DAGS TRADING (PRIVATE) LIMITED
versus
REGIONAL MANAGER OF BEITBRIDGE
ZIMBABWE REVENUE AUTHORITY
and
COMMISSIONER OF CUSTOMS AND EXCISE
ZIMBABWE REVENUE AUTHORITY
and
COMMISSIONER GENERAL ZIMBABWE REVENUE AUTHORITY
and
MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 2nd & 23 October 2019

Opposed Application

F Musakana, for the Applicant
Ms E Bishi, for 1st, 2nd & 3rd respondent
No appearance for 4th respondent

CHIKOWERO J: This is an application for review.

Applicant seeks review of two decisions. The first, by first respondent, was contained in letter dated 17 July 2016. That letter was addressed to the applicant. In it was communicated the decision to suspend applicant's account. First respondent also ordered applicant to pay duty in the sum of US$49 735.39 plus a 100% penalty in the sum of US$49 735.39. Further, interest at the rate of 10% per annum was levied on the total amount of $99 470.78 for as long as the same remained unpaid.

Following an exchange of correspondence between applicant and first respondent the latter wrote to the former on 10 June 2018. The material part of the letter reads as follows:

> "FOLLOW UP ON APPEAL ON SUSPENSION OF AGENTS BOND
> Reference is made to your letter dated 14 March 2018, my interim response dated 7 May 2018 and my letter dated 17 July 2016 on the above subject matter.

> Please be advised that my decision, communicated to you in my letter, dated 17 July 2016 still stands. Your suspension will therefore not be lifted until the outstanding duty, penalty and interest have been paid."

Clearly therefore, the first respondent's decision, whose review was intended, was made on 17 July 2016 and not 10 June 2018. The letter of 10 June 2018 only confirmed that the decision of 17 July 2016 still stood. In the circumstances, however, the fact that applicant sought to have the court review the first respondent's "decision" of 10 June 2018 is not fatal to the application.

The reason is this. Second respondent upheld the decision of 17 July 2016 in his own letter to applicant's legal practitioners. The letter, dated 10 November 2018, was received by the legal practitioners on 7 December 2018. It is date stamped accordingly. This is the second decision sought to be reviewed.

Because of the significance of second respondent's letter of 10 November 2018, it is necessary that I set out its contents. The letter reads:

> "APPEAL ON SUBMISSION OF AGENTS BOND: BILL OF ENTRY NUMBERS S 32320, 32321 AND 32322 OF 7 JUNE 2016 DAGS TRADING (PVT) LTD
>
> I refer to your RZ/S22/rm reading the above matter.
>
> The facts of the matter are that your client using his transit bond, registered bills of entry S 32320, S 32321 and S 32322 of 7 June 2016 at Beitbridge Border Post for the clearance of a consignment of Maq washing powder, that was destined for Zambia through Victoria falls. The consignment was not re-exported, contrary to the requirements of the Customs and Excise Act (*Chapter 23:02*), s 237, hence the establishment of an offence. As a result of failure to re-export the consignment, the state was prejudiced of $49 735.39 as duty. Your client was advised to pay the duty due and a 100% fine, which had immediately become due and payable or risk having his account suspended. Since your client failed to account for the consignment and had not paid the duty due, the Regional Manager, Beitbridge, suspended his customs account maintained in the Automated Systems of Customs Data (ASYCUDA). You have since appealed against his decision.
>
> I have taken note of your appeal where you mention that one J Makavise and another Mandla Moyo, whom your client made an effort to have them arrested by police, had fraudulently dealt with the consignment. You also mention that he intercepted one of the three trucks and assisted in recovering part of the goods. That your client had not committed any crime and that the suspension of the account was unlawful.
>
> After careful consideration of your appeal, I cannot overlook the fact an offence was committed. Since your client had used his bond to register the consignment as in transit, he remained the party that was obligated to account for the consignment but he failed to do so. The customs and Excise Act (*Chapter 23:02*) as read with the Customs and Excise (General) Regulations, SI 154/2201, as amended, s 60 refer. By using his bond as surety, your client bound himself in ensuring that the goods would be re-exported and in the event of failure to meet the obligations regarding goods in transit, duty remained payable.

I note that you state that part of the consignment was recovered. There is no such evidence, which is known to Zimbabwe Revenue Authority. It is also important to note that the issue in contention is the consignment of Maq washing powder that was destined for Zambia and not the trucks, which your client assisted in intercepting.

