid notice among others. They did not specifically deal with the question whether or not review proceedings are civil proceedings and if they are, whether their institution must be pursuant to the giving of notice.

Disposition

[39] In the end, there is no gainsaying that much as review applications could be characterised as civil proceedings their nature and the law that governs their filing in the High Court, extricate and sets them apart from the rest of civil proceedings which are shackled by the requirement for notice in terms of s 196(1) of the Customs and Excise Act [*Chapter 23:02*]. I reach the conclusion therefore that the preliminary objection that this application is not properly before this court for want of compliance with the provisions of s 196(1) of the Act and s 6 of the State Liabilities Act is without merit. It is accordingly dismissed.

Having said this, I turn now to the second issue for determination.

The merits

[40] I stated in the introductory and other earlier paragraphs that the applicant challenged the respondents' decision on the basis of gross unreasonableness, irrationality and absence of reasons. It said as a result of those afflictions the decision was not only invalid but was no decision at all. As stated earlier, the respondents insisted that the decision was sound and therefore valid.

The law

[41] Section 27 of the High Court Act [*Chapter 7:06*] gives the High Court power to review decisions of inferior courts and tribunals. It provides as follows;

> "27(1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be.

(a) Absence of jurisdiction on the part of the court, tribunal or authority concerned.
(b) Interest in cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be.
(c) Gross irregularity in the proceedings or the decision.
(2) Nothing in subsection (1) shall affect any other law relating to the review of proceedings or decisions of inferior courts, tribunals or authorities."

In essence therefore this court is endowed with power to review and scrutinize the legality of administrative actions. That power does not entail the court substituting the inferior court or tribunal's decision with its own discretion. Where the court finds that the administrative decision was in violation of the powers given to the public authority, it is usually best that the court remits the case to the public authority for it to consider a new decision. That route is taken to avoid the court usurping the powers of the administrative body. The rule is however not cast in stone. It can be departed from in demonstrated exceptional circumstances. At the end of everything what underpins these considerations is the notion of fairness. See *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664(S). The grounds which must appear *ex facie* the application are therefore set out in s 27 although the proviso to subsection (1) of s 27 appears to suggest that the court can have recourse to some other grounds. Where that, however, is the course taken, the law which permits such recourse to any other review grounds and the particular grounds relied upon must be indicated. As a result, the concepts of gross unreasonableness and gross irrationality have been accepted as factors which can be taken when present to warrant the vitiation of a decision.

[42] As to what principles must be taken into account where a court departs from the general practice of remittal of the matter to the administrative body, the case of *Director of Civil Aviation* v *Hall* 1990 (2) ZLR 354 (SC) is apposite. In that authority, it was held at p 362E-G that:

"It will only do so where-
(a) The end result is a foregone conclusion and a referral back would be a waste of time; or
(b) Further delay would cause unjustifiable prejudice to the applicant; or
(c) The statutory tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again; or
(d) The court is in as good a position to make the decision itself."

[43] In the case of *CJ Petrov and Co (Pvt) Ltd v Gwaradzimba NO* 2014 (1) ZLR 487 (H) MAFUSIRE J summarised the requirements in slightly different way as follows:

a. where the result is a foregone conclusion and it would be a waste of time to refer the matter back
b. Where further delay would prejudice the applicant,
c. Where the extent of bias or incompetence is such that it would be unfair to the applicant to force it to submit to the same jurisdiction,
d. Where the court is in as good a position as the administrative body to make the decision.[2]

[44] Whilst s 4(2) of the Administrative Justice Act does not make provision for substitution of an administrator's decision with that of the court, the courts in this jurisdiction still apply this remedy based on the common law and the provisions of s 2(2) of the same Act which allows them to consider any other relief that would meet the justice of the case. The same principle that this remedy must only be applied in exceptional circumstances is followed in South Africa.

