

MAIN ROAD MOTORS
versus
ZIMBABWE REVENUE AUTHORITY
and
MINISTER OF FINANCE & ECONOMIC DEVELOPMENT
and
ATTORNEY GENERAL Case 1

SYLVIA CHORUWA
versus
ZIMBABWE REVENUE AUTHORITY Case 2

PATRICK MUGUTI
versus
ZIMBABWE REVENUE AUTHORITY Case 3

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 26 & 31 October 2017 & 18 January 2018

Opposed application

Adv B. Hungwe, with him, *Mr L. Mudisi*, for the applicants;
Mr I. Muzenda, for the first and second respondents in Case 1; and for the respondent in Cases 2 and 3;
No appearance for the third respondent in Case 1

MAFUSIRE J

- 1 These were three opposed applications heard as one case. The globular relief sought was just about the same. Some facts differed here and there. Counsel agreed this was not in any material respects. They therefore agreed it would be practical for the cases to be combined.
- 2 The proposed relief was poorly crafted. Without reading the full applications into them, the draft orders by themselves were virtually meaningless. For expedience, I have simply picked the quintessence of the remedy sought by the applicants from their affidavits, which themselves were prolix, argumentative and could easily pass off as heads of argument.

- 3 Apart from costs of suit, the essence of the main relief sought by the applicants was an order declaring as *ultra vires* the Constitution, s 192[1] of the Customs and Excise Act, *Cap 23:02* [*“the Customs Act”*].
- 4 Ancillary relief included an order declaring as unlawful, the seizure, or attempted seizure, by the Zimbabwe Revenue Authority [*“ZIMRA”*], of certain second hand Toyota Fortuner motor vehicles imported by the applicants in November 2015; March 2016 and October 2016. The applicants also sought the immediate and unconditional return of such of the motor vehicles as might have been seized by ZIMRA; the nullification of ZIMRA’s call for extra duty, penalties and interest, and the reimbursement of such of the amounts as the applicants might have paid already.
- 5 ZIMRA is the central collector of revenue for Government. It was established as such by the Revenue Authority Act, *Cap 23:11*.
- 6 Except for some additional detail, or some not so consequential variation here and there, the factual background in all the three matters was largely identical, and in most material respects common cause. The brief facts, as summarised by myself were these. Through relatives based in that country the applicants bought the vehicles in South Africa and imported them to Zimbabwe.
- 7 At the border, the applicants, through their customs clearing agents, declared certain values on the vehicles for the purposes of duty, as required by the Customs Act.
- 8 Except for Case 1: *Main Road Motors v Zimbabwe Revenue Authority & Ors* HC 139/17, the applicants say ZIMRA’s proper officers rejected the declared values and calculated their own, which were higher. A proper officer is the designated officer at a port of entry.
- 9 In Case 1, the proper officer accepted the declared value. The amount of duty as calculated by him was duly paid. The vehicle was cleared and released to the applicant and it became its property. That was on 23 November 2015.

- 10 In Case 2: *Sylvia Choruwa v Zimbabwe Revenue Authority* HC 138/17, Sylvia Choruwa [***Sylvia***], the applicant, says the value of her vehicle as declared by her agent was R469 000. That was picked from some tax invoice. The duty on such a value would have been US\$17 000. But the proper officer raised the value. The duty on the raised value came to US\$20 800. The higher amount of duty was paid. The vehicle was cleared. The agent delivered it to her. That was on 22 March 2016. She subsequently got the vehicle registered in her name.
- 11 In Case 3: *Patrick Muguti v Zimbabwe Revenue Authority* HC 137/17, the declared value was R200 000. The applicant [***Patrick***] says this was extracted from a vehicle purchase document. The proper officer rejected it. He raised it to R240 000-00. The duty on the raised value was US\$10 180. It was duly paid. The vehicle was cleared. The agent delivered it to Patrick. That was on 31 October 2016. Patrick said from then on the vehicle became his personal property.
- 12 Subsequently, in November 2016, ZIMRA impounded, or threatened to impound and embargo the vehicles unless and until additional duty, as re-assessed by its officers, together with penalties for late payments and interest, were all paid in full.
- 13 For Main Road Motors, this development was coming a year after the vehicle had been cleared and released to it. For Sylvia this was eight months later. For Patrick this was after six days.
- 14 ZIMRA said in post clearance audits, its officers had discovered several anomalies in the declarations of value by the applicants, or their agents, for customs clearance purposes. Basically it said the applicants had undervalued their vehicles. They had given false information concerning the vehicles' models and mileage, basically making the cars appear much older. For that reason, ZIMRA had recalculated the values of the vehicles using guidelines in the Customs Act and had re-assessed the duty. It had gone on to raise penalties and interest on the new amounts.

