

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

2012/HPA/0022

**BETWEEN:****ZAMBIA REVENUE AUTHORITY****APPELLANT**

AND

**FELIMART INVESTMENT LIMITED****RESPONDENT**

Before the Hon. Mrs. Justice A. M. Banda-Bobo in Chambers on the 11<sup>th</sup> day of August, 2014.

**FOR THE APPELLANT:**

Ms. S. Zimba, Legal Officer of ZRA

**FOR THE RESPONDENT:**

Mr. S. M. Dzekedzeke of Dzekedzeke &amp; Co.

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**J U D G M E N T**

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**Cases referred to:**

1. *Vancouver (City) v British Columbia (Assessment Appeals Board)* (1996) B. C. J. 1062 (CA)
2. *Natural Valley Ltd v ZRA*, 2011/RAT06/C & E
3. *Mohammed Hussen v ZRA* (1999/RAT/13)
4. *The Attorney-General v Steven Luguru*, SCZJ No. 20 of 2001
5. *Howard v Baillie* 2HB1
6. *Holman v Ford Motors Co.* 239 50.2d 40,43
7. *Ancor Security v Zambia Revenue Authority* 2013/HPC/0398\*
8. *Zambia Revenue Authority vs. Ancor Security Limited*/2013/HPCA/143
9. *Sonny Mulenga and Others vs. Investrust Merchant Bank Limited* [1999] ZR 101 (SC)
10. *M/S Maheshwari Agro Industries vs. Union of India and Others* No. 1264/2011 of 15<sup>th</sup> December, 2011

**Legislation and other authorities referred to:**

- *Revenue Appeals Tribunal Act No. 11 of the 1998*
- *Revenue Appeals Tribunal Regulations, Statutory Instrument No. 143 of 1998*
- *Customs Excise Act Chapter 322 of the Laws of Zambia*
- *Customs and Excise (Amendment) Act No. 2 of 2001.*
- *Tax Appeals Tribunals Act, Cap 345 of the Laws of Uganda*
- *Interpretation and General Provisions Act*
- *Halsbury's Law of England, 3<sup>rd</sup> Edition Volume 9, at page 581*
- *Wade. (2000).Administrative Law.(8<sup>th</sup> Edition). London: Sweet and Maxwell*
- *High Court Act, Chapter 27 of the Laws of Zambia*
- *Subordinate Court Act Chapter 28 of the Laws of Zambia*
- *Halsbury's Law of England, Volume 44(1) 4<sup>th</sup> Edition*

This is an appeal against the Ruling of the Revenue Appeals Tribunal ("**The Tribunal**") that it has inherent, implied and ancillary powers to grant Stays against the recovery of disputed demand of tax whilst seised of an appeal. For the appeal in question, which the record will show, was concerned with Customs and Excise, the Tribunal placed reliance on **Section 5 (2) (f) of the Customs and Excise (Amendment) Act, No.2 of 2001** which reads as follows:

***"The Tribunal shall hear and determine appeals under this Act in respect of any of the following matters:.. (f) any other matter against which an appeal shall lie under this Act"***

The appellant filed one ground of appeal namely that:

***The learned honourable Chairman and members of the Tribunal erred in law and in fact when they held that the Revenue Appeals tribunal, whilst seised of an appeal, has inherent implied and ancillary powers to grant Stays against the***





***recovery of disputed demand of tax notwithstanding that both the Revenue Appeals Tribunal Act No. 11 of 1998 and Revenue Appeals Regulations of 1998 do not expressly provide for the power to grant stays.***

Both parties relied on their written submissions.

Appellant's counsel submitted that the question for the Court's determination is whether the Tribunal ***has inherent, implied and ancillary*** powers to grant Stay of Execution against recovery of disputed demanded tax whilst seised of an appeal.

In coming to the said decision, the Tribunal relied on the provisions of **Section 25 of the Interpretation and General provisions Act, Chapter 2 of the laws Zambia** as read with the provisions of **section 5(2) (f) of the Customs and Excise (Amendment) Act, No. 2 of 2001** and ruled that it has such power.