Regarding the suspension of the account, it should be noted that the Regional Manager took every necessary step to get your client to account for the goods or pay the duty and he went on to give notice of suspension of the account. It was his duty and within the provisions of the law to suspend your client's account, after he had taken note of your client has written representation. Section 98E of the Act referred to herein deals with registration of registered users and suspension or cancellation of registration, and states, in part, the Commissioner shall;

(a) give notice to the registered user of the proposed cancellation or suspension; and
(b) provide the reasons for the proposed cancellation or suspension; and
(c) afford the registered user a reasonable opportunity to respond and make as to why the registration should not be cancelled or suspended.

In addition, in (d), that if such a person has contravened or failed to comply with any provision of this Act, the Commissioner may cancel or suspend for a specified period the registration of the registered user.

In view of the foregoing, considering that there are no new facts that you have proffered on behalf of your client with regards to the subject matter of the appeal, I am not prepared to vary the previous determination. The account shall remain in suspension until your client meets all the terms set as stated in the Regional Manager's letter of July 17, 2016 addressed to your client.

Should there be no payment of the outstanding duty and fine by December 12, 2018, I shall institute recovery measures for the same.

Yours faithfully
NH Machinga
For: Commissioner of Customs and Excise."

The facts of this matter, in summary, are these. Applicant is a registered clearing agent. Operating at Beitbridge Border Post, it facilitates the clearing of imports and exports. In doing so, it puts its own reputation and pocket on the line by standing as surety for importers and exporters. In other words, where an importer hands up documents to applicant, declaring that its goods are destined for Zambia and therefore merely passing through Zimbabwe (hence exempt from paying import duty to the Government of Zimbabwe at Beitbridge Border Post) the applicant cannot but accept that as the truth. It facilitates the clearing of the goods on pain of having to pay duty, itself, should it turn out that the goods were transported no further than Zimbabwe. That is what happened in the case. The Maq washing powder, declared as destined for Zambia, were off loaded in Zimbabwe.

Applicant, because it had stood as surety, and had lodged a bond with the Zimbabwe Revenue Authority at Beitbridge, was summarily called upon to pay the duty in the sum of US$49 735-39 plus a 100% fine. The total amount payable thus stood at a staggering US$99 470-78. First and second respondents, being officers in the employ of the Zimbabwe Revenue Authority, saw where the shoe hurt most. The former suspended applicant's account with the Zimbabwe Revenue Authority. The latter upheld that decision. This simply meant applicant remained as a registered clearing agent. Its registration was neither cancelled nor suspended. Further, its licence to operate was neither cancelled nor suspended. But until it paid the sum of US$99 470-78 it could in fact not operate because its account, maintained in the Automated Systems of Customs Data, was disabled by Zimra. Applicant remains to date unable to operate as a customs clearing agent. All this is common cause.

In instituting and arguing this application, I was told that it is an application for review of the administrative actions of the first and second respondents brought in terms of s 4 of the Administrative Justice Act [*Chapter 10:28*] as read with order 33 Rule 256 of the High Court Rules, 1971.

I have looked at sections 3 and 4 of that Act. I have also considered the provisions of Order 33. I bear in mind this court's powers of review as well as the grounds for review enunciated in ss 26 and 27 of the High Court Act [*Chapter 7:06*]. In light of all this, I am satisfied that this court can review the decisions with which applicant is aggrieved. I am aware of the distinction observed by MAKARAU JP (as she then was) in *U-Tow Trailers (Pvt) Ltd* v *City of Harare and Another* 2009 (2) ZLR 259 (H) between a court application for review and an application in terms of the Administrative Justice Act [*Chapter 10:28*]. This is what her Ladyship said at 269 E:

> "As correctly pointed out by the first respondent, this is not an application for review. It is an application for the setting aside for an administrative decision on the basis that it was not arrived at fairly and thus, at law, contravenes the Act."

I add this only. The Administrative Justice Act is fluid in my view. One can institute an application in terms of s 4. On the other hand, as noted in *U-TOW Trailers (Pvt) Ltd* v *City of Harare and Another* (*supra*) its provisions are a reiteration of the common law principles of natural justice. One can therefore, in my view, employ its provisions, without saying so, to mount an application for review. The Act may have opened a door for litigants, in some cases, to effectively bring applications for review outside the mandatory 8 week period and without applying for and

obtaining condonation, as long as they christen the approach to the court as an application in terms of the Act. After all, one may argue, there are times when what matters is that the body is clothed. The name of the clothing material may not always matter.

The grounds for review relied upon are:

(a) Failure to give notice to the applicant when the decision to suspend its account or licence was taken.