- 16 ZIMRA says post clearance audits are authorised by s 223A of the Customs Act. In subsection [4] ZIMRA is empowered to undertake a post-clearance audit of goods cleared at entry in order to satisfy itself of the accuracy of any declarations made on them. In terms of subsection [1], a declaration made for the purposes of clearance of goods at ports of entry which contains any omission, inconsistency, error or misrepresentation shall be invalid whether or not such declaration has been accepted by an officer. Subsection [3] says that any goods not properly declared shall be deemed to be uncustomed goods. Uncustomed goods, among other things, are dutiable goods on which the full amount of duty has not been paid.
- 17 In terms of s 192 of the same Act, ZIMRA is empowered to seize or embargo goods in respect of which the correct amount of duty has not been paid.
- 18 ZIMRA, through its deponent, one William Gadzikwa [***William***], at the relevant time the Acting Regional Manager, Customs and Excise Region 3, and in equally expansive and argumentative affidavits, explained that owing to the large number of goods that pass through the borders requiring customs clearances, ZIMRA has an enormous task to check, scrutinise, assess and collect duty. Mistakes are sometimes made. It was in appreciation of the difficult circumstances that its officers operate under that the Legislature, in s 223A and others, clothed ZIMRA with powers to conduct post clearance audits and to recover any underpayments of duty.
- 19 The applicants did not accept ZIMRA's demands. In February 2017 Main Road Motors and Sylvia filed an urgent chamber application to bar ZIMRA *pendente lite* from impounding and embargoing their vehicles. The *lite* said to be pending were these applications.
- 20 The urgent chamber applications failed on the points *in limine*. Under judgment HMA 17-17 I dismissed them on three grounds, namely that the proper respondent had not been cited; that the certificate of urgency was incurably; and that the matters were not urgent, in the sense that the applicants had themselves not treated them as such. The details appear in the judgment.

21 *In casu*, the applicants do not accept ZIMRA’s argument about post clearance audits. They say that once the vehicles had been customs-cleared and released to them, they had become their personal properties. Any attempt to seize and embargo them as ZIMRA had done, or had purported to do, was unlawful, because such conduct violated their inalienable right to property as enshrined in s 71 of the Constitution.

22 Section 71[3] of the Constitutions says:

“Subject to this section and to section 72, no person may be compulsorily deprived of their property except where the following conditions are satisfied – ”

23 ZIMRA justified its actions on s 192 [1] of the Customs Act. William stressed that the power to seize and embargo goods in post-clearance audits can be exercised at whatever place, and from whomsoever those goods are found, within a period of six years from the date of importation.

24 In full, s 192[1] of the Customs Act reads:

“192 Embargo on goods which have passed out of customs control

[1] If at any time an officer has reason to believe that the correct duty has not been paid on any goods which have passed out of customs control, or that there has been or may be in respect of those goods a contravention of any of the provisions of this Act or any other law relating to the importation of goods, he may, **within a period of six years from the date of importation**, removal from bond or delivery from factory in the case of excisable goods, seize or place an embargo on those goods, wheresoever or in possession of whomsoever found, and until the embargo has been withdrawn no person shall remove such goods from the place indicated by the officer or in any deal therewith, except with the permission of the officer” [*emphasis by Counsel for both parties*].

25 The applicants say s 192[1] is *ultra vires* s 68[1] of the Constitution. Section 68[1] of the Constitution says:

“Every person has a right to administrative conduct that is lawful, **prompt, efficient, reasonable, proportionate**, impartial and both substantively and procedural fair” [*emphasis by applicants’ Counsel*].