Counsel contended that by reaching the conclusion that it did, the Tribunal ignored a cardinal principal of the rule of law namely that an administrative tribunal can only exercise such powers as are expressly conferred in the governing legislation. In counsel's view, tribunals are statutory bodies established only by legislation and only have authority to grant orders as provided for in their enabling legislation. Following on this, counsel contended that if it is the intention of the legislation that the Tribunal must have certain powers, such powers must be expressly set out in the enabling legislation. This Court was referred to the case of **Vancouver (City) vs. British Columbia (Assessment Appeal Board)**<sup>1</sup> and **Section**

**28(1) of the Tax Appeals Tribunal Act, Chapter 345 of the Laws of the Republic of Uganda** which explicitly provides for power of the Uganda Tax Appeals Tribunal to grant stays of execution. Further reference was made to the case of **Natural valley limited v. ZRA**<sup>2</sup> in which the Tribunal itself held that it did not have authority to allow a process that is not provided for in the Act as doing so would be *ultra vires* the Act. In counsel's view, the Tribunal was right in that case in refusing to grant Natural Valley limited a default judgment on the premise that the **Revenue Appeals Tribunal Regulations of 1998** do not provide for the process of default judgment. On the basis of the foregoing authority, counsel submitted that the Tribunal has no authority to grant a stay of Execution because the power to grant the stay of Execution is not explicitly provided for in **the Revenue Appeals Tribunal Regulation of 1998**. Granting the Stay of Execution when there is no express power to do so, counsel submitted, is *ultra vires* the enabling legislation. Further reliance was placed on the reasoning of the Tribunal itself in the case of **Muhammed Hussein vs. Zambian Revenue Authority**<sup>3</sup>, wherein the Tribunal declined to issue a writ of *fieri facias* for the reason that the enabling statute did not give the Tribunal jurisdiction to issue a *Writ of fieri facias*.

In addition, counsel submitted that both **the Revenue Appeals Tribunal Act** and the **Revenue Appeals Regulations** do not provide for power of the Tribunal to grant Stays of Execution. For this reason, or so went counsel's argument, the power of the Tribunal to grant Stays of Execution cannot be inferred or implied. To buttress this



point, counsel drew the Court's attention to **Sir Wade in his book Administrative Law (2000) (8<sup>th</sup> edition)**.

Counsel contended that since no tribunal can be given power to determine legal issues except by an Act of Parliament, the Act of Parliament creating the tribunal must make clear what the powers of the tribunal are. Counsel contended that the Tribunal misdirected itself when it stated as follows:

***“Although the authority to grant Stays of Execution may not be express from the Act, it certainly cannot be said that there is no such implied authority”.***

Counsel's interpretation of **Section 5(2) of the Customs and Excise Act** was that it gives the Tribunal powers to hear and determine matters within its jurisdiction as provided in **Section 5(2) (a) (b) (c) (d) (e)** and all these matters are within the jurisdiction of **the Tribunal in Section 3 of the Revenue Appeals Tribunal Act**. On this score or as counsel saw it, the Tribunal can hear and determine such matters within its jurisdiction. However, and according to counsel that authority cannot be inferred on matters on which the Tribunal has no authority to adjudicate.

Counsel went so far as to assert that **Section 25 of the Interpretation and General provisions Act, Chapter 2 of the laws of Zambia** relied upon by the Tribunal was quoted and used out of

context. In the present case, counsel explained, the Tribunal has no powers to enforce anything under the Act. As such, the Tribunal cannot imply power or issue Orders for Stay of Execution.

Reference was made to the case of **The Attorney general vs. Steve Luguru**<sup>4</sup> to further augment the present case, that the Tribunal has no jurisdiction to grant an Order of Stay of Execution.

According to counsel, the case of **Howard vs. Billie**<sup>5</sup> which the Tribunal relied on is distinguishable from the present case. As counsel saw it, while the **Howard case (supra)** dealt with what was set out in a Deed, the current case relates to powers under a piece of legislation.

It was contended that while the High Court Rules contained in the **High Court Act, Chapter 27 of the Laws of Zambia** and **Subordinate Court Act Chapter 28 of the Laws of Zambia** provide for the grant of Order of Stay of Execution by the High Court and Subordinate Court respectively, **the Revenue Appeals Tribunal Act** does not provide the Tribunal with power to grant Orders of Stay of Execution. Counsel therefore reasoned that the Tribunal, unlike the courts of law, cannot and does not possess the inherent and implied jurisdiction as it held.

Counsel urged this Court to note that **the Customs and Excise Act, Chapter 322 of the Laws of Zambia** demands that revenue must be collected and if it is established that there was an over payment, in



this case by the Respondent, the overpaid amount will readily be refunded in accordance with **Section 92 of Customs and Excise Act**. The lack of a Stay of Execution does not in any way prejudice the Respondent in that once all conclusive evidence is adduced to the appellant an assessment will be made accordingly and if need be the respondent will be refunded.

Counsel urged this Court to hold that the Tribunal has no power to grant any Orders for Stays of Execution because the enabling legislation does not provide for such power.