(b) Procedural irregularity by failing to comply with the provisions of section 98 (E) (4) and (5) of the Customs and Excise Act [*Chapter 23:01*]

(c) Decision to impose full duty and a 100% penalty fine was grossly unreasonable, unlawful, unjustified and against international standards and practice.

The draft order originally read:

"IT IS ORDERED THAT:

1. The decision by the first and second respondents against the applicant to enforce payment of customs duty in the sum of US$49 785-39 and a 100% penalty fine be and is hereby declared null and void and is hereby set aside.
2. The first and second respondents be and are hereby ordered to remove the suspension of the applicant's account within 7 working days of this order being served on them.
3. The first, second and third respondents be and are hereby directed to follow the necessary procedures in terms of the Customs and Excise Act or any other applicable law if they are interested in making any claim against the applicant.
4. The respondents are hereby ordered to pay costs, jointly and severally, the one paying and the others to be absolved."

Firstly it is unnecessary, in couching provisions of a draft order, to repeat the word "order" or "ordered" as was done in paragraph 3 of the present draft. The provision should simply, as far as that is possible, spell out what the respondent(s) should do. A good draft order is that which is capable of being granted, unamended even by the court itself.

Secondly, it is not the function of the court, in granting orders, to usurp the role of respondent (s)' legal advisors, who are paid to tender such advice, to itself assume that responsibility. In my view, Mr *Musakana* acted properly in applying for an amendment of the draft order. I granted the application. That saw paragraph 3 disappearing from the draft order.

THE PRELIMINARY POINTS

THE APPLICATION WAS IMPROPERLY BEFORE ME

Second respondent upheld the first respondent's decision on 10 November 2018. The application for review was filed on 31 January 2019. The application, having been thus filed outside the prescribed 8 week period, and without condonation having been sought and obtained, was improperly before me.

This point, taken by first, second and third respondents, was founded on Order 33 rule 259 of the High Court Rules, 1971.

It reads:

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

While the second respondent made the decision complained of on 10 November 2018, signaling the termination of the proceeding, the 8 week period commenced running on receipt of the letter communicating that decision. The letter of 8 November 2018 was received by the applicant's legal practitioners on 7 December 2018. Ms *Bishi* properly abandoned this preliminary point because the 8 week period, correctly reckoned, had not lapsed by 31 January 2019.

FAILURE TO GIVE NOTICE IN TERMS OF THE LAW

Section 196 (1) of the Customs and Excise Act [*Chapter 23:02*] reads:

"196. Notice of action to be given to officer

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*].

Section 6 of the State Liabilities Act [*Chapter 8:15*] states:

"(1) Subject to this Act, no legal proceedings in respect of any claim for

(a) money, whether arising out of contract, delict or otherwise; or

(b) delivery or release of any goods:

and whether or not joined with or made as an alternative to any other claim shall be instituted against –

(i) …

(ii) ….

(iii) Any officer or employee of the State in his official capacity:

Unless notice in writing of the intention to bring the claim has been served in accordance with subsection (2) at least sixty days before the institution of the proceedings."

Since applicant had not given the sixty days notice prior to instituting the present application, so Ms *Bishi* contended in Heads of Argument, the application should fail on this point without even proceeding to the merits.

The following decisions were cited in support of this position: *Puwayi Chiutsi* v *Zimra* HH 65/05, *Machacha* v *Zimbabwe Revenue Authority* HB 186/11 and *Betty Dube* v *Zimra* HB 02/14.

In Heads of Argument, applicant contended that the meaning of s 196 (1) of the Customs and Excise Act [*Chapter 23:02*] is clear when one reads it together with the provisions of s 6 (1) of the State Liabilities Act [*Chapter 8:15*]. In short, this application for review is not a claim for money whether arising out of contract, delict or otherwise. Further, this application for review is not an application for the delivery or release of any goods.

Accordingly, applicant was not required by law to give the sixty days notice before filing the application.

Reliance was placed upon *Innscor Africa Limited and Another* v *Competition and Tariff Commission* SC 52/18 where at page 13 of the cyclostyled judgment, the court cited with approval *Van Heerden* v *Queens Hotel (Pvt) Ltd* 1973 (2) SA 14 (RAD).

At page 21, the court in *Van Heerden* v *Queens Hotel (Pvt) Ltd* said:

"In interpreting statutes, courts are not concerned with the elegance of the language used. Statutory instruments are not usually remarkable for the elegance of their language. The court must interpret the words in a statutory instrument so as to give effect to the true intention of the legislature, and once that intention is clear, the fact that the language used in expressing it may not be as elegant as one would like, is not a matter of consequence, especially if the language is grammatical and easily understood."