- 26 The applicants argued that seizing and embargoing goods one year [in the case of Main Road Motors] and eight months [in the case of Sylvia] after customs clearances, was the antithesis of promptness, efficiency and reasonableness.
- 27 The applicants also argued that once a ZIMRA officer has assessed the duty on imported goods; has received the duty paid by the importer, and has cleared the goods, he becomes *functus officio*, and cannot go back to his decision to review it again.
- 28 ZIMRA responded in full to the merits of the applications, but also raised several technical objections.
- 29 In respect of Cases 1 and 2, ZIMRA’s first technical objection was that the applicants had approached the court with ‘dirty hands’ and were therefore not entitled to be heard because they had violated the fiscal principle that says pay-now-and-argue-later, which is enshrined in s 119 of the Customs Act. This section reads:

“119 Appeals against valuation of goods

- [1] Any person who is aggrieved by any determination of the Commissioner in terms of this Part may, subject to section *one hundred and ninety-six* **and after payment of the amount of any duty or tax demanded by the Commissioner in respect of the goods concerned**, appeal to the High Court against such determination [*emphasis by respondent’s Counsel*].
- [2] If on an appeal in terms of this section the High Court determines that a lesser amount was payable by way of duty or tax than the amount actually paid by the appellant in terms of subsection [1], the Commissioner shall refund the amount overpaid in accordance with section *one hundred and twenty-five*.”
- 30 In respect of Case 1 in particular, William said despite Patrick’s claim to the contrary, Main Road Motors “... had not paid a dime ...” of the top-up duty required. In respect of Case 2, he said despite being granted a special dispensation to pay in monthly instalments over six months, Sylvia had only made a single payment, which was not even a full instalment.

- 31 ZIMRA's second technical objection to Cases 1 and 2 was that the applications being for review, had become time-barred by virtue of Order 33 r 259 of the Rules of this Court. In terms of this Rule, an application for review shall be instituted within eight weeks of the termination of the action or proceeding in which the illegality complained of allegedly occurred.
- 32 All the three applications were filed with this court on 22 May 2017. In respect of Cases 1 and 2, the date of the termination of the actions complained of was 28 November 2016. Thus, the applications were allegedly six months out of time. None of the applicants applied for condonation.
- 33 ZIMRA's first technical objection in respect of Case 3 was that the applicant was non-suited by reason of his failure to comply with the mandatory provision of s 196[1] of the Customs Act. This provision requires that sixty days' notice be given before any civil proceedings are instituted for anything done, or omitted to be done by the Commissioner or an officer of ZIMRA.
- 34 ZIMRA's second technical objection in Case 3 was that the application had also become time barred by reason of the provisions of s 193[12], as read with s 196, of the Customs Act. Section 193[12] prescribes that any proceedings before this court for the recovery of seized goods must be instituted within three months of the date when the notice of seizure was issued, after which period no such proceedings may be instituted.
- 35 William pointed out that Patrick's vehicle was seized on 2 November 2016. His application having been filed on 22 May 2017 was three months out of time.
- 36 The third technical objection by ZIMRA in respect of Case 3, particularly in relation to the remedy to have the seized vehicle released, and the reimbursement of the money charged as penalty and interest, was that this relief had since been overtaken by events in that after Patrick had paid the additional duty; the fine; the penalty and the storage charges, the vehicle had been released to him. As such, an order of court in this regard would amount to a *brutum fulmen*.

37 At the hearing, Counsel agreed that the points *in limine*, or at least some of them, went to the root of the applications. As such, they further agreed that a determination be made on them before the merits could be considered. I agreed.

38 The main thrust of Mr *Hungwe*'s argument, for the applicant, as I understood him, and in my own words, was that what was at stake in these three applications was the enforcement of a fundamental right and freedom as provided for in s 85 of the Constitution.

