BAUXIM LOGISTICS (PVT) LTD
versus
MINISTER OF FINANCE & ECONOMIC DEVELOPMENT
and
ZIMBABWE REVENUE AUTHORITY
and
ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUNANGATI –MANONGWA J:
HARARE, 14 November 2022 & 7 November 2023

T Sibanda, for the applicant
L T Marange, for the 2nd respondent
K Munatsi Manyowa, for 1st and 3rd respondents

Opposed Matter

MUNANGATI-MANONGWA J: This application is a constitutional challenge by the applicant who seeks a declaration of the invalidity of ss 193(12) and (13) of the Customs and Excise Act [*Chapter 23:02*] (hereinafter referred to as "the Act").In the same vein the applicant seeks that pending the determination of the Constitutional issue the second respondent be interdicted from disposing the applicant's fuel truck Registration Number AFJ0870 and a trailer Registration number AFJ 9490

The applicant herein is a transporter. He was contracted to carry fuel from Mozambique to Zambia. As the truck entered Zimbabwe through Forbes Boarder Post an inspection by Customs officials confirmed the contents and consequently the truck was sealed by the second respondent's officials. Upon reaching Chirundu boarder post on 6 October 2021 its truck was found to be laden with water instead of fuel. The driver immediately vanished and remains unaccounted for. The applicant's trailer and truck were seized by the second respondent's Regional Manager Region 1, Customs and Excise. Penalties which included the payment of fines and duty were imposed upon the applicant. Without acknowledging liability the applicant settled the fines. Distancing itself from the apparent criminal conduct the applicant made representations to the aforesaid Regional

Manager to no avail and an appeal to the Acting Commissioner of Customs did not yield the desired results as the Commissioner upheld the decision to forfeit the applicant's truck and trailer by way of a letter dated 14 December 2021. On 10 January 2022 the applicants gave 60 days' notice of intention to institute legal proceedings in terms of s 6 of the State Liabilities Act as read with s 196 of the Act for the recovery of the fuel tanker and trailer. In the notice the applicant sought an undertaking from the second respondents that it was not to dispose the vehicles. The second respondent declined to give such an undertaking and in essence did not respond to the applicant's request. The applicant believes that the Commissioner's decision was wrong given the circumstances of the case and wants to pursue same. On 27 January 2022 the applicant approached this court on an urgent basis in Case No HC 559/22 seeking an interim interdict against the second respondents from disposing applicants fuel tanker. The second respondent opposed the matter and raised a point *in limine* that the applicant's right to institute proceedings in terms of s 193(12) of the Act had since prescribed as the three months period calculated from the date of notice of seizure has since elapsed. This court held that the matter was not urgent and was removed from the roll. It is against this background that the applicant herein is bringing this constitutional challenge on the validity of the three (3) months prescription period provided under s 193(12) of the Act.

The first and second respondents raised a point *in limine* that the application is improperly before the court. Mrs *Munatsi Manyowa* counsel for these respondents contended that the applicant cannot seek two different reliefs in a single application. Her argument was that the applicant's application seeks constitutional invalidity hence it cannot in the same vein seek an interim interdict. She argued that one cannot seek an interim interdict through a court application but only through an urgent application as there is need for a return day for final resolution of a dispute. She thus argued that the application for the interim relief should have been made separately.

The second respondent equally raised a point *in limine* that the applicant is not properly before the court. It was submitted on behalf of the third respondent that the applicant had not given the requisite notice of intention to sue as required by s 196 of the Act as read with the State Liabilities Act [*Chapter 8:14*]. Mr *Marange* submitted that there is total bar to institution of proceedings where the requisite notice has not been rendered. He submitted that whilst the applicant had given an initial notice for the urgent application and the cause of action is the same, the relief now being sought is different hence the applicant should have given another notice of

intention to sue as it now seeks a declaratur. He further argued that the notice which was initially given did not refer to the constitutionality of ss 193(12) and 193(13). The second respondent stated that failure by the applicant to specifically state the relief to be sought in the notice is such that the respondent will not be in a position to make amends when not privy to what the applicant's claim is. He submitted the present proceedings have to fail for want of the requisite notice.

