REPORTABLE (35)

ZIMBABWE REVENUE AUTHORITY
v
BRUNO FUNGAYI TAKAWIRA

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, GUVAVA JA & CHATUKUTA JA
BULAWAYO: MARCH 20 & 23, 2024

T.L. Marange, for the appellant

G. Nyengedza, for the respondent

GWAUNZA DCJ: This is an appeal against the decision of the High Court, Bulawayo (the court *a quo*) which granted an order compelling the appellant to reimburse the respondent the sum of USD 63 378.00 being duty for the importation of a motor vehicle.

FACTUAL BACKGROUND

The appellant is a statutory body established in terms of s 3 of the Revenue Authority Act [*Chapter 23:11*] and tasked with the mandate of collecting certain revenues of the State which include import duty. The respondent is a male adult and is physically challenged. He made an application in the court *a quo* seeking an order compelling the appellant to reimburse him a sum of USD 63 378.00. The basis of the application was that on 24 January 2022, the respondent was granted suspension by an official of the appellant from paying import duty on a Toyota Land Cruiser (the motor vehicle) that he intended to buy in South Africa. The application for suspension

had been made and granted in terms of the Customs and Excise Act [*Chapter 23:02*] as read with the Customs and Excise (Suspension) Regulation, 2003 (S.I. 257 of 2003) as amended by Statutory Instrument 101 of 2011.

Following the grant of the application for suspension, the respondent proceeded to have the motor vehicle bought in for clearance and imported into Zimbabwe on 28 February 2022. However, his suspension was rejected at Beitbridge Border Post being the port of entry, on the basis that the suspension had been granted in violation of the Customs and Excise (Suspension) Amendment Regulations Statutory Instrument 10 of 2022 (S.I. 10 of 2022) which was promulgated on 17 January 2022. In terms of S.I. 10 of 2022 the maximum limit of the value of a motor vehicle that can be imported duty free by a physically challenged person is USD 40 000.00. The respondent's motor value was valued at R 2 129 000.00 which exceeded that prescribed duty free limit. The respondent proceeded to pay the duty in question so as to avoid the seizure of the motor vehicle.

SUBMISSIONS BEFORE THE COURT *A QUO*

In motivating the application, the respondent argued that it was unfair for the appellant to withdraw the suspension of duty. It was his case that, as a member of the public who had relied on a suspension letter issued by the appellant's official, he was entitled to administrative conduct that was procedurally fair and just. He insisted that the appellant was bound by the letter of suspension.

The application was opposed by the appellant which argued that, at the time the suspension was granted, S.I. 10 of 2022 had already come into effect. It further argued that since

the value of the respondent's motor vehicle exceeded USD40 000.00 it did not qualify for the suspension.

DETERMINATION BY THE COURT *A QUO*

The court *a quo* granted the application. It found that the appellant could not withdraw a letter of suspension which was issued by one of its officials during the course of his duties. Further, it found that the letter of suspension, once issued, remained valid up to the time the motor vehicle was imported into Zimbabwe. It also found that the law did not apply retrospectively unless the words of the relevant legislation expressly provided so.

Irked by the decision of the court *a quo* the appellant filed this appeal on the following grounds.

GROUNDS OF APPEAL

1. The court *a quo* erred at law in finding that the letter from the appellant contained undertakings and representations which the appellant could not renege on.
2. The court *a quo* erred at law in finding that the suspension of duty had been lawfully given when in fact the suspension was granted contrary to s 6 of the S I 10 of 2022.
3. The court *a quo* erred at law and fact in finding that all the requirements for the granting of the suspension of duty were met at the time the duty suspension letter was given.
4. The court *a quo* erred at law in finding that S I 10 of 2022 had been applied retrospectively by the appellant.
5. The court *a quo* erred at law in granting an order for the refund of customs duty when duty had been collected in terms of the law.

THE APPELLANT'S SUBMISSIONS BEFORE THIS COURT

Mr *Marange* for the appellant, argued that the court *a quo* erred when it ordered the appellant to reimburse the respondent the import duty on the grounds that the appellant had issued the respondent with a letter suspending his obligation to pay duty. He argued that the court *a quo* failed to take into account that the suspension was granted contrary to the provisions of Customs and Excise (Suspension) Amendment Regulations Statutory Instrument 10 of 2022. Counsel further argued that the provisions of S.I. 10 of 2022 were couched in peremptory terms and therefore required strict compliance. Counsel submitted that anything done contrary to the provisions of the law was a nullity.