In response, Respondent's counsel submitted that the appellant had wrongly relied on the provisions of **The Revenue Appeals Tribunal Act**. It was argued that the Tribunal is given the power to grant orders and the Act is clear that granting of an order to stay is ancillary to the function that the Tribunal can do. The appellant, counsel asserted, had attempted to mislead the Court to believe that the doing of the act only relates to the acts that should be done in pursuance of enforcement of an order. In counsel's view though, the correct position and interpretation is that the Tribunal is given powers to do an act that is reasonably necessary to maintain the status quo or an act that is envisaged to be a measure aimed at enforcing a judgment. My attention was drawn to the learned author of **Garner's Administrative Law 6<sup>th</sup> Edition** which according to



counsel at page 10 provides:

*“In a wide range of circumstances, ‘punishment’ or ‘suffering in a body or goods’ may be imposed not by the ‘ordinary courts’, but by the tribunal specially established for particular types of cases”.*

Counsel therefore submitted that the Tribunal has the power to punish and it is envisaged that the power to punish will have the ancillary powers that are meant to effect execution of judgment or otherwise and stay of execution or injunction is such a power that the Tribunal may exercise.

In counsel's view, the question for this court's determination is whether the Tribunal has inherent, implied and ancillary powers to grant a stay of execution against recovery of disputed demand of tax whilst seised of an appeal. The Tribunal's implied authority, counsel insisted, is derived from the wording of **Section 3 of the Act**.

Counsel sought to and relied on **Section 5(2)(f) of the Customs and Excise (Amendment) Act No. 2 of 2001** arguing in the main that the foregoing section ensures that all ancillary matters are capable of being attended to. This, counsel argued, need not have been listed exhaustively in the Act.

Counsel disagreed with the assertion that by relying on the provisions of **Section 25 of the Interpretation and General**

**Provisions Act, Chapter 2 of the Laws of Zambia**, the Tribunal ignored a cardinal principle of the Rule of law namely that an Administrative Tribunal can only exercise such powers as are expressly conferred in the governing legislation.

It was asserted that the object of statutory interpretation is to find out what the intention of the legislation was. To augment this argument, the Court's attention was drawn to the **Halsbury's Law of England volume 44(1) 4<sup>th</sup> Edition paragraph 1327**. While agreeing entirely with the principle of general Interpretation of statutes, counsel argued that this principle is only applicable where the interpretation is ambiguous, vague and in doubt.

It was further argued that the court interpreting statutes will in appropriate cases identify the mischief intended to be suppressed and once that has been identified, everything should be held in favour of advancement of suppression of that mischief (**see: paragraph 1474 Halsbury's Laws of England (supra)**).

According to counsel, in this instance the mischief intended to be cured by the establishment of the Tribunal was the determination of grievances against the decision of the appellant.

It was further contended that if the power to enforce judgment and orders of the Tribunal cannot be inferred, then **Section 25 of the Interpretation and General Provisions Act**, is the answer.



Counsel's view therefore, was that although the power to grant the Stay of Execution may not be as express from the Act, it certainly can be said that there is such implied authority. The jurisdiction of the Tribunal in respect of the Value Added Tax appeals is to be found in **Section 3(b) of the Revenue Appeals Tribunal Act No.11 of 1998.**

Counsel submitted that the Tribunal has the power to stay decisions made by bodies that they have jurisdiction over. Reference was made to the case of **Holman vs. Ford Motor Co SO.**<sup>6</sup> wherein it was stated that an order would be empty if orders and judgments could not be stayed pending review. In terms of the appeal before the tribunal therefore, it cannot be said that the Revenue Appeals Tribunal does not have jurisdiction.

My attention was further drawn to the case of **Armcor Security vs. Zambia Revenue Authority**<sup>7</sup> where Armcor applied for the stay of execution of the assessment pending determination of the appeal which application was granted.

In sum counsel urged this court to uphold the Stay until disposal of appeal because the tribunal has jurisdiction to grant any orders for stay of execution.

In reply, appellant's counsel largely rehashed submissions earlier made mainly that the Tribunal has no jurisdiction whether express, implied or ancillary to grant an order of stay of execution.

Counsel contended that the Tribunal is an administrative agency and not a Court of the Law and thus has no inherent jurisdiction and any order it grants must be stated in the enabling legislation.

According to counsel, only this Court has inherent jurisdiction, that is, a jurisdiction derived from the authority of **the Constitution of the Zambia, Chapter 1 of the Laws of Zambia. Article 94, of the Constitution** which enables the Court to have power to make orders beyond those that are provided by the statute. Implicitly, or so the argument went, since the Tribunal is an administrative agency established only by legislation, it cannot exercise power it doesn't have under the legislation.

