PAYLOADS (PVT) LTD
and
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 3 October & 8 December 2022

Opposed Matter

Mr *A Chimhofu*, for the applicant
Mr *S Bhebhe*, for the respondent

MANGOTA J: On 1 September, 2021 the defendant's customs officials placed the plaintiff's truck and trailer under notice of seizure. The truck, 2012 Freightliner Columbia Horse, bears registration number AEZ 0647. It was pulling a 2012, Henred Tridem Trailer which bears registration number AFJ 8260.

The defendant's officials intercepted the truck and trailer at Forbes Border Post. It was en route from Mozambique to Zambia through Zimbabwe. It was carrying fertilizer (DAP) bags to Lusaka.

The fertilizer consignment was duly declared. Duty was paid for it before it was cleared on bill of entry number S 3184. It was when the defendant's officials searched the truck that they discovered that, apart from the declared and cleared fertilizer, the truck was carrying 36 bags of marijuana and 3 bales of second-hand clothes which had not been declared. The discovered goods resulted in the defendant's officials placing the truck and trailer under seizure. It was seized under notice of seizure No. 0030721.

On 17 January, 2022 the plaintiff wrote notifying the defendant of its intention to sue the latter. It did so in terms of s 196 of the Customs and Excise Act [*Chapter 23:02*].

On 23 July, 2022 the plaintiff sued the defendant. It instituted its action under case number HC 4943/22. It moved for certain declaraturs which, in substance, boiled down to the return to it of its truck and trailer.

The defendant entered notice of appearance to defend and raised two special pleas to the claim of the plaintiff. These are that:

a) the notice which the plaintiff gave in terms of s 196 of the Customs and Excise Act is fatally defective – and
b) the plaintiff's claim prescribed in terms of ss 193(12) and 196(2) of the Customs and Excise Act.

The special pleas which the defendant raised constitutes its cause of action for this part of the case. It moves me to dismiss the plaintiff's claim with costs. It premises its motion on the plaintiff's alleged defective notice of intention to sue and/or the alleged prescription of the plaintiff's claim.

The plaintiff, on the other hand, claims that the notice which it gave of its intention to sue the defendant was/is compliant with s 196 (1) of the Customs and Excise Act. It insists that, if the same is not 100% compliant with the provisions of the Act, there was substantial compliance with the Act and this, it suggests, makes the proceedings which it instituted properly before the court. It denies that its claim has prescribed as the defendant asserts.

Section 196(1) of the Customs and Excise Act [*Chapter 23:02*] ("the Act") is relevant to the defendant's first special plea. It deals with the need on the part of the plaintiff or applicant who wants to sue the defendant or the respondent in terms of the Act to notify the latter of its intention to sue. It reads:

> "No civil proceedings shall be instituted against the State, the Commissioner or an officer under the 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*]."

The long and short of the above-cited provision of the Act is that a person who intends to sue the State, the Commissioner or an officer who falls under the Act can only do so after he has given notice of sixty days to the person or authority whom he wants to sue. It follows, from the observed matter, that where the plaintiff and/or the applicant sues any of the mentioned persons without having given him notice for a period of sixty days, the suit which is so instituted is a none of event. It is a nullity. It is a nullity because of its direct contravention with the peremptory provisions of the Act.

It is a fundamental principle of our law that a thing which is done contrary to the direct prohibition of the law is void and of no force or effect. ….And the disregard of a peremptory provision in a statute is fatal to the validity of the proceedings affected: *Schierhout* v *Minister of Justice*, 1926 AD 99 at 109.

In stating as it did, the court was only re-emphasizing what Maxwell stated in his Interpretation of Statutes, 7th edition, p 316 wherein the learned author remarked that:

"…..failure to comply with a peremptoy requirement is usually presumed to entail a nullity."

Machacha v *Zimbabwe Revenue Authority*, HB 186/11 explains why the sixty-days' notice should be given to the defendant or the respondent by the plaintiff or applicant. It states that the primary objective of the notice is to afford the defendant or respondent the time to investigate material facts upon which its actions are challenged as well as to afford it the opportunity to protect itself against the consequences of possible wrongful action by tendering early amends as envisaged in the Act. …Failure to give notice is therefore fatal to the cause of the plaintiff or the applicant.

That the plaintiff gave notice of its intention to sue the defendant requires little, if any, debate. The letter which its erstwhile legal practitioners wrote to the defendant on 17 January, 2022 Annexure A to the plaintiff's replication, is clear testimony of the stated matter. It is for the mentioned reason, if for no other, that the plaintiff maintains the position that adequate notice of intention to sue was given to the defendant.