In *Betty Dube* v *Zimra* (*supra*) KAMOCHA J held that the fact that the applicant in that matter was seeking a declaratory order did not exempt her from complying with the provisions of s 196 (1).

None of the cases cited in first, second and third respondent's heads of argument, all finding that non-compliance with s 196 (1) was fatal, concerned an application for review.

I am not required to determine this preliminary point. When she rose at the hearing, and after introducing herself, Ms *Bishi* advised that she had abandoned this point *in limine*.

THE NON-CITATION OF THE ZIMBABWE REVENUE AUTHORITY WAS FATAL TO THE APPLICATION

Unlike its two erstwhile companions, this preliminary point was argued.

In support thereof I was referred to *Tregers Industries (Pvt) Ltd* v *Commissioner General of the Zimbabwe Revenue Authority* 2006 (2) 62 (H).

In that matter, at 67F GARWE JP (as he then was) came to this conclusion:

> "I find that the Commissioner-General of the Authority has been wrongly cited as the respondent and it is the authority itself that should have been so cited. I accordingly uphold the point raised *in limine* and on that basis alone would dismiss the application."

His Lordship was dealing with a case where the applicant sought the return of moneys garnished by the Zimbabwe Revenue Authority, being value added tax on goods sold. The applicant had sued the Commissioner of the Zimbabwe Revenue Authority.

I agree with Mr *Musakana* that the present matter is distinguishable from *Tregers Industries (Pvt) Ltd* v *The Commissioner-General of the Zimbabwe Revenue Authority* (*supra*).

This is an application to review the decisions of the first and second respondents. It is true that they are officers of the Zimbabwe Revenue Authority. But they are not the Zimbabwe Revenue Authority. It is their decisions, not those of the Zimbabwe Revenue Authority, which are sought to be reviewed.

Order 33 Rule 256 provides as follows:

> "256 Review proceedings by notice of motion
> Save where any law otherwise provides, any proceedings to bring under review the decision… of any … board or officer … shall be by way of court application directed and delivered by the party seeking to review such decision… to the … board or officer, as the case may be, and to all other parties affected."

In *Matida* v *Chairman Public Service Commission and Another* 1998 (1) ZLR 507 (H) ADAM J interpreted this Rule, at 509C, in these words:

> "Rule 256 surely is concerned with the decision or proceedings of the legal persona, be that an inferior court tribunal, board or officer. This means it is that legal persona whose decision or proceeding has to be reviewed that must be cited and the application must be directed and delivered, in the case of the tribunal or board, to the Chairman of that board."

First and second respondents were correctly cited.

That said, the last words of Rule 256, after the last comma, mean, in this matter, that the Zimbabwe Revenue Authority should also have been cited and served with a copy of the application.

Going by the provisions of Order 87 (1) of the High Court Rules, the non- joinder of the Zimbabwe Revenue Authority is not fatal to the application.

The preliminary point is dismissed.

THE MERITS

The starting point is Chapter 2 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

It reads in part:

> "Chapter 2
> National Objectives
> 8. Objectives to guide
> State and all institutions and agencies of government.
> (1) The objectives set out in this Chapter guide the State and all institutions and agencies of government at every level in formulating and implementing laws and policy decisions that will lead to the establishment, enhancement and promotion of a sustainable, just, free and democratic society in which people enjoy prosperous, happy and fulfilling lives.
> (2) Regard must be had to the objectives set out in this Chapter when interpreting the state's obligations under this constitution and any other law."

It falls upon the shoulders of the judiciary to interpret and apply the law. In doing so, sight cannot be lost of the bigger picture: the establishment, enhancement and promotion of a just society.

How do l contribute to this?

By paying regard to the national objectives when interpreting the obligations of the state and its agencies under the constitution and any other law.

This court must foster the fundamental rights and freedoms relevant to this matter. The only way that l can protect the relevant fundamental rights and freedoms and to promote their full realization and fulfillment, as is required of me by section 11 of the Constitution, is this. I must interpret and apply the constitution and the law to the facts of this matter in a way that does not negate the enjoyment of the applicable fundamental rights and freedoms.

Chapter 4 of the Constitution sets out an expanded Bill of Rights. Section 44 places a duty on this court to respect, protect, promote and fulfill the rights and freedoms set out in Chapter 4. This is the context:

"Chapter 4

DECLARATION OF RIGHTS

PART 1

APPLICATION AND INTERPRETATION OF CHAPTER 4

44. Duty to respect fundamental human rights and freedoms.
The State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfill the rights and freedoms set out in this Chapter."

I am unable to think of any clearer and better encompassing language than that employed, in defining what I must do in this matter, than s 44.