Reference was made to **Maxwell on interpretation of the statutes at 75** which state that; *"the rule of construction is to intend the legislature to have meant what they have actually expressed"*. Counsel submitted that the intention of the legislature therefore could not have intended to grant the Tribunal the power to Stay execution.

My attention was drawn to the case of **Muhammed Hussein vs. Zambia Revenue Authority**<sup>3</sup>, where it was held that the jurisdiction



of the Tribunal is to be found in the enabling statute. Further, that the enabling statute is clear and unambiguous in that the Tribunal cannot grant a stay pending the hearing of an issue.

As counsel saw it, the fact that the **Revenue Appeals Tribunal Act and Regulation** do not expressly provide for power to grant Stays of Execution entails that the Tribunal has no jurisdiction so to do. According to counsel, in the case of **Zambia Revenue Authority vs. Armcor Security Limited/2013/HPCA/143**<sup>8</sup>, the Court held that:

***“The Tribunal has no inherent jurisdiction to grant stays of proceedings/execution. There are no express provisions empowering the Tribunal to grant a stay...”***

Counsel reiterated her submission that the tribunal has no jurisdiction, express or implied, to grant an order of Stay of execution and that this Court upholds the present appeal and set aside the order staying execution with costs.

I have carefully considered the submissions, I have also seriously applied my mind to the Ruling on the record of appeal which was appealed against and examined the authorities to which my attention was drawn by both counsel.

Ignoring arguments on the periphery for a moment, the decision in this appeal turns on the question of whether the Revenue appeals

Tribunal has, as aforesaid, whilst seised of an appeal, inherent implied and ancillary powers to grant Stays against the recovery of disputed demand of tax notwithstanding that both the **Revenue Appeals Tribunal Act No. 11 of 1998** and **Revenue Appeals Regulations of 1998** do not expressly provide for the power to grant stays.

**Black's Law Dictionary (2009), 9<sup>th</sup> Edition at page 1548** defines a "Stay" as:

- "(a) The postponement or halting of proceeding, Judgment, or the like; or*
- (b) An Order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding."*

**The Revenue Appeals Tribunal Act No. 11 of 1998** creates the Tribunal. The preamble to that Act states as follows:

*"An act to establish the Revenue Appeals Tribunal to hear appeals under the Customs and Excise Act, the Income Tax Act and the Value Added Tax Act; to repeal the provisions relating to appeals under the Customs and Excise Act, the Income Tax Act and the Value Added Tax Act; and to provide for matters connected with or incidental to the foregoing."* (emphasis added by Court)



Section 3 of the same Act in parts relevant to this appeal provides as follows:

***"There is hereby established the Revenue Appeals Tribunal whose functions shall be-***

***(a) to hear and determine appeals under the Customs and Excise Act in the following circumstances:***

***(i) where an importer of any goods is of the opinion that the goods are incorrectly classified by the Commissioner-General under any item of the Customs Tariff and the importer, pays the amount demanded as duty by the Commissioner-General or furnishes security to the satisfaction of the Commissioner-General for the payment of the amount, and the importer appeals to the Tribunal against such classification within three months after the payment of such amount or furnishing of such security;***

***(ii) where a person who intends to import goods or manufacture goods within Zambia and is of the opinion that the goods of the class or kind that the person intends to import or manufacture, as the case may be, are incorrectly classified by the Commissioner-General under any item of the Customs Tariff and that person appeals to the Tribunal against such classification; or***

***(iii) where the Commissioner-General has determined the value of any goods intended for importation into Zambia or manufactured within Zambia and any person aggrieved by such determination appeals to the Tribunal;***"

What is clear from the foregoing is that the Tribunal under the Act can hear and determine appeals under the Customs and Excise Act under the circumstances enumerated there under. In essence, the Tribunal is given the power to grant orders. The clarity of the Act to the effect that granting of an order to stay is incidental to the function that the Tribunal can do, cannot be over emphasised.