The annexure appears at p 28 of the record. It notifies the defendant of the plaintiff's intention to review the decision of the defendant in terms of the Administrative Justice Act [*Chapter 10:28*]. The plaintiff's intention to review the decision of the defendant is premised on the ground that the decision in question is so grossly unreasonable that it should not be allowed to stand. It should, according to the notice, be set aside with the result that the plaintiff's truck and trailer should be returned to it.

The defendant's submission is that the notice which the plaintiff gave to it relates to an application for review and not an action for a declaratur which the plaintiff filed. The notice, it argues, is in respect of a cause of action which is different from the one which the plaintiff pleaded in its papers. The letter of 17 January 2022, it insists, is misleading in that it does not relate to the correct nature of the plaintiff's intended cause of action. It submits, further, that the

notice does not enable it a timely opportunity to investigate the plaintiff's cause of complaint as well as to protect itself. It insists that the plaintiff's failure to give proper notice which is compliant with s 196(1) of the Act is fatal to the latter's cause.

The plaintiff's statement in respect of the issue which the defendant raised is that the notice complies with the requirements of the Act. It admits that the letter makes reference to an application for review and that the proceedings which it instituted are for a declaratur. It claims that the stated matter does not change the import of the notice in the context of s 196(1) of the Act. It pleads that, where a finding which is to the effect that the notice is not compliant with the section of the Act is made, the notice is in substantial compliance with the Act.

Whether or not the objection of the defendant lacks merit as the plaintiff is suggesting does, in a large measure, depend on the interpretation which must be placed on s 196(1) of the Act. Where the words of the Act are clear, as they appear to be *in casu*, they should be taken as they are. The Supreme Court provides a clear and unambiguous interpretation of the section 196(1) of the Act. It does so in *Care International Zimbabwe* v *Zimbabwe Revenue Authority & 2 Ors*, SC 76/17 in which it remarked that:

> "……it is not just the failure to give notice that a court can take cognizance of. The failure to provide sufficient detail on the cause of action in compliance with the requirements of the provision may also result in the court declining to hear the plaintiff or the applicant, as the case may be. 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 question which begs the answer is: can the notice which the plaintiff gave to the defendant on 17 January, 2022 be said to have afforded the defendant sufficient facts to enable the latter to investigate, decide as well as to either settle or defend the claim of the plaintiff. The answer to the hypothetical question which has been posed is, in my view, in the negative. It is in the negative because, whilst the plaintiff made the defendant to focus its attention on the grounds of review vis-à-vis the decision which it made, the plaintiff changed goal posts without any notice to the defendant. It sued for a declaratur instead of reviewing the decision which the defendant had made.

The plaintiff does not explain its sudden change of course. It stated one thing in the notice and did a completely different thing in the suit. It, in short, communicated to the

defendant one matter and did something else which the defendant was not prepared for. The defendant could not have prepared its mind for a declaratur when the notice which the plaintiff forwarded to it invited it to prepare its mind for a review. The ambush which the plaintiff did on the defendant only serves to show its unwholesome intention which the court cannot condone let alone accept.

Nothing turns on the plaintiff's allegation which is to the effect that the defendant did not plead that its conduct caused it to suffer prejudice. On the principle of *res ipso loquitor*, the prejudice which the defendant stands to suffer speaks for itself. It does not have to be pleaded. It is as clear as night follows day that a party who invites another to a cause of action from which he departs in preference to another cause which is materially different from the former cause inflicts serious prejudice on his victim.

That the conduct of the plaintiff is prejudicial to the defendant requires little, if any, debate. Prejudice, under the observed set of circumstances, is not fanciful but real. The circumstances speak for themselves. They show the prejudice which the defendant stands to suffer when, as is evident *in casu*, the defendant is, by dint of trick of the plaintiff, placed into such an invidious position as the plaintiff created for it.

It is trite that a review is materially different from a declaratur. A review speaks of such procedural irregularities as bias, lack of jurisdiction and/or other matters which relate to its specific import. A declaratur, on the other hand, relates to the rights of a person-natural or legal. It deals with that person's existing, future or contingent rights. The two areas of law are, though related, totally exclusive of each other. The cause of action for a review is not the same as that of a declaratur. The two causes are mutually exclusive of each other.

The plaintiff's statement which is to the effect that it made substantial compliance with s 196(1) of the Act does not hold. It does not because the plaintiff itself does not explain what it means when it alleges that its notice is in substantial compliance with the provisions of the Act. The provision under which the notice is to be given does not define the meaning and import of the phrase 'substantial compliance'. The phrase does not even exist in the provision of the Act. The provision itself does not make any reference to what the plaintiff describes as substantial compliance. It refers to strict compliance. It is peremptory, and not directory, in nature. It

admits of no discretion on the part of the court. It demands clear and strict compliance. It admits of no exception.

