TM SUPERMARKETS (PRIVATE) LIMITED
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 12 & 18 MAY 2016

Opposed application

G Madzoka for Applicant
S Bhebhe for Respondent

TSANGA J: This is an application under the Administrative Justice Act [*Chapter: 10:28*] seeking an order to set aside part of the respondent's decision directing applicant to pay a penalty in the sum of US $ 134 789.00 for alleged contravention of s 174 of the Customs and Excise Act [*Chapter 23:02*]. Applicant, **TM** Supermarkets (Private) Limited, **(TM)** avers that the respondent, the Zimbabwe Revenue Authority [ZIMRA], erroneously assumed that **TM** admitted to the committing one of the offences, outlined therein, being failure to pay the correct duty, when it had not so admitted. In particular, **TM** asserts that ZIMRA acted *ultra vires* the Customs and Excise Act [*Chapter 23:02*] in that it is not empowered to impose penalties outlined in s 174 (2a) then as these may be imposed only after a person has been convicted by a court of law. **TM** asserts further that ZIMRA could also not have relied on s 200 to impose a 100% penalty as there was no admission by it that it had contravened s 174 of the Act.

The facts upon which the application is made are these. Sometime in November 2012 **TM** imported refrigeration units from South Africa. The units were without condensers, compressors and evaporators as these were to be supplied separately. The goods were described by **TM**'s clearing agent, Key Logistics, as "furniture meant to receive refrigeration equipment". Duty was accordingly made under this classification as opposed to being levied under goods classified as "refrigeration equipment" which has a different code and tariff

altogether. The tariff used attracts a duty of 5% whilst the correct tariff attracts a duty of 60%.

The wrong tariff was discovered at the physical examination stage at the container depot. ZIMRA determined then that the goods constituted refrigeration equipment and that duty had been underpaid. The cabinets had piping fitted to them which contained refrigeration gas. A fine of $134 798.00 was imposed. A reduction was rejected on the grounds that had the omission not been picked up, the State would have suffered prejudice. **TM** appealed on 15 January 2013 and ZIMRA says that the appeal was again dismissed. Having not heard any further from **TM**, the deposit fine was converted to revenue.

In light of the fact that there was no deliberate attempt to evade duty, the 100% fine is said to be unreasonable. ZIMRA opposes the application on several grounds. As a preliminary point it is averred by ZIMRA that **TM**'s application is fatally defective as it did not give the requisite 60 days' notice of its intention to institute legal proceedings against it in accordance with s196 of the Customs and Excise Act [*Chapter 23:02*]. ZIMRA also points out that this issue of the requisite notice requiring to be given to the Commissioner, has been dealt with vividly in cases a number of cases before this court, all of which have come to the same conclusion that for ZIMRA to be sued, the relevant notice must be given in terms of s 196 of the Customs and Excise Act. They also argue that in terms of the Revenue Authority Act [*Chapter 23:11*], ZIMRA is clearly an agent of the state. The application is therefore said to be defective for want of compliance with mandatory provisions.

On the merits, ZIMRA's argument is that the goods had the essential character of complete goods as the pipes already contained gas. It says that **TM**'s clearing representative, Speedlink Cargo, conceded in a letter to it that the goods had been wrongly classified, particularly as the cabinets had refrigeration tubes. Furthermore, in another letter written by **TM**'s Managing Director to ZIMRA, it is said he agreed with the tariff determination and what **TM** asked for was a reduction in the penalty as first offenders. However, the merits of this matter can only be delved into if the point *in limine* raised is disposed of in favour of **TM**.

Mr *Madzoka* argued on behalf of the applicant, **TM**. His main point in opposition to the point *in limine,* was that the Customs and Excise Act [*Chapter 23:02*] does not to require any such notice to be given to ZIMRA. He said it speaks of notice to the State, the Commissioner or an officer. He further argued that the "State" is not defined. Drawing on the

meaning of State as defined in the case of *Chandeler* v *Director of Public Prosecutions* [1] where it is said to "denote organs of government of a national community", he said ZIMRA is not the "State" within this meaning of the word.

As regards Commissioner, whose meaning is defined, he argued that only natural persons can be commissioners and that artificial persons and juristic persons like ZIMRA are not commissioners. A similar argument was made in relation to an officer as referring to a natural person. ZIMRA was said to be a body capable of being sued in its own name and that proceedings against ZIMRA are not proceedings against the State. As such, he said that there was no need to favour ZIMRA with a notice in terms of s 196 of the Act and that if the legislature had wanted ZIMRA to be given notice, it would have said so clearly in the Act.