The learned authors of **Garner's Administrative Law 6<sup>th</sup> ed.** which at p10 provides:

***"In a wide range of circumstance 'punishment' or 'suffering in a body or goods' may be imposed not by the 'ordinary courts', but by the tribunal specially established for particular types of cases".***(emphasis added by Court)

In addition **section 25 of the Interpretation and General Provisions Act chapter 2 of the Laws of Zambia** provides that:

***" 25. Where any written law confers a power on any person to do or enforce the doing of an act or thing, all such***



***powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing."***

In interpreting the above provision, the Tribunal observed as follows on page 4 of the Ruling:

***"Our view...is that although the authority to grant Stays of Execution may not be as express from the Acts, it certainly cannot be said that there is no such implied authority. Furthermore, "Stay Orders" are not in the true sense part of enforcement mechanisms"***

I find that the Tribunal was on firm ground when it held as it did for to hold otherwise would be to emasculate the Tribunal from fully performing its functions as by law provided. Appellant's counsel urged this Court essentially to agree with the assertion that because the appellant is mandated by **the Customs and Excise Act, Chapter 322 of the Laws of Zambia** to collect taxes, it should be left to the appellant to, in the case of a dispute such as the one before the Tribunal, to determine the overpayment and refund the amount in accordance with **Section 92 of Customs and Excise Act**. I do not agree with this submission for to do so would be to say that the appellant should be the final authority, a Tribunal, in its own right on what ought to be paid. That in essence, it can do no wrong. The absurdity of this reasoning becomes clear when one considers that

The **Revenue Appeals Tribunal Act** states that the Tribunal will hear appeals under the **Customs and Excise Act, the Income Tax Act and the Value Added Tax Act**. It follows therefore that the lack of a Stay of Execution would indeed prejudice the Respondent in that there would be no way to have the decision of the appellant overturned. The mischief intended to be cured by the establishment of the Tribunal was the determination of grievances against the decision of the appellant.

It is therefore logical to say that **the Revenue Appeals Tribunal Act No. 11 of 1998** empowers the Tribunal not only to stop enforcements or collection of tax pending the outcome of an appeal. Indeed the Tribunal cannot do this on its own motion but upon an appropriate application being made by a party. This is what happened in this case. The same is in following with the principle set by the Supreme Court in several cases including that of **Sonny Mulenga and Others vs. Investrust Merchant Bank Limited**<sup>9</sup> that an appeal does not operate as a Stay. As was correctly observed by the Tribunal, it is erroneous to think that the Tribunal can be given authority to hear matters without the law inferring some enforcement mechanisms to ensure compliance with Orders of the Tribunal. I am of the considered view that **Section 5(2)(f)** broadens the scope of the authority of the Tribunal to ensure that in carrying out of the duties spelled out in the various Acts under which the Tribunal can hear appeals, all ancillary matters are capable of being attended to.



The Tribunal cited and quoted in support of its Ruling, the case of **M/S Maheshwari Agro Industries vs. Union of India and Others**<sup>10</sup> and I agree that:

*"...inherent powers have to be inferred even in the absence of any specific statutory provisions conferring the power to stay upon such authorities under the Act"*

I also agree with the holding by Eyre C.J. in **Howard vs. Ballie**<sup>4</sup> that:

*"every agent who is given express authority has also the right to do all subordinate acts incidental to and necessary for the execution of that authority"*

The Howard case explained "medium powers" which are not expressly stated but consist of "all the means necessary to be used" in order to attain the accomplishment of the object of principle power. I am of the considered view that the granting of Stays fall within the province of medium powers not expressly stated but which the Tribunal can grant to accomplish its objects as by law established.

It has been held in **Holman vs. Ford Motor Co SO.**<sup>5</sup> and I agree, that an order would be empty if orders and judgments could not be stayed pending review.

There is therefore considerable force in respondent counsel's argument that the Tribunal has the power to punish and it is envisaged that the power to punish will have the ancillary powers that are meant to effect execution of judgment or otherwise and stay of execution or injunction is such a power that the Tribunal may exercise.

I therefore cannot agree with appellant's counsel that by relying on the provisions of **section 25 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia**, the Tribunal ignored a cardinal principle of the Rule of law namely that an Administrative Tribunal can only exercise such powers as are expressly conferred in the governing legislation. On the contrary, the Tribunal was well within its powers to decide as it did. A closer examination of the aforesaid **Section 25** reveals that the Tribunal has the power to make Stay orders as it did in the present case.

In view of the foregoing, this appeal fails. For the avoidance of doubt this Court upholds the Tribunal's holding that in terms of **Section 5 (2)(f) of the Customs and Excise (Amendment) Act, No.2 of 2001** and **Section 25 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia**, the Revenue Appeals tribunal, whilst seised of an appeal, has inherent, implied and ancillary powers to grant Stays of Execution against the recovery of disputed demand of tax.



Costs follow the event to be taxed in default.

Leave to appeal is granted.

**DELIVERED AT LUSAKA THIS 11<sup>TH</sup> DAY OF AUGUST, 2014.**



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**MRS. JUSTICE A. M. BANDA-BOBO  
HIGH COURT JUDGE**