In response the applicant's counsel submitted that it cannot be said the applicant is not properly before the court due to the manner in which the draft order is couched. He submitted that as long as the relief claimed is clear the manner in which the order is drafted does not oust a litigant from court. As regards the absence of notice which is compliant, the applicant's counsel contended that proper notice was given which notice is extensive, referred to a number of infractions and a number of relief terms. Referring to *Engineering Supply Company (Pvt)* Ltd v *Controller of Customs*[1] he maintained that the letter also referred to constitutional infractions and hence there was substantial compliance given that a practical and robust approach has to be taken as opposed to a legalistic approach. He thus submitted that there is no need to continuously issue notices as the respondents had been warned and notified of the intended legal action and the cause of action and the relief sought.

Whether the applicant is properly before the Court

The main argument on whether the applicant is properly before the court was hinged on the fact that the applicant did not give the requisite notice to the second respondent. What the parties failed to appreciate as regards the need for notice is that the notice referred to in the State Liabilities Act is to enable investigations of the circumstances leading to the claim or intended claim so that the party to whom notice is given can rectify or correct the situation, settle the claim or resist the claim. Whilst it was necessary to give notice in the previous application due to the nature of the relief sought, it is pertinent to note that *in casu* the applicant seeks the declaration of sections of the Act under scrutiny as being ultra vires the constitution. In that regard none of the respondents is being asked to rectify or honour a claim. It is a claim on constitutional invalidity. It transcends the duties of any of the respondents. It is a call to weigh and consider whether the sections contained in an Act of Parliament conform to the dictates of the Supreme law of the land.

[1] 1988 (1) ZLR 238 HC

None of the officers of the first and second respondents is being asked to act in a particular manner. Neither does the situation call for the investigation of conduct of the officers of the second respondent. Rather the court is being called upon to consider whether the provisions of the impugned sections ought to live or should be defaced from the relevant statute as being non-conforming. In such an instance there was no need to issue any notice to any of the respondents *vis* the institution of a constitutional challenge.

Whether interim is competent

The first respondent complained about the applicant seeking an interim order in a court application. Suffice that the court considering a constitutional invalidity may grant temporary relief. This is provided for in s 175 of the Constitution. It reads:

> **"175 Powers of courts in constitutional matters**
>
> (1) Where a court makes an order concerning the constitutional invalidity of any law or any conduct of the President or Parliament, the order has no force unless it is confirmed by the Constitutional Court.
> (2) A court which makes an order of constitutional invalidity referred to in subsection (1) may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of the law or conduct concerned."

The argument by Mrs *Munatsi Manyowa* has no merit as a temporary interdict or relief may be granted by this court if it is to make an order for constitutional invalidity. It does not require an applicant to file a separate application. The legislature properly provided for temporary relief as a measure to protect the interests of an applicant so that should the constitutional invalidity be confirmed the applicant would not have suffered any prejudice during the waiting period for the confirmation of the constitutional invalidity. Thus the applicant was correct and within its right to seek such relief in the draft order. Simply put the applicant is saying, should the court be with me and find favour with my argument, my interests have to be protected as the issue gets escalated to the Constitutional court. Thus the points raised by all the respondents that the applicant is not properly before the court have no merit and are accordingly dismissed.

Equally the argument by Mrs *Munatsi Manyowa* about the manner in which the draft order is couched has no merit. Apart from the court not finding issue with the draft order in respect of

how it is couched, litigants must understand that a draft order is just a draft, as it suggests. ZHOU J in *Craft* v *Craft*[2] aptly summarized the position as;

> "In any event, the draft order is merely a draft. The exact wording of the order is the ultimate responsibility of the court, as long as the substance of what is being claimed does not change and the relief sought is supported."

The court thus throws out the objection as having no merit. The parties agreed that the matter is not *lis pendenis* which objection had been initially raised by the second respondent but later abandoned. Given the aforegoing the court finds that there is no impediment that stops the matter from being heard on merits. Accordingly the matter will be decided on merits.

Mutonhori Attorneys, applicant's legal practitioners
Civil Division of the Attorney General's Office, first & third respondent's legal practitioners
Zimbabwe Revenue Authority, second, respondent's legal practitioners

[2] HH241/22 at p78 of the cyclostyled judgment