In so far as the question of retrospectivity is concerned, Mr *Marange* submitted that the court *a quo* erred in not appreciating that S.I. 10 of 2022 was promulgated before the letter of suspension was issued. He argued that there was therefore no respective application of that statutory instrument.

RESPONDENT'S SUBMISSIONS BEFORE THIS COURT

Per contra, Mr *Nyengedza*, for the respondent, argued that the court *a quo* was correct in finding that once the appellant had made a decision to grant the suspension of duty, it could not thereafter withdraw the suspension as it had become *functus officio*. He submitted that the court *a quo* upheld the doctrine of sanctity of contract when it granted the order directing the appellant to reimburse the respondent the money he had paid as duty. Counsel argued that it was procedurally unfair for the appellant to withdraw the suspension as such a withdrawal would amount to a review of its earlier decision. He further argued that the respondent, as a member of the public, was

entitled to administrative conduct which was fair and just. For these propositions, counsel relied on *S v Zemura* 1973 (2) RLR 357 (1974 (1) SA 584 (RA)).

ISSUE FOR DETERMINATION

1. Whether or not the respondent was legally obliged to pay the requisite import duty in spite of the suspension thereof granted by the appellant.

THE LAW

The respondent was granted a suspension of duty in terms of the Customs and Excise (Suspension) Regulations, 2003 as amended by S.I. 101 of 2011. Section 4 of S.1. 257 of 2003 was repealed and substituted with the following:

> **"4, (1)** Subject to this section, duty is wholly suspended on **1** motor vehicle, classified under heading **87:03**, or **one** light commercial vehicle, classified under any of the following tariff codes heading **8704.2130, 8704.2140, 8704.3130 or 8704.3140;** which was manufactured or assembled **not more than 10 years** preceding the date of its importation, imported by a person **once in every 5 years—**
>
> (a) who is blind, if the Commissioner is satisfied that the vehicle is to be used for the benefit of that person; or
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> (b) with a physical disability that is not temporary, if the vehicle has automatic transmission and additionally, or alternatively, special controls that render it suitable for use by that person, and the Commissioner is satisfied that the vehicle is to be used by that person; or
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> (c) with any physical disability that impedes his personal mobility and is not temporary, whether or not the vehicle is of a description referred to in para (b), so long as the Commissioner is satisfied that the vehicle is to be used by that person."

There was no limit placed on the value of a motor vehicle that could be imported duty free by a physically handicapped person.

Section 4 of S.I. 257 of 2003 was subsequently amended by S.I. 10 of 2022 on 17 January 2022 by the insertion, *inter alia*, of subs (6) which provides that:

> "The maximum import value for any motor vehicle to benefit under this suspension is forty thousand United States dollars."

The amendment had the effect of imposing a limit on the value of a motor vehicle that could be imported duty free by a physically handicapped person.

It is an elementary principle of law that anything done contrary to the dictates of law is a nullity. In the celebrated case of *MacFoy v United Africa Co. Ltd* [1961] 3 All ER 1169 (PC) at 1172 it was held as follows:

> "If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court, to be set aside. It is automatically null and void without more ado, although it is sometimes convenient to have a court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

Similarly in *Schierhout* v *Minister of Justice* 1926 AD 99 at 109, INNES CJ stated that:

> "It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect."

With particular reference to revenue and tax collection, courts have also been very clear on the position that an arrangement contrary to law is null and void *ab initio*. In *Commissioner of Taxes v Astra Holdings (Pvt) Ltd* 2003 (1) ZLR 417 (S) at 428 A - C it was held as follows:

> "There is no doubt that the purported contract would have been born out of the mistake of the law requiring that sales tax be charged and collected by the motor dealer on all motor vehicles sold locally. Although unknown to the parties it would have been in contravention of the law for Astra Holdings not to charge and collect the sales tax which the statute required it to collect.
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> **In my view such an arrangement would be null and void *ab initio*. It is a bargain the Commissioner could not make at law because it would have the effect of being in breach of his statutory duty to collect tax which is due to revenue. It is one thing for revenue to enter into an arrangement with a taxpayer on how, in the exercise of its managerial powers, it will collect tax, but it is another for it to seek to decide that a particular tax imposed by Parliament is not due from a taxpayer when in fact it is and in so doing disclaim the right to the tax and abandon the statutory power to collect it.**"(Own emphasis)