[45] The question which then arises is when is a decision grossly irregular, grossly unreasonable or grossly irrational. The starting point can safely be this court's findings in the case of *Dombodzvuku & Anor* v *Sithole NO & Anor* 2004 (1) ZLR 242 (H) at p 243: where in an exposition of what must be established by an applicant challenging a decision on the basis of gross unreasonableness, it was remarked that: -

> " .. an incorrect interpretation of the law cannot be grossly unreasonable merely because it does not find favour with its attacker. **The person attacking the decision must go further and show that, on the facts before the court, the decision defies logic and is completely wrong.** A different opinion of the law, clearly showing how it was arrived at, cannot be said to defy logic. It may be wrong but may not necessarily be unreasonable….The decision by the first respondent was arrived at after hearing argument from both counsel and it was a carefully considered decision. The decision represents the first respondent's interpretation of the law and it can only be an incorrect decision and not an irregular one. She engaged in a logical process…. She did not spin a coin or consult an astrologer to reach at her decision…. It is my view that the applicants have fallen into the all too often error of thinking that anyone whom we disagree with is being unreasonable."

[46] In the case of *The Students Representative Council of University of Zimbabwe and Others* v *Paul Mapfumo N.O. & Others* HH 263/23 at p. 11 CHITAPI J remarked that:

> "I am prepared to draw a parallel between the expressions gross unreasonableness and irrationality because they both involve a thought process and decisions which are so flawed to the point that the decision reached thereby becomes grossly irregular. One

[2] At 498E-F. See also the comments by MATHONSI J in *Gurta AG v Gwaradzimba NO* 2013 (2) ZLR 300 (H) at 411 and *UZ v Mugumbate &Ors* S-63-17.

> can argue then that where the process and decision reached are so irrational and outrageous that they defy logic and common sense, then the proceedings can be said to be grossly irregular. Facts and circumstances of each case will define whether or not a decision or determination is not just irregular but grossly so, the latter being the threshold for interference with the proceedings by the review court."

[47] Clearly, it is not the mere allegation of unreasonableness that makes a decision by an inferior court or tribunal impeachable. The standard is not that low. An applicant must therefore isolate the facts of the case before the court and demonstrate that on the basis of those facts, the decision being challenged could not have been a logical one; that it defies logic and was arbitrary.

[48] The majority of the terms used have been described and explained by the courts previously. For instance, in the case of *Katsimberis v Muchuchuti-Guwuriro and Anor* HH 187/24, this court had occasion to explain the tenor of some of the terms when it said:

> "The term grossly unreasonable means manifestly unreasonable. It means the decision is so outrageous in its defiance of logic that no court acting reasonably could have arrived at such a decision. It connotes unreasoniblity or unacceptability to a very great extent, degree or intensity. The difference between gross unreasonableness and unreasonableness can be equated to that between gross negligence and ordinary negligence. The former is a higher standard or version of the latter. The same goes for gross irrationality. A grossly irrational decision is one that approximates it having been made in the absence of any intellect. It must have been made pursuant to the application of an arbitrary method of deciding cases akin to the throwing of lots. Where a court employs some semblance of reasoning based on acceptable thought processes the fact that the decision is ultimately wrong does not slap it with the ignominy which comes with gross unreasonableness or irrationality or make the decision so wrong that it will prejudice the rights of the litigant and cause a miscarriage of justice."

Application of the law to the facts

[49] In this case, I have already said the grounds of review set out by the applicant are that the decision made by the respondents was grossly unreasonable and grossly irrational because it was an arbitrary finding. It did not have reasons. This needs to be tested against the legal standards highlighted above. I have not lost sight of the fact that the point of departure between the parties was what constituted semi-knocked down vehicle kits. That fact was argued before the second respondent who is the first respondent's commissioner to whom the Regional Manager at Forbes Border post's initial determination was appealed. He was supposed to make a determination on it. He said he did. For completeness and to put issues into context, I reproduce it below. It was that:

> "After a careful consideration of the facts and your submissions, I did not find any new information that warrants a deviation from the Regional Manager's decision. In view of the above, I regret to advise that you that your appeal was not successful in this

> instance and the decision by the Regional Manager still stands. If you are not satisfied by this decision, you may approach the courts for recourse."

[50] The above constituted the decision and its reasons. I agree with Mr *Mpofu* that the letter does not identify anything. It does not single out or attempt to articulate the issues for resolution despite the applicant not only having categorically set out its gripe with the initial decision by the third respondent but also provided reference points to aid in the issues for determination. If it could be considered as a decision, then it was a caricature, a parody of a standard determination.