The plaintiff's reliance on s 6(2) of the State Liabilities Act [*Chapter 8:15*] cannot assist its cause at all. It cannot do so because subsection (2) of the section (6) places emphasis on the plaintiff's cause of action. It reads:

> " A notice referred to in subsection (1) –
>
> a) Shall be given to each person upon whom the process relating to the claim is required to be served; and
> b) Shall set out the grounds of the claim; and
> c) Where the claim arises out of goods sold and delivered or services rendered, shall specify the date and place of the sale or rendering of service and shall have attached copies of any relevant invoice and requisition, where available; and
> d) Where the claim is against or in respect of an act or omission of any officer or employee of the State, shall specify the name and official post, rank or number and place of employment or station of the officer or employee, if known."

The word "*claim*" which appears in paragraphs (a) to (d) of subsection (2) of section (6) of the State Liabilities Act refers to nothing else other than the cause of action of the plaintiff or the applicant. It matters not, therefore, whether or not the notice which is required to be given by s 196(1) of the Act is in terms of the State Liabilities Act as the plaintiff seems to suggest. Whether the notice is given in terms of the State Liabilities Act or the Customs and Excise Act the end result is the same. The end result relates to the cause of action of the plaintiff or the applicant. In the current proceedings, the plaintiff's cause of action was, as has already been observed, materially different from its initial cause of action. This, therefore, makes the notice which it forwarded to the defendant defective.

The plaintiff's last leg on this aspect of the case is that, if the notice which it gave to the defendant is not 100% compliant with s 196(1) of the Act, it be condoned for its infractions. It places reliance on s 6(3) of the State Liabilities Act in the mentioned regard. The section provides that:

> "The court before which any proceedings referred to in subsection (1) are brought may condone failure to comply with that subsection where the court is satisfied that there has been substantial compliance therewith or that failure will not unduly prejudice the defendant."

The Legislature, it is observed, conferred a discretion on the court to condone the plaintiff's failure to comply with s 6(1) of the State Liabilities Act subject to it being satisfied of two matters. These are that:

i) the plaintiff has made substantial compliance with subsection (1) of the State Liabilities Act – and
ii) the plaintiff's condonation by the court does not prejudice the defendant.

What is evident is that the Legislature did not make any provision for condonation of failure by the plaintiff or the applicant to comply with s 196(1) of the Customs and Excise Act. It made the section peremptory. I cannot, in view of the observed matter, import s 6(3) of the State Liabilities Act into s 196(1) of the Act. The two pieces of legislation, though related, are different from each other. One provides for condonation and the other one which is relevant to these proceedings does not. Further, as has already been stated in the foregoing paragraphs of this judgment, s 196(1) of the Act does not make any reference to substantial compliance which is part and parcel of s 6(3) of the State Liabilities Act. Given that the conduct of the plaintiff, as has been found, remains prejudicial to the defendant, no condonation is available to the plaintiff.

Ebrahim v *Controller of Customs and Excise*, 1985 (2) ZLR 1 (S) upon which the plaintiff places further reliance appears to have been over-ruled *by Care International in Zimbabwe* (*supra*). It is in the latter case that the Supreme Court took a position which is in consonant with s196 (1) of the Act. Given that the decision in *Ebrahim* (*supra*) was/is premised on s 178 which was repealed and substituted with section 196(1) of the Act, it stands to reason and logic that the law as enunciated in *Care International in Zimbabwe* which was decided on the basis of s 196(1) of the Act would appear to hold more sway than does the law which is premised on the repealed provision of the Act.

It is evident, from a reading of the above expose' that the notice which the plaintiff gave to the defendant cannot be regarded as valid. It has all the footprints of a very defective notice. It is, in short, fatally defective.

The defendant's second special plea is that of prescription. Prescription is a defence which is available to the defendant or the respondent. He raises it as soon as he realizes that the plaintiff or the applicant has filed his suit outside the time which the law prescribes for filing of the same. The main piece of legislation which deals with the defence of prescription is the

Prescription Act. It lays down prescriptive periods within which the plaintiff or the applicant must institute his suit. It does so within its s 15.

