TAFADZWA MUSARARA
versus
MINISTER OF FINANCE & ECONOMIC DEVELOPMENT
and
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE 6 October 2020 and 28 March 2022

Opposed application for declarater

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Mr T Tabana, for the applicant
Mr K Chimiti, for the 1st respondent
Mr P Mukucha, for the 2nd respondent

CHINAMORA J:

Introduction and background facts

On 26 June 2020, the applicant applied to this court for an order seeking to have sections 192 (1) and (1a) of the Customs and Excise Act [Chapter 23:02] declared invalid as they offended sections 68 (1), 56 (1), 71 (2) and (3) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 ("the Constitution"). In other words, the constitutional matter that was before me was whether the aforesaid provisions of the Customs and Excise Act were in conflict with the provisions of the Constitutions named by the applicant. What prompted the applicant to act is that, at the beginning of December 2019, he purchased a Mercedes Benz G63 G Wagon from one Clemio Kahuni, which vehicle was subsequently registered as AFE 6327. According to the applicant, at the time of purchase, the said motor vehicle was in the warehouse of the 2nd respondent. He averred that his belief was that Mr Kahuni had fully paid any tax and duty payable on the importation of the vehicle in terms of the law, and proceeded to pay US$160,000-00 as full purchase price for the motor vehicle.

To put the relief sought in context, it is necessary for me to look at the provisions of the Customs and Excise Act which are the subject of this application. I will start with section 192 (1), which is couched in the following terms:

> "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 provision of this Act or any other law relating to the importation of goods, he may, within a period of 6 years from the date of importation of the goods, removal from bond or delivery from factory in the case of excisable goods, seize or place an embargo on those goods, wheresoever or possession of whom found, and until the embargo has been withdrawn no person shall remove such goods from the place indicated by the officer or in any way deal therewith, except with the permission of the officer". **[My own emphasis]**

Let me immediately turn to section 192 (1a), which provides that:

> "Any person who removes any goods in contravention of subsection (1) shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment".

The applicant contends that the above provisions are inconsistent with sections 56 (1), 68 (1), 71 (2) and (3) of the Constitution of Zimbabwe ("the Constitution"). What prompted the applicant to act is that, at the beginning of December 2019, he purchased a Mercedes Benz G63 G Wagon from Clemio Kahuni, which was subsequently registered as AFE 6327. The applicant says that, when he purchased the said vehicle, it was in the warehouse of the 2nd respondent. He avers that his belief was that Mr Kahuni had fully paid any tax and duty payable on the importation of the vehicle in terms of the law, and proceeded to pay US$160,000-00 as full purchase price for the vehicle.

On its part, the 2nd respondent submits that Mr Kahuni had not fully paid the tax and duty required by the law. As a result, ZIMRA's officers seized the motor vehicle, in terms of section 192 (1) of the Customs and Excise Act, after the applicant had taken its delivery. The applicant contends that he is an innocent purchaser, and that the provisions of section 192 (1) and (1a) should not have been used against him to seize the vehicle. It is for that reason that the applicant instituted the present proceedings seeking an order declaring the aforesaid sections invalid for being inconsistent with the Constitution. Additionally, the 2nd respondent raises a point in *limine*, namely, that the matter is *lis alibi pendens*, as he alleges that HC 2155/20 is still pending before this court. I will now look at the constitutional provisions referred to by the applicant before I deal with the preliminary point later in my judgment.

The constitutional provisions

My deliberate starting point is section 68 (1) of the Constitution, which accords everyone the right to just administrative action which is carried out in a lawful, reasonable and procedurally fair manner. The section, *inter alia*, 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".

Whilst on section 68 (1), it is relevant to observe that the right encapsulated in this provision is also contained in (and complemented by) section 3 (1) of the Administrative Justice Act [Chapter 10:28] ("the AJA"). In this respect, section 3 (1) of the AJA compels an administrative authority which takes action which may affect the rights, interests or legitimate expectations of any person to act lawfully, reasonably and in a fair manner and give reasons for its action. To complement this directive, section 3 (2) of the AJA unequivocally states:

> "(2) In order for an administrative action to be taken in a fair manner as required by paragraph (*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".