[51] As clearly shown in the arguments the applicant protested, that the second respondent used an entirely wrong test. By his own confession, he scouted for new information and new circumstances in a case where his obligation was to deal with the record of the case which had been presided over by the third respondent in order to determine the procedural correctness and legality of the decision which had been taken. What made everything more unpalatable was that the initial decision itself did not constitute a decision at law because it also failed to deal with the issues put into contestation. That on its own was a gross irregularity. There were no reasons for the decision. A decision-maker cannot store his/her reasons for the decision taken in his/her mind. There is a statutory obligation for ZIMRA to deal with grievances brought before it by a taxpayer. The decision being impugned in this case fell far short of that standard. Looked at from the shortcomings, I have no hesitation that it was arrived at without the application of the decision maker's intellect. He simply based his findings on the prior findings of his subordinate, which, unfortunately, suffered from the same flaws.

[52] The days when public administrators paid lip service to the legal requirement to give adequate reasons are gone. In terms of section 68 (2) of the Constitution giving adequate reasons is now a constitutional requirement. Reasons are now regarded as a fundamental requirement of administrative justice and an essential component of natural justice or procedural fairness. Clearly the respondents' previous conduct where it allowed the applicant to benefit from the rebate under similar circumstances and for similar items before the present consignment was imported created a legitimate expectation on the applicant's part. The first respondent gave a prior approval for the importation of all the items that are now subject of the dispute. The applicant therefore had a legitimate expectation that on the basis of previous practice it would be issued with the necessary importation approvals by the respondent. When the first respondent decided to go back on that prior approval it was

required by the law to provide reasons for that decision. It barely did. Reasons should consist of more than mere conclusions, and should refer to the relevant facts and law as well as the reasoning process leading to the conclusions. The failure by the respondent to provide adequate reasons for the refusal is therefore a gross irregularity.

[53] What makes the determination taken even more astounding is that the applicant had not on its own uninformed decision simply imported the disputed kits. The irrefutable evidence is that it had sought and obtained prior approval of the first respondent. It had given the first respondent a packing list which indicated the kits that were intended for importation. The first respondent had examined that packing list and approved it. At importation, the applicant said it had not departed from that packing list by even an item. In that regard, it cannot be disputed that the applicant foretold the first respondent what it was going to import into the country. It wanted prior confirmation of the first respondent and assurances its consignment would be covered by the rebate under SI 45/2020. The first respondent as demonstrated by the letters sent to the applicant, happily gave those guarantees and certifications. When it was called to inspect the cargo, the first respondent, for inexplicable reasons made a volte-face and suddenly reneged on its earlier approval. Without any explanation for it, it started alleging that what had been imported were completely built units instead of the semi-knocked down kits.

[54] A further argument by the applicant was that the occasion which brewed this disagreement was not the first time that the applicant had imported SKD kits using the same method. It had previously done so and the rebate had been granted. That in my view, builds into the irrationality of the decision reached by ZIMRA. It adds to the layers of inducement dangled at the applicant to import the kits not only in full belief but with full knowledge that its imports were already permitted and fully qualified for the rebate under SI 45/2020. There is no denial that the applicant was induced by ZIMRA to import the kits. Yet in the end, the argument was that what had been imported did not qualify as semi-knocked down vehicle kits. That conclusion by the respondents is illusory because ZIMRA has no baseline for what an SKD is. I presume it is the reason why licensed assemblers resort to pre-importation approvals by the tax authority. The supposed definitions of what a semi-knocked down vehicle kit is that are given in both SI 45/2020 and SI 203/2022 are wholly inadequate. In fact, what appears under R 2(a) of SI 203/22 cited by Mr *Munyuru* for the respondents as defining what a completely built car is does not even approximate a definition.

[55] Yet in the challenged determinations, ZIMRA alleges that it had carried out a post-clearance audit of the kits. Counsel insisted that such a procedure did not apply because post-clearance audits are provided for in terms of s 223A of the Customs and Exercise Act. The section deals with that person who walks through customs and makes a false or erroneous declaration. The law provides that the person can be followed after clearance and be forced to pay the correct duty. The section does not apply in instances where a prior application for clearance is made and the taxpayer has not misled the tax authority.