He further argued that the legal decisions ZIMRA relies on for its notice argument[2], are distinguishable from the case in point in that the issues raised herein regarding the nature of ZIMRA were not raised in those proceedings.

The Relevant Legal Provisions

The relevant section of the Customs and Excise Act [*Chapter 23:02*] which lays out the requirement to give notice reads as follows:

> "**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*].
>
> (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.

Section 2 of the Act defines Commissioner as follows:

> "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

[1] [1962] 3 ALL ER 142 at 156.
[2] *Ronald Machacha* v *Zimbabwe Revenue Authority* HB 186/11; *Puwayi Chiutsi* v *Commissioner of Police and Zimbabwe Revenue Authority and Anor* HH 65/05

> (*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;"

An office:

> "(a) means an officer 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;"

Section 4 of the Revenue Authority Act [Chapter 23:11] defines the functions of the Zimbabwe Revenue Authority as:

> "(a) to act as an agent of the State in assessing, collecting and enforcing the payment of all revenues; and -----"

As such ZIMRA is a State entity. It is in my view an organ of government through which it collects revenue.

What can be logically and legally deduced from the above provisions is that the State, ZIMRA being the state entity in this instance; the Commissioner, being the person responsible for the department within ZIMRA which collects revenue; as well as an officer of the relevant department within ZIMRA which collects revenue, can be sued in civil proceedings. Looking at the definition of an officer, it would make little, if any sense, to exclude the entity that the officer works for, from being the given the requisite notice. Furthermore, the word "State," all too frequently used in legislative enactments, must be read contextually, and in general refers to the relevant branches of government institutions that operate under the broad rubric of the umbrella State.

It is also clear from the above provisions that all parties involved cannot be sued without proper notice. The requirements must be followed. It is only after the time period has expired without any result that any claim or action may be brought. There is presently nothing in s 296 of the Customs and Excise Act [*Chapter 23:02*] or in the State Liabilities Act [*Chapter 8:14*] that allows for condonation of failure to give the requisite notice or failure to operate within the stipulated time frame.[3] It follows that failure to give notice of intention to sue as laid out in the applicable Act, does have an impact on the legality of the proceedings.

In *Care International Zimbabwe* v *Zimbabwe Revenue Authority and Anor*[4] it was held that there can be no doubt that the Commissioner referred to in s 196 (1) of the Act is the

[3] Whether condonation for failure to observe time frames should be permitted is another issue altogether. For a discussion of this see for instance *Michael Nyika & Anor* v *Minister of Home Affairs & others* HH 181 /16
[4] HH 373 -2015

Commissioner-General responsible for the supervision and management of ZIMRA. It was equally held that ZIMRA is an agent of the state under the supervision and management of the Commissioner-General, hence the continued protection granted under ss 196 and 6 of the Act and the State Liabilities Act respectively. The issue which the applicant seeks to raise in this case as regards it having no obligation to notify ZIMRA is the same as that which was raised in the *Care International* case. There is no merit in the submission that the issue applicant now raises was not addressed in that case. Furthermore, Mtshiya J considered other cases that had dealt with the issue of notice. As he put it:

> "I am also unable to ignore the authorities relied on by the first respondent, namely *Tasmine P/L* v *Zimbabwe Revenue Authority* HB 115/09, *Ronald Machacha* v *Zimbabwe Revenue Authority* HB 186/11, *Puwayi Chiutsi* v *Commissioner of Police and Zimbabwe Revenue Authority and Anor*, HH 65/05and *Bethy Dube* v *ZIMRA* HB 2/14, where the need to comply with s 196(1) of the Act was emphasized".

For the reasons I have spelt out above, I am equally unable to agree with **TM** as applicant that there is no need to give notice to ZIMRA. It is a state entity. As explained in various cases, the requirements for notice for suing state organs, not only give consistency to procedural niceties for suing the State, but also accord the State institution in question, an opportunity to fully investigate the claim and to consider whether to settle. (See *Stambolie* v *Commissioner of Police*[5] *Minister of Safety and Security* v *De wit*.[6]

Accordingly, the point *in limine* regarding the legality of the application is upheld.

The application is improperly before this court and is accordingly dismissed with costs.

Wintertons: Applicant's Legal Practitioners
Kantor and Immerman: Respondent's Legal Practitioners

[5] 1989 (3) ZLR 287 SC at p 298C
[6] 2009(1) SA 25 (SCA);