To sum up, the net effect of sections 3 (1) and 3 (2) of the AJA is to buttress the constitutional imperative by requiring administrative authorities to act lawfully, reasonably and in a fair manner. In this respect, in *Attorney-General v Mudisi and Ors* SC 48-15, the Supreme Court explained the essence of the duties imposed upon administrative functionaries, thus:

> "One of the fundamental precepts of natural justice, encapsulated in the maxim *audi alteram partem*, is the right to make every person to be heard or afforded the opportunity to make representations before any decision is taken that might impinge upon his rights, interests and legitimate expectations. This precept of common law forms part of the large duty imposed upon every administrative authority to act legally, rationally and procedurally and is now codified in section 3 (1) (a) of the AJA as the duty to 'act lawfully, reasonably and in a fair manner'. The obligation to act in a fair manner is further expanded in section 3 (2) to require the giving of 'adequate notice of the nature and purpose of the proposed action' and 'a reasonable opportunity to make adequate representations' as well as 'adequate notice of any right of review or appeal where applicable". **[My own emphasis]**

See also, *Schmidt and Anor v Secretary of State for Home Affairs* [1969] 1 All ER 904 (CA).

I must now consider the provisions of section 56 (1) of the Constitution, which state:

> "All persons are equal before the law and shall have the right to equal protection and benefit of the law".

This provision guarantees everyone protection of the law. In *Bernard Wekare v The State and Ors* CCZ 9-16 at 22, MALABA DCJ (as he then was) gave a succinct explanation of the meaning of section 56 (1) as follows:

> "The right also provides protection to a person under a legal system that that is fair in the sense that it guarantees to him or her all the procedural and substantive benefits of due process. In other words, the right to the protection of the law guarantees to a person protection against an unfair legal system". **[My own emphasis]**

The applicant further relies on sections 71 (2) and (3) of the Constitution, which give every person the right to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of property, and stipulate the conditions under which compulsory acquisition of property may be allowed. I will not dwell much on these provisions as I do not believe that the seizure of the applicant's motor vehicle in terms of section 192 (1) amounts to a compulsory acquisition. I will return to give my fuller views on the applicability of sections 71 (2) and (3) of the Constitution to this dispute. Having looked at the provisions of the Customs and Excise Act which are contended to violate the Constitution, I turn to the law dealing with when declaratory relief may be granted.

The law on grant of declaratory relief

The applicant seeks an order which declares sections 192 (1) and (1a) of the Customs and Excise Act invalid on the basis that they are inconsistency 56 (1), 68 (1), 71 (2) and (3) of the Constitution. This kind of relief is founded on section 14 of the High Court Act [Chapter 7:06], which provides as follows:

> "The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination".

The import of section 14 was dealt with in *Munn Publishing (Pvt) Ltd* v *Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 337 (S), where the Supreme Court held that there are two requirements that must be satisfied before a declarater can be awarded by the court. It is clear from

the architecture of Section 14 that an essential condition precedent to the grant of a declaratory order is that the applicant must be an interested person. Additionally, such an interest should be in the sense of having a direct and substantial interest in the subject matter of the suit that could be prejudicially affected by the judgment of the court. (See *United Watch & Diamond Co (Pty) Ltd & Ors* v *Disa Hotels Ltd & Anor* 1972 (4) SA 409 (C) at 415; *Milani & Anor* v *South African Medical & Dental Council & Anor* 1990 (1) SA 899 (T) at 902G-H). It is apparent from section 14 of the High Court Act and the decided cases that a court will not make a declaratory order unless there is an interested person in respect of whom the declarater will be binding.