[56] The applicant rounded off its arguments by stating that what is in issue here is simply the definition of an SKD. Mr *Mpofu* insisted that the respondent accepts that in terms of the statutory instrument, SKD kits do not pay duty. He added that for ZIMRA to claim that what had been imported were not SKD kits but completely built-up units (CBUs) is a conclusion of fact. But for that conclusion to be arrived at it, ZIMRA had to show the work tools it had employed for that purpose. It had to have an objective standard to do so. The decision could not be an arbitrary one.

[57] Section 9V of the Customs and Excise (Suspension) Regulations, 2003 as amended by SI 45/ 2020 is couched as follows:

> "(1) Customs duty is suspended for a period of three years with effect from 1st December, 2019 on SKD single and double cab motor vehicle kits imported by approved assemblers in terms of this section.
> (2) In this section—
> "assembler" means any person who is registered as an assembler of single and double cab motor vehicles in terms of subsection (6) for the purposes of this section;
> "form" means the appropriate form referred to in the Schedule to this section**;**
> **"Semi-Knocked Down (SKD) single and double cab motor vehicle kits" means assembly kits for motor vehicles described under tariff code** 8704.21.20, 8704.21.30, 8704.21.40, 8704.31.20, 8704.31.30 and 87 04.31.40 being imported by an approved assembler entirely for completion of the process of assembling single and double cab motor vehicles" (The bolding is mine for emphasis)

Clearly, what the provision only does is to illustrate the type of vehicles for which semi-knocked down kits may be imported without attracting payment of duty. It does not describe what an SKD kit is. What is given in the tariff codes which are stated is not the definition of semi-knocked kits but the make of vehicles for which such kits may be imported. A taxpayer would not be able to know how knocked down a vehicle kit must be for it to conform and qualify for the rebate by simply reading s 9V of the Customs and Excise (Suspension) Regulations, 2003 as amended or the tariff codes. As alluded to above counsel for the respondent, what constitutes an SKD is not apparent from s 9V. Rule 2(a) of SI 203/22

describes what a completely built car is. When that is read, it demonstrates that the applicant imported completely built vehicle units. I reproduce r 2(a) below. It says:

> "RULE 2 (a)
>
> Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled."

[58] I am not sure whether Mr. *Munyuru* had really studied the provision before submitting that it provided the definition of a completely built car because it does not. It caters for both complete and incomplete articles. It is so general that it is of no use in the debate before the court. In the end, I am convinced that any taxpayer who reads s 9V as amended by SI 45/20 and is directed to r 2(a) of SI 203/2022 in the hope of finding an answer to what an SKD kit is would be more confused than they had been at the beginning. The long and short of all this is that both SI 45/20 and 203/22 do not define what an SKD kit is. The fact that there is no legal definition of how broken down a vehicle kit must be for it to constitute an SKD kit estops the first respondent from imposing the whim of its officials as to what that definition is. A public authority cannot be allowed to regulate its affairs on the basis of the idiosyncrasies of its officials. I make this point on the backdrop of the allegation by the applicant that before this dispute, it had on other occasions imported the same kits in the same format and qualified for the rebate. That allegation was not disputed by the respondents. It leaves me without a doubt then that there is no objective standard by which to measure how broken down semi-knocked down kits ought to be.

[59] To compound issues, in the papers or at the hearing, the respondents did not even attempt to show how they arrived at the decision that the kits were not semi-knocked down but completely built units. They did not suggest what the definition of that term is. On the contrary, it was the applicant's contention that in the absence of a definition of the term in our legislation, the parties and the court have to resort to the trade usage of the phrase. In its quest to prove this, the applicant commended the court to start from the dictionary meaning of semi-knocked down kit. The Cambridge Dictionary defines the phrase to mean 'a product that is exported in a set of parts which must be put together for sale to customers'.