The Court went on to quote with approval the case of *R v Board of Inland Revenue ex p. MFK Underwriting Agencies Ltd & Ors* [1990] 1 All ER 91 where BINGHAM LJ said as follows at 110d-j:-

> "I am, however, of opinion that in assessing the meaning, weight and effect reasonably to be given to statements of the Revenue the factual context, including the position of the Revenue itself, is all important. **Every ordinary sophisticated taxpayer knows that the Revenue is a tax-collecting agency, not a tax-imposing authority. The taxpayer's only legitimate expectation is, *prima facie*, that he will be taxed according to statute, not concession or a wrong view of the law (see *R v A.G. ex p. Imperial Chemical Industries plc* (1986) 60 TC 1 at 64 per Lord OLIVER). Such taxpayers would appreciate, if they could not so pithily express, the truth of WALTON J's aphorism: 'One should be taxed by law, and not be untaxed by concession**.'" (Own emphasis)

Moreover, in the case of *Chioza* v *Siziba* 2015 (1) ZLR 252 (S) at p. 261 para E – F it was clearly set out that it is against the dictates of the law for a Court to make an order which is contrary to legislation. It was stated as follows:

> "It is expressed in the maxim *ex turpi causa non oritur actio*. See *Dube* v *Khumalo* 1986 (2) ZLR 103 (S) at p 109. It is based on the principle, expressed variously, **that the court cannot aid a party to defeat the clear intention of an ordinance or statute; that courts of justice cannot recognize and give validity to that which the legislature has declared shall be illegal and void; and that the courts will not permit to be done indirectly and**

obliquely what has expressly and directly been forbidden by the legislature." (Own emphasis)

APPLICATION OF THE LAW TO THE FACTS

The respondent was granted a suspension of duty on 24 January 2022 in terms of s 4 of the Customs and Excise (Suspension) Regulation, 2003 (S.I. 257 of 2003) as amended by S.I. 101/2011. It is evident that the letter of suspension of duty was issued after the amendment of the law had come into effect on 17 January 2022. It follows therefore that the suspension of duty granted to the respondent was granted contrary to S.I. 257 of 2003 as amended by S.I. 10 of 2022. Based on the *dictum* in the *Commissioner of Taxes v Astra Holdings (Pvt) Ltd* case (*supra*), the suspension of duty was void *ab initio.*

Counsel for the respondent, in his submissions, conceded that the suspension of duty was granted contrary to the provisions of the law. The court finds that his reliance on the *Zemura* case (*supra*) is misplaced. Even though that case condoned an illegal act on the basis that the guilty party had acted on the wrong advice of a public official, it is distinguishable from the matter before this Court. The *Zemura* case was a criminal matter in which the appellant had been convicted and sentenced for a crime that required *mens rea* as an essential element. On appeal, he raised the defence of a "claim of right" as he had acted on the advice of a public official. The appeal court set aside his conviction on the basis that he had acted on the advice of a public official and therefore lacked the requisite *mens rea* to commit the crime.

In contrast to the *Zemura* case, the court in *casu*, is not seized with a criminal matter. It is the court's view that the suspension was null and void considering that it was granted after the

law which applies to such exemptions had already changed. The law is clear that anything done contrary to the law cannot be sustained.

DISPOSITION

The grant of suspension of duty contrary to S.I. 257 of 2003 as amended by S.I. 10 of 2022 did not obviate the respondent's obligation to pay the requisite duty. The court *a quo* erred in finding to the contrary. The appeal therefore has merit.

Turning to the question of costs, while the appellant had sought punitive costs in the event of success, the court takes the view that such costs are not merited in view of the fact that the suspension of duty was erroneously granted by the appellant.

In the premises, it is ordered as follows:

1. The appeal be and is hereby allowed with no order as to costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:

   "The application be and is hereby dismissed with no order as to costs."

GUVAVA JA : I agree

CHATUKUTA JA : I agree

Zimbabwe Revenue Authority Legal Service Division, appellant's legal practitioners

Majoko & Majoko, respondent's legal practitioners