SHIELA SITHOLE
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 4 March & 13 April 2022

COURT APPLICATION

S Dhlakama, for the applicant
T L Marange, for the respondent

MANZUNZU J:

INTRODUCTION

The applicant was based in the United Kingdom from the year 2000 until her return in 2018. She applied for an immigrant's rebate. While she was allowed a rebate for other goods she was denied the same for a motor vehicle. Aggrieved by that decision the applicant seeks a declaratory order and other consequential relief.

The application is opposed. The respondent has also raised a preliminary point that of prescription which is subject of this ruling.

The issue for determination is whether or not the applicant's claim has prescribed. On the other hand the applicant argued that a claim that is declaratory in nature is not susceptible to prescription. In any event it was further argued that s 196(1) of the Customs and Excise Act [*Chapter 23:02*] was unconstitutional.

PRESCRIPTION

Section 196 of the Customs and Excise Act, [*Chapter 23:02*] (the Act) provides that:

> "(1) 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*].
>
> (2) Subject to subsection (12) of section *one hundred and ninety-three*, any proceedings referred to in subsection (1) shall be brought within eight 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." (emphasis is mine).

There are two peremptory requirements in this section for an applicant who brings an action against the respondent. The first one is the need to give 60 days notice of one's intention to sue. The second is such action must be brought within 8 months after the cause of action has arisen.

It is not in dispute that the cause of action arose on 12 March 2020 and that the applicant instituted these proceedings on 9 June 2021. This is a period in excess of 8 months, to be precis it's a period of 14 months 28 days. Ms *Dhlakama* for the applicant argued that due to Covid 19 lockdowns and some practice directions by the court the period of 8 months had not yet expired. It was such a generalized argument by counsel short of assisting the court in the exact calculation of the period. The argument did not show that applicant acted within the required 8 months period.

In any event applicant failed to show that she issued a notice of intention to sue which is one of the mandatory requirements.

The applicant took issue with s 196 of the Act from two angles. The first one is that the claim is not susceptible to prescription. The second angle of applicant's argument was that s 196(1) of the Act is *ultra vires* s 56(1) as read with s 68(1) and 69(3) of the Constitution 2013.

WHETHER A CLAIM THAT IS DECLARATORY IN NATURE IS NOT SUSCEPTIBLE TO PRESCRIPTION

Section 14 of the High Court Act [*Chapter 9:06*] under which this application was brought reads 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".

Mr *Marange* for the respondent argued that applicant had no existing or future right to protect because her claim has prescribed by virtue of s 196(2) of the Act. He further relied on the case of *Dube* v *ZIMRA* HB 2/14 in which the court said:

> "The rights that the applicant sought to invite this court to determine were prescribed and extinguished. Cadit questio. There are no existing, future or contingent rights to determine. The court will not decide abstract, academic or hypothetical questions unrelated to any existing, future or contingent right. See Munn Publishing (Private) Limited v Zimbabwe Broadcasting Corporation 1995 (4) SA 675 at page 680A… The fact that she is seeking a declaratur does not entitled her to disregard the above peremptory provisions of the Customs and Excise Act under which she sought to found her rights in the first place. She must comply with the law."

In response Ms *Dhlakama* for the applicant relied on the earlier judgment of this court in *Ndlovu* v *Ndhlovu & Anor* 2013 (1) ZLR 110 (H). Apart from citing this case in the written

heads in support of the argument that a declaratory is not susceptible to prescription, no further oral argument was advanced to demonstrate that position. A party who relies upon a precedent has a duty to demonstrate how such case is relevant as authority to his/her own situation. In any event the circumstances of Ndlovu case are distinguishable from the present case in that the court was called to interpret a provision of the Prescription Act on a claim which was based on the fact that the sale was *null* and *void ab initio.*

I am not satisfied that the applicant has raised a valid legal point such as to exclude the application of prescription based on the relief of a *declaratur.*

WHETHER SECTION 196 (1) OF THE ACT IS *ULTRA VIRES* SECTION 56 (1) AS READ WITH SECTION 68 (1) AND 69 (3) OF THE CONSTITUTION, 2013

Section 196(1) of the Act makes it mandatory for the applicant to give 60 days notice of intention to sue. *In casu* the applicant did not do so hence her challenge about the constitutionality of that provision.

Section 56(1) of the Constitution provides that:

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

Section 68(1) of the Constitution provides that:

> "(1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, pro-portionate, impartial and both substantively and procedurally fair".

Section 69(3) provides that:

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

It is on the basis of these constitutional provisions that the applicant argued that s 196 (1) of the Act which requires the giving of 60 days notice, is unconstitutional because it violates the right to equal protection and benefit of the law.

Ms *Dhlakama* also relied upon s 2(1) of the Constitution which states that:

> "(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency."

Having cited the above constitutional provisions, Ms *Dhlakama's* argument was that the requirement to give notice was not a justifiable limitation as it puts the parties in an unequal position. She relied on the case of *Mangwiro* v *Minister of Justice* which she cited without full citation. She urged the court to declare s 196(1) of the Act as invalid.

The Mangwiro case whose full citation is *Mangwiro* v *Minister of Justice, Legal and Parliamentary Affairs*, HH 172/17 dealt with the issue of whether or not s 5(2) of the State Liabilities Act, [*Chapter 8:14*] is inconsistent with the Constitution of Zimbabwe and therefore invalid. Section 5(2) is an immunity from execution limitation clause. On the other hand s 196(1) of the Act does not grant immunity but is a necessary provision for the proper administration of justice when dealing with State institutions. I agree with Mr *Marange* on this observation. The applicant failed to comply with the mandatory provision to give notice.

DISPOSITION

The application be and is hereby dismissed with costs.

Tafadzwa Ralph Mugabe Legal Counsel, applicant's legal practitioners
ZIMRA Legal Services Division, respondent's legal practitioners