39 Mr *Hungwe* further argued that the right to administrative justice and access to the courts, in terms of s 68 and s 69 of the Constitution, is a fundamental right that is enshrined in the Declaration of Rights under Chapter 4 of the Constitution, and that, as such, it should not be unnecessarily impeded by obstructive and restrictive legislation and rules of procedure.

40 Section 85 of the Constitution says:

“85 Enforcement of fundamental human rights and freedoms

[1] Any of the following persons, namely—

- [a] any person acting in their own interests;
- [b] any person acting on behalf of another person who cannot act for themselves;
- [c] any person acting as a member, or in the interests, of a group or class of persons;
- [d] any person acting in the public interest;
- [e] any association acting in the interests of its members;

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

[2] The fact that a person has contravened a law does not debar them from approaching a court for relief under subsection [1].

[3] The rules of every court must provide for the procedure to be followed in cases where relief is sought under subsection [1], and those rules must ensure that—

- [a] the right to approach the court under subsection [1] is fully facilitated;

- [b] formalities relating to the proceedings, including their commencement, are kept to a minimum;
 - [c] the court, while observing the rules of natural justice, is not unreasonably restricted by procedural technicalities; and
 - [d] a person with particular expertise may, with the leave of the court, appear as a friend of the court.
- [4] The absence of rules referred to in subsection [3] does not limit the right to commence proceedings under subsection [1] and to have the case heard and determined by a court.”

41 Mr *Hungwe* argued that jurisprudence or principles developed or affirmed in case law pre-dating the Constitution [which only became effective in 2013] should defer to the Constitution in the event of a conflict. He said sub-section [2] of s 85 of the Constitution collapsed the ‘dirty hands’ principle as espoused in cases such as *Associated Newspapers of Zimbabwe [Private] Limited v The Minister of State for Information and Publicity in the President’s Office & Ors*¹. In that case CHIDYAUSIKU CJ said:

“This Court is a court of law, and as such, cannot connive at or condone the applicant’s open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards.”

42 For the respondents, Mr *Muzenda* [now MUZENDA J], also as I understood him, and in my own words, argued that applications are creatures of statutes and of the Rules of Court. The right of access to the courts is never an issue. But such right has to be exercised within certain statutory parameters. Where a statute, for example, prescribes certain procedures to be taken before someone exercises their right of access to court, or where the Rules of Court prescribe certain time frames within which such right of access may be exercised, there is nothing in the Constitution that says that such requirements are obstructive or an impediment to the exercise of the right.

43 Drawing from the Constitutional Court case of *Zinyemba v Minister Lands & Rural Settlement & Anor*² Mr *Muzenda* further argued that there being an Act of Parliament, namely the Administrative Justice Act, Cap 10:28, to give effect to the rights

¹ 2004 [1] ZLR 538

² 2016 [1] ZLR 23 [CC]

enshrined in s 68[1] of the Constitution, as provided for in sub-section [3], s 85 of the Constitution takes a back seat. It was incompetent for the applicants to purport to found a cause of that section. The principle of avoidance dictates that remedies should be found in legislation before resorting to constitutional remedies. The principle of subsidiarity holds that norms of greater specificity should be relied on before resorting to norms of greater abstraction.

44 I note that to ZIMRA's second objection in Cases 1 and 2, namely that the applications were out of time by reason of the provisions of r 259, there was practically no reply. This objection was first raised in the opposing affidavits. Neither Patrick, on behalf of Main Road Motors in Case 1, nor Sylvia in Case 2, filed any answering affidavits. None of them sought condonation. Only in the heads of argument, by their legal practitioners of record, was this reticent and ambivalent reference to the point:

"A. Failure to Comply with Order 33 Rule 259 of the High Court Rules, 1971

The Applicant after the cause of action arose, he [*sic*] gave the mandatory Notice of Intention to sue, under the **State Liabilities Act [Chapter 8:15]**, which after the expiration of the sixty days, this Application for Review, contesting the constitutionality was launched."

45 Rule 259 says:

"259. Time within which proceedings to be instituted

Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceeding in which the irregularity or illegality complained of is alleged to have occurred:

Provided that the court may for good cause shown extend the time."