Once the court is satisfied on the aspect of interest, it must consider the second rung of the test for the grant of declaratory relief. At this stage, the court asks whether or not the case which is before it is a proper one for the exercise of its discretion under s 14 of the High Court Act. In examining this leg of the test, it is instructive to consider the remarks of WILLIAMSON J in the case of *Adbro Investment Co Ltd* v *Minister of the Interior* 1961 (3) SA 283 (T) at 285B-C. The learned judge said:

> "I think a proper case for a purely declaratory order is not made if the result is merely a decision on a matter which is really of mere academic interest to the applicant. I feel that some tangible and justifiable advantage in relation to the applicant's position with reference to an existing, future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought".

Now that I have looked at the law applicable to the determination of declaratory relief, I will proceed to examine the constitutional provisions relied on by the applicant for the relief that he seeks against the 1st and 2nd respondents.

Whether the constitutional issue was properly before the High Court

Having addressed the requirements of a declarater, it is imperative for me to decide on whether the constitutional validity of sections 192 (1) and (1a) of the Customs and Excise Act was a matter properly before this court. In *Makumire v Minister of Public Service, Labour & Social Welfare and Anor* CCZ 01-20, MALABA CJ set out the principles to be observed for such a matter to be properly before the court. These can be summarised as follows: Firstly, litigant challenging the invalidity of a legislative provision must demonstrate that he or she or it has been harmed by the law under challenge, and that the order of the court will practically affect his, her or its rights.

Secondly, the court will not anticipate a question of a constitutional nature ahead of the need to decide it. The third point made by the learned Chief Justice is that, the court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, the court will not rule on the validity of a statute upon complaint of a party who fails to show that he is injured by its operation.

In *casu*, the facts show that the applicant was aggrieved by the seizure of the motor vehicle he had bought from Mr Kahuni and made full payment. He further submitted that he is an innocent purchaser who had no cause to suspect that duty had not been paid. The applicant avers that the seizure of his motor vehicle contravened section 68 (1) of the Constitution as he was not given an opportunity to make representations before the seizure. Further, the applicant asserts that the actions of the 1st and 2nd respondents denied him the benefit and protection of the law. Undoubtedly, as the person from whom the vehicle was seized after purchasing it for US$160,000, the applicant has been harmed by the actions of ZIMRA. I note that the applicant has real and substantial interest in the matter within the provisions of section 68 (1) of the Constitution and sections 3 (1) and (2) of the AJA. The application before me has not been filed to determine something in the abstract, but a real live issue of the physical detention of his motor vehicle by ZIMRA officers. The said motor vehicle still remains in the custody of ZIMRA under seizure. It is noteworthy that the respondents have not disputed that they did not give notice of the intended seizure to the applicant before the seizure was effected. Nor have they denied that the applicant was not given the opportunity to make representations prior to the seizure. If anything, both the 1st and the 2nd respondent accept that the notice of seizure was issued contemporaneously with the physical detention of the vehicle. (See paragraph 5.4 of the Opposing Affidavit, at page 30 of the record). This court is therefore being asked to decide on the constitutionality of sections 192 (1) and (1a) of the Customs and Excise Act which allows ZIMRA to act in the manner they did. Put differently, the issue before me is whether or not an administrative body is not violating the Constitution by taking action someone's rights without giving him or her notice of the action sought to be taken and affording them the opportunity to make adequate representations before the offending action is taken. In light of the factual reality, it is not an academic application. As such, the constitutional issue raised in the application is properly before this court.

Lastly, the applicant argues that sections 71 (2) and (3) of the Constitution were violated by the seizure of his vehicle. As I have noted, the seizure of the vehicle on the basis that duty had not been paid, does not amount to a compulsory acquisition which implicates these provisions. It is apparent that the seizure was done in order to enforce payment of duty. To that extent, it was not compulsory acquisition in the interests of defence, public safety, public order, public morality, public health or town and country planning as envisaged by section 71 (2) (i). Also clear is that the seizure was not an acquisition in order to develop or use the motor vehicle for a purpose beneficial to the community. It is obvious that only sections 68 (1) and 56 (1) are implicated by the seizure of the applicant's vehicle.

