**IN THE HIGH COURT FOR ZAMBIA** **2014/HP/0084**
**AT THE PRINCIPAL REGISTRY**
**HOLDEN AT LUSAKA**
**(Civil Jurisdiction)**



**BETWEEN:**

**ZAMBIA LEAF TOBACCO COMPANY LTD** **APPLICANT**

AND

**ZAMBIA REVENUE AUTHORITY (ZRA)** **RESPONDENT**

**Before Hon. Mrs. Justice J. Z. Mulongoti**

**on the 21st day of November, 2014**

***For the Plaintiff:*** ***Mr. R. M. Simeza assisted by Ms. K Viyuyi of Simeza Sangwa Associates***

***For the Defendant:*** ***Ms. C. Kasese, Legal Officer ZRA***

# R U L I N G

**Cases cited:**

1. *Royal Trading ltd V. Zambia Revenue Authority SCZ Judgment No. 39 of 1999*
2. *Turbulent Engineering and Mining Supplies Ltd v. Simwinga and ZRA 2008/HK/354*
3. *Admark Ltd V. ZRA SCZ Judgment No. 9 of 2003*
4. *Mung'omba & Others V. Machungwa & Others (2003) ZR 17 (SC)*
5. Davies *Jokie Kasote V. The People (1977) ZR 75*
6. *Germins Motorways Ltd V. ZRA Appeal No. 118 of 2008*
7. *R V. Medical Appeals Tribunal, Ex parte Gilmore (1957) 1 QB 574*
8. *Kabimba V The Attorney General and Lusaka City Council (1995/97) ZR 252*
9. *Newplast Industries V. Commissioner of Lands (2001) ZR 51 (SC)*

**Legislation referred to:**

1. *Order 3 Rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia*
2. *Orders 33/3; 33/7, 2/2 and 14 A1 of the rules of the Supreme Court (White Book), 1999 Edition*
3. *Section 164 of the Customs and Excise Act Chapter 322 of the Laws of Zambia*

The Ruling relates to an application by the Respondent for a Notice to Raise a Preliminary Objection on a point of Law. The application was made pursuant to *Order 3 Rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia* and *Orders 33/3; 33/7, 2/2* and *14A1 of the rules of the Supreme Court (White Book), 1999 Edition.* The Notice was supported by an affidavit sworn by one Jubilee Hamwaala, a Senior Collector for Credibility and Controls of the Respondent's Credibility and Controls Customs Services Division.

She deposed that the applicant and two other companies namely Alliance One (Z) Ltd and Tombwe Processing Ltd, its Agent made an application for a coefficient with regard to processed tobacco in October 2009. That on 14th December 2009, the respondent approved the coefficient submissions and resultant coefficients relating to processed tobacco for Tombwe Processing Ltd as shown by exhibit JG4. That the said approval was based on the workings submitted to the respondent by Tombwe Processing Ltd. However, the applicant, without any further consultation with the respondent, has been using the coefficient which was only approved for Tombwe

Processing. Consequently, the respondent rejected the applicant's duty drawback claims.

The applicant appealed this decision to the Commissioner General by letter dated 17th April 2013. The Commissioner General rejected the appeal by letter dated 1st October 2013 exhibited as JH6. This prompted the Applicant to commence these proceedings by way of judicial review on 22nd January 2014. The deponent further deposed that any action against the respondent must be preceded by the respondent being given one month's notice of the intention to commence proceedings.

That the applicant never served such notice. In addition that any matter emanating from the Customs and Excise Act, must be brought before Court within three months from the date the cause arose. In casu the cause of action arose on 1st October 2013 and thus a period of three months had elapsed when the proceedings were commenced.

The respondent also filed Skeleton Arguments in support of the Notice to Raise a Preliminary Objection. Ms. Kasese, the respondents Legal Counsel submitted that the action is irregularly before this court because the

Applicant did not follow procedure as stipulated in *section 164(1) of the Customs and Excise Act Chapter 322 of the Laws of Zambia* (the Customs Act), which provides:

> *"A Writ of Summons shall not be issued against nor a copy of any process served upon the Authority for anything done under this Act or any other law relating to Customs Excise until one month after notice in writing has been delivered to the Authority, by the person, or the person's legal practitioner, who intends to issue such writ, summons or process."*

