

CONSILIA CHINANZVAVANA
versus
THE MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT
and
THE ZIMBABWE REVENUE AUTHORITY
and
THE ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MHURI J
HARARE; 18 January 2024 & 31 July 2024

OPPOSED APPLICATION

T Biti, for the applicant
M Chimombe, for the first and third respondents
S Bhebhe, for the second respondent

MHURI J:

This is a constitutional challenge to Section 196 subsections (1) and (2) of the Customs and Excise Act [*Chapter 23:02*], THE ACT. Applicant is challenging the requirement to give 60 days notice before one institutes proceedings against Zimbabwe Revenue Authority (ZIMRA). The relief she is seeking is an order of constitutional invalidity declaring the above subsections ultra vires the Constitution of Zimbabwe, (THE CONSTITUTION).

The factual background that gave rise to this application is that, on the 19th of December 2021, as she was at Nyabira Toll Gate, her motor vehicle Mazda BT50 double cab was impounded by ZINARA on the instruction of Zimra for having failed to pay the requisite duty. Aggrieved by this action, applicant filed an application for a spoliation order in this Court under HC 1014/22, which application was unsuccessful for failure to give the requisite notice. As a result, applicant then filed this current application.

The application is strongly opposed by all the respondents.

It was the applicant's contention that the said provision infringes on her right of access to a court or to some other tribunal for the resolution of any dispute protected by section 69 (3) as well as her right to a fair and speedy trial before an independent and an impartial court codified by section 69 (1). She also contended that the said provision infringes on her right to equal protection and benefit of the law as protected by section 56 (1) of the Constitution. Her

main argument was that the requirement to give 60 days' notice is an unnecessary constraint to her right of access to the courts particularly in a country like Zimbabwe where the majority of people are poor and cannot afford lawyers. She questioned why it is only Zimra which requires notice when other bodies such as RBZ, Air Zimbabwe etc have no such requirement. It was submitted that therefore section 56 is flouted hence the notice period is unconstitutional.

First and third respondents' opposition to the application was to the effect that the rationale behind the requirement to give notice in terms of section 196 (1) is that claims have to be investigated before litigation is instituted as there are cases that are settled at that stage. It was submitted that it is not only Zimra which is accorded this requirement but also applies to all claims against the State in terms of the State Liabilities Act. Further it was submitted that the period of 8 months required in terms of section 196 (2) is reasonable because the goods seized have to be disposed of, as, to allow litigants a wide discretion to institute proceedings when they want would not achieve the second respondent's mandate. The provision is meant to bring finality to tax issues, and actually promotes the right to a fair and speedy trial as envisaged in section 69. As regards section 56(1) of the Constitution, it was the respondents' submission that applicant has not provided facts of other people who have approached courts, the State or the Commissioner on tax issues and have been treated in a different manner from her. Their prayer was that the application be dismissed.

The application is opposed by the second respondent on the basis that the second respondent is special and different from other parastatals therefore special specific procedures should be followed when one intends to sue it. Section 196 (1) of the Act does not bar institution of proceedings against Zimra, it merely regulates the bringing of these claims by requiring notice to be given first. It does not deny access to the courts and were that was the case, so argued second respondent, some provisions of the Courts Rules would be struck out. It further argued that all the rights mentioned by applicant are not without limitation. They can be limited in terms of section 86 (2) of the Constitution. It also reiterated the submission by first respondent that the purpose of imposing the sixty day notice is to allow it to gather sufficient facts to allow an investigation. As regards section 56 (1), it was submitted that the Constitutional Court has pronounced itself on the meaning of this provision to the effect that the provision does not protect people of different circumstances. It was its prayer that the application be dismissed.

The impugned provisions of Section 196 of the Act provide as follows:

“(1) No civil proceedings shall be instituted against the State, the Commissioner-General or an officer for anything done or omitted to be done by the Commissioner-General or an officer under this Act or any other law relating to customs and excise until 60 days after notice has been given in terms of the State Liabilities Act [*Chapter 8:14*].

(2) 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.”

The above provisions are clear and unambiguous. A litigant is obliged to give the requisite notice of 60 days to Zimra before instituting any proceedings against it. This is in terms of the State Liabilities Act [*Chapter 8:14*]. The proceedings are to be brought within 8 months after the cause arises. Consequently, where a plaintiff or applicant initiates a lawsuit in contravention of the above as provided for in terms of the State Liabilities Act, such lawsuit is invalid.

It is clear that these provisions all they do is regulate the procedure, manner and timeframes within which litigation is to be done. Regulation, as correctly stated by Respondents does not amount to denial. It there to ensure that persons do not sit on their laurels and institute their claims expeditiously to finality. There is therefore nothing unconstitutional about a provision that regulates the manner in which persons must institute proceedings.

Section 56(1) of the Constitution, Equality and Non-discrimination provides:

“(1) All persons are equal before the law and have the right to equal protection and benefit of the law.”

Section 69 (2) and (3) of the Constitution provides as follows:

“(2) 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 court, tribunal or other forum established by law.

(3) Every person has the right of access to the courts, or some other tribunal or forum established by law for the resolution of any dispute.”