Effect of granting an order of invalidity of a law

In terms of section 175 (1) of the Constitution, any declaration of invalidity of any law or any conduct of the President or Parliament made by a competent court has no force until it has been confirmed by the Constitutional Court. This section is complemented by section 167(3) of the Constitution, which provides that the Constitutional Court makes the final decision on whether an Act of Parliament is constitutional and must confirm an order of invalidity made by another court. The sections serve distinct yet harmonious purposes, with the emphasis being placed on the express oversight of the Court over orders of constitutional invalidity of legislation made by other courts. The point needs to be emphasized that he Constitutional Court is not bound by any order of constitutional invalidity which I might make in this matter. In this connection, in *S* v *Chokuramba* CCZ 10-19, the Constitutional Court held that:

> "Th[is] Court is empowered to confirm an order of constitutional invalidity only if it is satisfied that the impugned law or conduct of the President or Parliament is inconsistent with the Constitution. It must conduct a thorough investigation of the constitutional status of the law or conduct of the President or Parliament which is the subject-matter of the order of constitutional invalidity. The Court must do so, irrespective of the finding of constitutional invalidity by the lower court and the attitude of the parties".

Before I delve into analysis of the case, I will deal with the preliminary point raised by the respondents.

Point in *limine* – *lis alibi pendens*

The basis of the contention that the application in *casu* is incompetent is that HC 2155/20 is pending before this court and involves the same parties and the same issue arises in both lawsuits. For that reason, the respondents prayed that the point in *limine* be upheld and the present application be dismissed. The applicant denied that the issue emanating from this application is before this court. He averred that HC 2155/20 was resolved without the need for a constitutional declaration and, accordingly, the preliminary point had been ill-taken. I agree with the applicant.

The order which I granted in HC 2155/20 is self-explanatory. It appears on pages 42-43 of the record. For the avoidance of doubt and completeness of the record, my order reads:

> **"IT IS ORDERED THAT:**
>
> Pending the return date and final determination of HC 2155/20, the following directions be and are hereby given:
>
> 1.1 The first respondent shall release to the applicant forthwith the Mercedes Benz G63 motor vehicle, Registration No. AFE 6327, which it is currently holding under Notice of Seizure No. 244680K at Manica Freight, NRZ Complex, Douglas Road Extension, Harare.
>
> 1.2 The applicant shall park and keep the aforesaid motor vehicle at No.27 Teign Road, Borrowdale West, Harare, and is hereby interdicted from driving the said motor vehicle (except to move it from Manica Freight, NRZ Complex, Douglas Road, Harare to No.27 Teign Road, Borrowdale West, Harare) and is further interdicted from disposing of the said motor vehicle.
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> 1.3 The 1st respondent shall place an embargo on the said motor vehicle at No.27 Teign Road, Borrowdale West, Harare, which embargo shall remain in force until the applicant pays the shortfall of customs duty on the motor vehicle which has been determined by the 1st respondent to be US$52,483.39.
>
> 1.4 The sum of US$52,483.39 shall be paid within 90 days of this order, which payment shall discharge the embargo placed on the motor vehicle.
>
> 1.5 Failing compliance by the 1st respondent with paragraph 1.1 of this order, the Sheriff of Zimbabwe or his lawful deputy or assistant with the assistance of a member of the Zimbabwe Republic Police, if necessary, is hereby authorized and empowered to take possession of the aforesaid motor vehicle from Manica Freight, NRZ Complex, Douglas Road Extension, Harare to No.27 Teign Road, Borrowdale West, Harare.
>
> 1.6 Each party shall bear its own costs".