[3] Further, the applicant referred the court to the World Customs Journal, March/April, 2015 Volume 9 Number 1 which defines completely built cars to be those which can be sold to the end users without the need to assemble anything more. Miller, Russel R. (2000); *Doing business in newly privatized markets: Global opportunities and challenges*, Greenwood Publishing Group. p. 281 weighs in with the following:

> "The degree of "knock-down" depends on the desires and technical abilities of the receiving organization or government import regulations. Developing nations may pursue trade and economic policies that call for import substitution or local content regulations. Companies with CKD operations help the country substitute the finished products it imports with locally assembled substitutes."

[60] I have indicated my embrace of the authorities which caution courts from usurping the powers of administrative authorities on review of their proceedings. The respondents urged me to be the umpire that was advocated for by the Supreme Court in *Affretair (Pvt) Ltd & Anor* v *MK Airlines (Pvt) Ltd* 1996(2) ZLR 15 (S) that:

> "The court's duty is not to usurp the administrative authority's functions. If the administrative authority acted fairly, and transparently, the court will not interfere with its decision simply because it does not approve of the conclusion reached. Transparency connotes openness, frankness, honesty and absence of bias, collusion, favoritism, bribery, corruption or underhand dealings and considerations of any sort."

[61] Yet in this case, my view is that the proceedings before the respondents and their decisions were the antithesis of openness, frankness, honesty and the absence of all the vices stated in *Affretair*. A tax authority which does not specify the degree of knock-down which it expects taxpayers to comply with acts arbitrarily. That is contrary to the foundations of the tax regime of Zimbabwe. As was said by MATHONSI JA in *Zimbabwe Revenue Authority* v *Triangle Limited* SC 59-23 at p. 10 "certainty is the lifeblood of tax law. Taxpayers are entitled to know exactly what taxes they must pay and how those taxes are computed.". Its decisions become completely irrational if it gives prior approval for an assembler to import kits as SKDs but on entry turns around to demand full import duty. At the hearings before its officers, the applicant pointed out to the first respondent, the absence of legislation and or guidelines to support its unilateral decision that the applicant had imported completely built vehicles. Yet by its own admission, the only reason it said so was that the engines were attached to the chassis and could be started. Even from a

[3] Cambridge Dictionary, s.v. "semi-knocked down". Available at: https://dictionary.cambridge.org/dictionary/english/semi-knocked-down.

layman's point of view that cannot constitute a completely built car. All the other parts were disassembled. There cannot be any argument therefore that to allege that the consignments comprised of completely built cars was a thumb-suck. It defies logic and is completely wrong.

[62] I could have opted to remit this matter to the first respondent for a fresh determination. I am constrained to avoid that route because even if I did, it would be impossible for the first respondent to be objective given that it does not have the yardsticks by which that even-handedness can be achieved. It would need to first build guidelines with which assemblers will be able to gauge compliance before importing the semi-knocked down kits. Even if it did formulate those compliance indicators, they cannot be used to fairly judge an import which has already been done in their absence. With the insistence apparent from the unreasoned determinations, it appears that the decision to refuse qualification of the applicant for the rebate would be a foregone conclusion. Further, the inevitable delay, if the decision would await the formulation of guidelines, would cause continued hardship for the applicant. It is for those reasons that the court has seen it prudent to substitute its decision for that of the first respondent in this matter.

Costs

[63] The general rule in our law is that costs follow the cause. I have not seen anything extra-ordinary in this case to warrant a deviation from that principle.

[64] Against the above background, I make the following order:

a. The applicant's application for review be and is hereby granted.
b. The second and third respondents' determination ordering the applicant to pay full import duty for Toyota Hilux semi-knocked down vehicle kits cleared under bills of entry ZWFBC 19091 and ZWFBC 19093 of 3 November 2022 be and is hereby set aside.
c. The first, second and third respondents' lawful agents be and are hereby ordered to allow the applicant to process its clearance papers under bills of entry ZWFBC 19091 and ZWFBC 190933 of November 2022 under the suspension of duty framework in terms of SI 45/2020 within seven (7) days of this order.

MUTEVEDZI J:…….

Rubaya and Chatambudza, applicant's legal practitioners
Muvingi and Mugadza, respondents' legal practitioners