The question that then arises is, does the impugned section limit applicant’s access to the courts? The case of *Norbet Mangena vs Minister of Home Affairs and Another* HH 115/16 aptly stated that statutes of limitation do not affect the substantive right guaranteed under a Constitution but merely limit the time within which one has to institute proceedings when enforcing their rights for a remedy. See also the case of *Stambolie vs Commissioner of Police* 1989 (3) ZLR 287 where it was held that: -

“... Statutes of limitations do not affect a substantive right but merely limit in time the remedy of bringing proceedings to enforce that right. Such statutes find justification in necessity and

convenience rather than logic. The only qualification to be noted is that in enacting a statute of limitation the legislature must allow a reasonable period within which the party aggrieved may sue to enforce his constitutional right.”

It is clear therefore that this provision does not trample on a person’s right to access the courts. I agree with the submission that the 8 months period is not so inadequate as to affect the fundamental right of access to the courts. I am also persuaded by the submission that the 60 day notice requirement serves a legitimate purpose of allowing the State to investigate the matter and potentially resolve it without the need for litigation. In the case of *Care International in Zimbabwe vs Zimbabwe Revenue Authority and 2 others* SC 88/21 quoting with approval NDOU J in *Machacha vs Zimbabwe Revenue Authority* HB186/11.it was held;

“In *MACHACHA vs ZIMRA* HB186/11, Ndou J explained the reason for the need to give the required notice of intention to sue. The learned judge stated:

“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 therefor 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.”

In *Ebrahim vs Controller of Customs and Excise* 1985(2) ZLR 1 (S), this court had to consider the purpose of section 178 of the customs and excise Act [*Chapter 177*], the precursor to the current Customs and Excise Act [*Chapter 23:11*]. After considering various authorities from the South African courts, the court said:

“..... In considering whether this letter is a compliance with section 99(a), it should be borne in mind that the primary object of the provision is to ensure that the administration shall be appraised, 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 subsection.

The administration will thus be able to investigate the circumstances and be placed in apposition to determine whether it should settle the claim or prepare to resist it”.

From the above authorities it becomes clear that it is not just the failure to give notice that a court can take cognisance of.....

This is primarily to do with the purpose underlying the need for notice which is to give the revenue collector sufficient facts to allow an investigation within reasonable time to make a decision on whether to settle the matter or defend the claim.”

The provisions actually promote the right to a fair –and speedy trial before an independent tribunal as envisaged in Section 69 of the Constitution. Further, the said provisions of the Customs and Excise Act are not discriminatory as they apply to anyone who intends to litigate against Zimra.

As regards Section 56(1) of the Constitution, this law envisages that all persons are equal before the law and have a right to equal protection and benefit of the law.

It provides equal protection and benefit for the persons affected by it. It includes the right not to be subjected to treatment to which others in a similar position are not subjected.

See *Nkomo v Minister of Local, Government, Rural & Urban Development & Ors CCZ-6-16* at page 8, par. 10.

In the case of *Greatermans Stores (1979) (Pvt) Ltd t/a Thomas Meikles Stores & Anor v Minister of Public Service, Labour and Social Welfare & Anor CCZ-2-18* at p. 23, the Court held that the purpose of s 56(1) is

“to ensure that those in similar circumstances and conditions who are the subjects of the legislation are treated equally, both in the privileges and in the liabilities imposed. There should be, as between them, equal protection of the law. The right does not require equal treatment of people who are in different circumstances...”

In the case of *Gonese v President of the Senate and Others CCZ-2-23*, at p. 29, para. 84 – 85, it was held that:

“[85] ... “a person alleging a violation of s 56(1) must demonstrate that he was denied the protection of the law, while others similarly positioned were afforded such protection. Put differently, he must show that the law in question operated to discriminate against him in favour of others in the same or similar position. See the *Mupungu* case *op. cit.* In other words, the general right to protection of the law *simpliciter* no longer exists or is not to be found in s 56(1). Thus, in *Nkomo supra*, it was stated:

“The applicant has made no allegation of unequal treatment or differentiation. He has not shown that he was denied protection of the law while others in his position have been afforded such protection. He has presented the Court with no evidence that he has been denied equal protection and benefit of the law.”

This applies with equal force in *casu*.

Applicant has not shown that she was treated differently from persons in the same circumstances as her. All she did was give examples of other Parastatals to which the requirement of giving notice does not apply.

Further, on s 56, it is important to note that the notice requirement applies equally to all persons seeking to institute civil proceedings against the State, the Commissioner or an officer under the specified laws. It does not discriminate against any individual or group, thus upholding the principle of equal protection of the law.

While the 60-day notice requirement may impose a procedural hurdle, it does not violate the constitutional rights to access the courts and equal protection of the law. It serves a legitimate purpose and applies equally to all persons seeking to institute civil proceedings under the specified laws.

It is on this basis that I find the provisions of s 196 (1) & 2 of the Customs and Excise Act [*Chapter 23:02*] not to be *ultra vires* the Constitution. They do not infringe the right to access the courts and the right to equal protection and benefit of the law.

In the result, it is accordingly ordered that:

1. The application be and is hereby dismissed
2. There be no order as to costs.

MHURI J:.....

Biti Law, applicant’s legal practitioners

Civil Division of Attorney-General’s Office, first and third respondents legal practitioners

Kantor and Immerman, second respondent’s legal practitioners