Evidently, there was no constitutional question pending confirmation in HC 2155/20. The law on *lis alibi pendens* is settled and permits of no doubt. It was set out in *Papande v Grobeller & Ors* HH-658-18 that for the defence of *lis alibi pendens* to succeed, a litigant ought to show: (a) that litigation is pending; (b) between the same parties or their privies; (c) based on the same cause

of action; and (d) such proceedings are in respect of the same subject matter. On the facts of this case, the point in *limine* was not properly taken.

At any rate, whether or not the defence can be sustained is in the discretion of the court. I take wisdom from the apposite observations of CHITAPI J in *DS Mining Syndicate and Anor v Spencer Tshuma* HH 281-21, where he said:

> *"Lis pendens* is of course not an absolute bar to a matter before court. The court has a discretion to deal with the *lis* before it even though another similar *lis* is pending. The court has a discretion to stay the *lis* before it or proceed with it despite pendency of the other one. Justice, equity and the balance of convenience will be relevant considerations in deciding whether to stay a matter set down for hearing before the court on the basis that there is a *lis* pending hearing but not yet placed before the court or set down. See *Keytor N.O* v *Van De Menlent & Anor* 2014 (5) 215 ECG at 218 quoted by ZISENGWE J in the case *Chingani Z syndicate & 2 Ors* v *Cleo Brand Investments (Pvt) Ltd* HMA 14/20".

Since this application confronts squarely the constitutionality of sections 192 (1) and (1a), in the exercise of my discretion, I would have dealt with the current *lis* and dismissed the preliminary point. However, as I have concluded that nothing arises from the facts which implicates the defence of *lis alibi pendens*, I did not have to resolve the point in *limine* on the exercise of my discretion.

Analysis of the case

It is against the factual background and position of the law outlined above that I am going to examine whether sections 192 (1) and (1a) of the Customs and Excise Act are inconsistent with sections 68 (1) and 56 (1) of the Constitution entitling the applicant to the declarater that he seeks. It is evident from section 68 (1) of the Constitution, section 3 (1) and section 3 (2) of the AJA that, for the actions of an administrative functionary to be lawful, it must adhere to the time tested maxim of *audi alteram partem*. This requires that a person who is at the receiving end of an administrative action that affects his rights and interests should be given an opportunity to explain himself. Indeed, there is authority for this proposition of law. (See *U-Tow Trailers (Pvt) Ltd* v *City of Harare and Another* 2009 (2) ZLR 259 (H) at 267F-G; 268 A-B). It must be noted further that in *Attorney-General v Leopold Mudisi & Ors supra*, Patel JA (as he then was) succinctly sums up what constitutes acting in a fair manner, as follows:

> "The obligation to act in a fair manner is further expanded in s 3 (2) of the [Administrative Justice] Act to require the giving of "adequate notice of the nature and purpose of the proposed action" and "a reasonable opportunity to make adequate representations" as well as "adequate notice of any right of review or appeal where applicable".

In this context, it is necessary for me to examine whether sections 192 (1) and (1a) of the Customs and Excise Act afford the persons whose goods are seized or placed under embargo the right to be heard before a decision impinging on their rights, interests and legitimate expectations is made. Section 192 (1) can be paraphrased as follows: if *at any time* an officer has reason to believe that the correct duty has not been paid on any goods *he may, within a period of 6 years* from the date of importation of the goods, seize or place an embargo on those goods, *regardless of* where they are found or who has possession at the time. I ask the question: does section 192 (1) meet the constitutional imperative in section 68 (1) of the Constitution and the requirements of sections 3 (1) and (2) of the AJA? My answer is that it does not, and I will explain why.

The Constitution, in section 68 (1), obligates administrative officials to act lawfully, promptly, efficiently, reasonably, proportionately, impartially, both substantively and procedurally. As earlier pointed out, the obligation is for such officials to give adequate notice of the nature and purpose of the action they propose to take, while giving the affected party a reasonable opportunity to make adequate representations. None of these opportunities are provided for in section 192 (1) of the Customs and Excise Act. It is beyond question that the duties placed on public officials by section 68 (1) of the Constitution are strengthened by section 56 (1) of the Constitution which gives every person the right to be protected by a fair legal system. The law is trite on this point. (See *Bernard Wekare v The State and Ors supra*; *Taylor v Minister of Education and Anor* 1996 (2) ZLR 772 (S).