Where the plaintiff or the applicant sues outside the periods which are stipulated in paragraphs (a) to (d) of s 15 of the Prescription Act, the defendant's plea of prescription more often than not holds unless the prescriptive period which is relevant to the cause of the plaintiff or applicant has, in some way or other, been interrupted. Other pieces of legislation which deal with prescription are, for instance, the Customs and Excise Act. It provides, in s 193(12) that the person from whom the articles have been seized or the owner thereof may institute proceedings within three months of the notice being given to him or published in terms of subsection (11) after which no such proceedings may be instituted. It also provides, in s 196(2) of the Act that any proceedings against the defendant and its officials may be brought only within eight months after the cause thereof arose.

The two prescriptive periods which are contained in one and the same Act are a source of confusion not only to the plaintiff or the applicant but also to the defendant or the respondent. It makes little, if any, sense that one piece of legislation has two periods of prescription. Clarity is, therefore, necessary so that the apparent confusion is not allowed to remain lingering in the minds of litigants.

In casu, the defendant's position is that the plaintiff's claim is predicated on an alleged wrongful act which was perpetrated on 1 September, 2021. It alleges that the plaintiff's cause of action arose on 1 September, 2021. It insists that the plaintiff should have instituted its claim within three months which are calculated from 2 September, 2021 or, in the alternative, within eight months which are calculated from the mentioned date. It remains of the view that the plaintiff's claim against it has been extinguished by prescription.

The plaintiff's position on the matter at hand is to the contrary. It claims that proceedings which it instituted on 25 July, 2022 were brought to court within the period of eight months. It ventured an incomplete explanation of the prescriptive period of three months which is laid down in the Act. It did so in para 24 of its replication.

The respective arguments of the parties spell out the confusion which relates to this part of the case. None of them was/is able to put clarity to its stated position. Each swallows some

very pertinent words which relate to either the three, or the eight, months- period. Each party fails to place its arguments into context.

The principles which are laid down in the Prescription Act [*Chapter 8:11*] ("the Act") are relevant to the resolution of the parties' dispute. Section 16 of the same provides that prescription shall begin to run as soon as a debt is due. The interpretation section of the Act defines a debt to refer to anything which may be sued for or claimed by reason of an obligation which arises from statute, contract, delict or otherwise. It states, in subsection (3) of s 16, that a debt shall not be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises.

Applying the above-mentioned principles of the Act to the circumstances of the present case, it is clear that the plaintiff became aware of the identity of the defendant and of the facts from which its truck and trailer were seized on 1 September, 2021. It, accordingly, had to engage the defendant from 2 September, 2021. If it did not do so, it could not embark upon those internal proceedings after 2 December, 2021. Its right to claim the truck and trailer from the defendant would have prescribed after the lapse of three months without any action on its part. Section 193(12) of the Act would have prohibited it from exhausting its domestic remedies which were available to it, so to speak.

The plaintiff, the record reveals, engaged the defendant as soon as the latter seized its truck and trailer. The letters, Annexures B and C, which it attached to its replication bear evidence of the stated matter. They appear at pp 30 and 31 of the record respectively.

The plaintiff's unchallenged statement is that the decision by the defendant against releasing its truck and trailer in terms of s 193(6)(a) was communicated to it on 29 November, 2021. It is for the mentioned reason, if for no other, that it wrote to the defendant in terms of s 196(1) of the Act. It did so after it realized that its intention to exhaust internal remedies within the three –months period which is stipulated in s 193(12) of the Act yielded no positive result. It, therefore, proceeded to approach the court with a view to dealing with its cause in terms of s 196(2) of the Act. It could not sue under the mentioned section before the defendant had advised it that its truck and trailer would not be released to it. Its cause of action for purposes of these proceedings arose on 29 November, 2021.

Given that the plaintiff became aware of the defendant's decision on 29 November, 2021 and it sued the defendant on 25 July, 2022 its suit was within the prescriptive period which is stipulated in s 196(2) of the Act. The eight-months period would have expired on 29 July, 2022 or on any date thereafter.

The defendant's plea of prescription cannot hold. It cannot hold in terms of s 196(12) which relates to the prescriptive period of three months. Nor can it hold in terms of s 196(2) which relates to the prescriptive period of eight month. Its plea of prescription is therefore not available to it.

Prescription, it is observed, is a complete defence. It is either black or white. It is not gray in colour at all. It has either run its course or it has not. It cannot be both. *In casu*, prescription did not run its course. The plaintiff's suit is, from the perspective of the defence of prescription, not available to the defendant.

On the strength of the above-analyzed matters, the defendant's special pleas succeed in one part and fail in another part. In the result:

a) The defendant's special plea which relates to the notice of intention to sue is upheld and the matter, HC 4943/22, is struck off the roll;
b) The defendant's plea of prescription is dismissed;
c) Each party meets its own costs.

Masiya-Sheshe and Associates, applicant's legal practitioners
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