The fundamental right and freedom entrenched in s 68 of the constitution is the right to administrative justice. Section 68 reads as follows:

"68 Right to administrative justice.
1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.
2) Any person whose right, freedom, interests or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reason for the conduct.
3) An Act of Parliament must give effect to these rights, and must –
a) provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal;
b) impose a duty on the State to give effect to the rights in subsections (1) and (2); and
c) promote an efficient administration."

Section 3 of the Administrative Justice Act [*Chapter 10:28*] reads:

"3 (1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall—
a) Act lawfully, reasonably and in a fair manner: and
b) …
c) …
2) In order for an administrative action to be taken in a fair manner as required by para (a) of subsection (1) an administrative authority shall give a person referred to in subsection (1):
a) adequate notice of the nature and purpose of the proposed action: and
b) a reasonable opportunity to make adequate representations: and
c) adequate notice of any right of review or appeal where applicable."

There can be no doubt, as was noted in *U-TOW Trailers (Pvt) Ltd* v *City of Harare and Another (supra)* that s 3 of the Act is "an embodiment of the *audi alteram partem* rule."

In that matter, MAKARAU JP (as she then was) stated at 268 C:

> "Additionally, in my view, the Act is simply a codification of the position that was gaining general acceptance at common law to the effect that rules of natural justice have to be observed before any administrative decision is taken where such may adversely affect the rights or property of an individual."

Hence, Mr *Musakana* argued, at the hearing, that on application of the common law principle of review as well as those set out in the Administrative Justice Act [*Chapter 10:28*] the relief sought ought to be availed.

No prior notice was given to the applicant before the first respondent made the decision to suspend the former's account and to pay the US$49 735.39 duty, the 100% penalty in the sum of US$49 735.39 and interest.

Applicant was not notified of the proposed decision before it was taken. He was not invited to make representations.

The decision was made without the applicant having been heard. It struck him like a bolt of lightning.

That the first respondent had the statutory power to make the decision is not the issue. What is procedurally untenable is how he made the decision. First respondent proceeded as if applicant did not have a voice.

He proceeded as if applicant's rights, interests and legitimate expectation counted for nothing.

Second respondent's decision, upholding the decision made by first respondent, has no leg to stand on. His upholding of an irregular decision suffers the same fate as that which he purported to uphold.

As for suspension of applicant's account, there is another basis for setting aside that decision. It was beset with illegality. There is no provision in the Customs and Excise Act [*Chapter 23:02*] providing for suspension of a registered user's account. The decision to suspend the account had no legal basis. What is contained in that Act are provisions relating to the suspension or cancellation of a registered user's (clearing agent's) registration or licence. It was common cause that applicant's registration and licence were neither cancelled nor suspended.

It is clear that the effect of the suspension of applicant's account until such time that the duty, penalty and interest on both amounts was paid was this. It was a back door suspension of applicant's registration and licence without satisfying the requirements of suspension of a registered user's licence. That is simply unacceptable.

There cannot be an analysis of the performance of Grade 7 pupils relating to their Zimbabwe School Examinations Council 2019 final examinations without those pupils having gone through Early Childhood Development and Grades 1 – 6. By the same token, the last ground for review raised by the applicant does not arise.

Third respondent was an interested party. She was properly cited. I will not order applicant to pay her costs. She was not erroneously dragged to court.

Fourth respondent neither filed papers in response to the application nor appeared at the hearing. Accordingly, I shall not say anything further about him.

The application succeeds. I see a misapprehension on the part of the first, second and third respondents in respect of how to utilize the powers bestowed upon them by the legislature rather than malicious conduct by them towards the applicant. I detect also a misapplication of the law relating to suspension of registration and suspension of a licence to suspension of a registered user's account. The latter is not provided for by law. There is neither malice nor reprehensible conduct attributable to first, second and third respondents. For these reasons costs will be on the ordinary scale.

In the result, I order that:

1. The first respondent's decision dated 17 July 2016 requiring applicant to pay duty plus 100% penalty amounting to US$99 570.78 together with interest at 10% *per* annum as well as suspending applicant's account be and is set aside.
2. The second respondent's decision dated 10 November 2018 upholding first respondent's decision of 17 July 2016 be and is set aside.
3. The first, second and third respondents shall remove the suspension of applicant's account within 7 days of service of this order.
4. The 1st, 2nd and 3rd respondents shall pay the applicant's costs jointly and severally the one paying the others to be absolved.

Zigomo Legal Practitioners, applicant's legal practitioners
Zimra Legal Services Division, 1st, 2nd & 3rd respondent's legal practitioners