Seizing someone's property first and then requiring that person to make representations *ex post facto* can hardly be what section 68 (1) of the Constitution contemplated. It is eminently unreasonable for the respondents to argue that section 193 of the Customs and Excise Act affords aggrieved persons the right to be heard after the event. This smacks of arbitrariness. For the right to be effective, in my view, the person must be heard before the act of seizure of his or her property is effected. In my view, a proper interpretation of section 68 (1) of the Constitution is to ask the person against whom administrative action (like seizure of property) is to be taken, to show cause

in a specified period why the property should not be seized. Indeed, such an approach seems to find support in judicial decisions in this jurisdiction and elsewhere. This appears from the words of MALABA DCJ in *Bernard Wekare v The State and Ors supra,* which can be seen in High Court cases, such as, *Zindoga and Ors v Minister of Public Service, Labour and Social Welfare and Anor* 2006 (2) ZLR 10 (H) and *Rwodzi v Municipality of Chegutu* HH 86-03. In the United Kingdom, the same approach is evident from *Schmidt and Anor v Secretary of State for Home Affairs supra,* while in South Africa *Grundling v Beyers and Ors* 1967 (2) SA 131 typifies the position in that jurisdiction.

My view is that sections 192 (1) and (1a) violate section 68 (1) of the Constitution. The basis of this position is that, the Constitution via section 68 (1) impels the need for reasonableness and proportionality in administrative conduct. There is no second guessing that proportionality entails that the desired goal of an administrative decision is achieved by the use of a method which is least drastic or oppressive to achieve it. In other words, an administrative body must not deploy more heavy-handed means than are necessary to achieve its objective, by idiomatically using a sledge hammer to kill a fly. It is obvious that this logic has judicial support. (See *S v Makwanyane* 1995 (3) SA 391 (CC). The objective of the enforcement regime under section 192 (1) of the Customs and Excise Act is to recover unpaid or the balance of underpaid customs duty. However, the provision is widely cast in a way which allows ZIMRA officers to act arbitrarily, to the detriment of the lawfulness, fairness and proportionality that sections 68 (1) and 56 (1) aim to achieve. As presently worded, sections 192 (1) and (1a) of the Customs and Excise Act cannot be rationally tested against the need for fairness and proportionality, particularly, where action to seize can be taken inside a period of 6 years and goods can be seized wherever they are found, irrespective of who now has them and the basis of their possession. This acts unfairly in the case of innocent purchasers of improperly cleared goods. My conclusion is that the applicant has satisfied the court that he is entitled to the relief that he seeks. I therefore hold that sections 192 (1) and (1a) of the Customs and Excise Act fall foul of sections 68 (1) and 56 (1) of the Constitution, and that the relief sought can be afforded.

In general, costs are in the discretion of the court and, invariably, follow the result. The applicant has not claimed costs of suit and proposed that there be no order as to costs. Accordingly, I will make no order as to costs, despite the applicant being the successful party.

Disposition

In the result, I grant the following order:

1. The point in *limine* be and is hereby dismissed.

IT IS DECLARED THAT:

2. Sections 192 (1) and (1a) of the Customs and Excise Act [Chapter 23:02] are hereby declared to be inconsistent with sections 68 (1) and 56 (1) of the Constitution of Zimbabwe Amendment (No.20) Act, 2013, and are accordingly struck out as being invalid.

IT IS ACCORDINGLY ORDERED THAT:

3. The Registrar of the High Court shall place the judgment of this Court before the Constitutional Court for confirmation of the order of invalidity.

4. There shall be no order as to costs.

Rubaya & Chatambudza, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st respondent's legal practitioners
Zimbabwe Revenue Authority, 2nd respondent's legal practitioners