46 As early as their urgent chamber applications in February 2017, the applicants indicated that they would bring review applications. In their notices of intention to sue in terms of s 196 of the Customs Act, the applicants said they were bringing review applications. Their applications are clearly marked court application ***for review***. So I have wondered how ZIMRA's objection on the basis of r 259, which refers to review applications, led applicants' lawyers to respond in respect of s 196 of the Customs Act, which refers to sixty days' notice to sue. There is complete dissonance.

- 47 In Case 3, I also note that nowhere does the applicant deal with ZIMRA's objection relating to the three months' prescription of s 193[12] of the Customs Act. This point seems to have been raised by the respondent for the first time in heads of argument. But nobody else dealt with it expressly at any time afterwards.
- 48 As a result, it is my finding that ZIMRA's objections in respect of the two types of prescription found in r 259 of the Rules of Court, and s 193[12] of the Customs Act, were not dealt with at all.
- 49 Statutes of limitation are a common factor of legal life the world over. The law helps the vigilant, not the sluggard. The rationale for the existence of such limitations is expediency. It is logical and practical that civil suits be brought within certain time frames. In *Stambolie v Commissioner of Police*³ GUBBAY JA, as he then was, drawing from the American case of *Chase Securities Corporation v Donaldson*⁴ said:
- “Statutes of limitations find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defence after memories have faded, witnesses have died and disappeared and evidence has been lost.”
- 50 I do not see how s 85 of the Constitution is relevant to ZIMRA's objections. Even accepting the applicants' argument that for ZIMRA to do post-clearance audits and to come back to the applicants for more duty, plus penalties and interest, one year, or eight months later, is a breach of their fundamental right to prompt and efficient administrative conduct, I do not see how r 259 and s 193[12] of the Customs Act can be said to be misaligned to s 85 of the Constitution. These provisions do not preclude or obstruct one's access to the courts, except after the lapse of certain time frames. They prescribe no formalities.
- 51 At any rate, to the rights endowed by s 85 of the Constitution, are certain limitations imposed by s 86 of the same Constitution. Furthermore, with r 259 specifically, where

³ 1989 [3] ZLR 287 [SC], at p 298C

⁴ [1944] 325 US 304

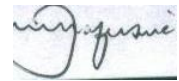
one is outside the eight weeks period, that is not the end of the matter. One may still apply for condonation and give reasons why they failed to act timeously. For good cause shown, the court will extend the time.

- 52 In *Nyika & Anor v Minister of Home Affairs & Ors*⁵ TSANGA J declared s 70 of the Police Act, *Cap 11:10*, providing for an eight month prescription period within which to bring proceedings against the State for anything done, or omitted to be done, by the police, as being inconsistent with s 69[2] and s 56[1] of the Constitution. Section 69[2] of the Constitution provides that in the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial tribunal or other forum established by law. Section 56[1] says all persons are equal before the law and have the right to equal protection and benefit of the law.
- 53 Noting that the general period of prescription of debts in terms of the Prescription Act, *Cap 8:11*, is three years, the learned judge held that the restrictive period of prescription in the Police Act is unfair and discriminatory to the generality of the target populace for a number of reasons, not least the lack of information and indigence on their part.
- 54 The circumstances of *Nyika's* case above are different. Unlike in this case, the court's final conclusion therein was arrived at after a proper and thorough ventilation of the issues and of the statutory provisions in question. In this case, there simply has been no cogent response to the objections by ZIMRA.
- 55 In the premises, I find that the applicants are non-suited by reason of their failure to bring their applications for review within the eight-week period prescribed by Order 33 r 259 of the High Court Rules, in the case of the applicants in Cases 1 and 2; or within the three-month period as prescribed by s 193[12] of the Customs Act, in the case of the applicant in Case 3.

⁵ HH 181-16

56 My findings above make it unnecessary for me to consider the rest of the points *in limine*. Therefore, the applications are hereby dismissed with costs.

18 January 2018

A handwritten signature in black ink, appearing to read 'J. J. J.', is written over a light blue horizontal line.

Mutendi, Mudisi & Shumba, legal practitioners for the applicants
Muzenda & Partners, legal practitioners for the respondents