According to counsel the section is couched in mandatory terms and failure to adhere to the provision is fatal as held by the Supreme Court in **Royal Trading Ltd v. Zambia Revenue Authority (1)**, that *"a notice of action must be delivered to the Commissioner General who is an officer for purposes of satisfying section 164(1) of the Customs and Excise Act."*

Learned Counsel also cited High Court decisions in **Turbulent Engineering and Mining Supplies Ltd v. Simwinga and ZRA (2)** and **ZRA v. Africa Beverages Ltd (3)** in emphasising the same point about failure to comply with *section 164(1)* and *164 (4) of the Customs Act*, being fatal and that the Court had no discretion in the matter. She also pointed out that subsection 4 provides for every action to be brought within three months after the cause arose.

Further, that in the Royal Trading case it was pointed out that subsection 4 does not give the Court any discretion to extend time within which such an action shall be commenced.

The case of **Admark Ltd v. ZRA (4)** was also cited where the Court held that the provisions of *section 164(4)* were mandatory. It was Counsel's further submission that the action is thus statute barred by virtue of *section 164(4)*. A plethora of High Court decisions were cited to support the argument. And that in the Admark case, the Supreme Court noted that the issue of time limitation can be raised even if it was not pleaded.

The respondent's counsel Mr. Simeza, SC, filed Arguments in Opposition to the Respondent's Notice of Intention to Raise a Preliminary Objection on a Point of Law. Mr. Simeza submits that applications for judicial review are solely governed by *Order 53 of the Rules of the Supreme Court of England* and therefore no other provision of the Law can dictate the procedural aspects of such applications. The case of **Mung'omba & Others V. Machungwa & Others (5)** was relied upon in which the Supreme Court held that:

> *"It is accepted that there is no rule under the High Court Rules under which Judicial Review proceedings can be*

*instituted and conducted and by virtue of section 10 of the High Court Act, Chapter 27, the Court is guided as to procedure and practice to be adopted. Having accepted that there is no practice and procedure prescribed under our Rules, we follow the practice and procedure for the time being observed in England in the High Court of Justice. The practice and procedure in England is provided for in Order 53 of the Rules of the Supreme Court (RSC). Order 53 is very detailed. In it one will find the law as on what basis judicial review is founded; the parties, how to seek the remedies and what remedies are available. Under the parties, care is taken not only as to who can initially commence the proceedings, but also who can possibly join or be joined. The Order provides the sort and form of evidence required at the hearing.*

*Once it is accepted that our Rules do not provide for the practice and procedure on Judicial review and we adopt the practice and procedure followed in England, our Rules for the purposes of Judicial review, are completely discarded and there is strict following of the procedure and practice in Order 53 of RSC. It will be noted from the learned editors of the White Book (RSC), that Order 53 created a uniform, flexible and comprehensive code of procedure for the exercise by the High Court of its supervisory jurisdiction over the proceedings and decisions of inferior courts tribunals and other persons or bodies which perform public duties or functions. The procedure of judicial review enables one seeking to challenge an administrative act or omission to apply to the High Court for one of the prerogative orders of mandamus, certiorari or prohibition or in appropriate circumstances to declarations, injunction or damages. As it is a comprehensive code of procedure on judicial review, our Orders 14 and 18 of the High Court Rules are thus inapplicable. These orders are only relevant to process begun under our rules and when applicable.* (The underlining was by way of emphasis by counsel).

The learned State Counsel further submitted that he was alive to the fact that in the Royal Trading case, supra, the Supreme Court held that; *"...judicial review is a process*

*and therefore falls within the ambit of section 164(1) of the Customs & Excise Act Chapter 322 of the Laws of Zambia.*" Mr. Simeza contends that the Mung'omba & Others case, was decided after the Royal Trading one. And that the Supreme Court took a different position than taken in the Royal Trading as regards applicability of our procedural Rules such as *section 164* to judicial review proceedings. That in Mung'omba, it was held in unequivocal terms that:

> *"Order 53 is comprehensive. It provides for the basis of judicial review: the parties; how to seek the remedies, what remedies are available and time within which to commence the action and gives the Court discretion to extend such time. It also provides the sort of evidence required at the hearing."*

Accordingly, the holding in the later case takes precedence over the earlier one. Consequently, this Court is bound by the decision in Mung'omba & Others. The Courts attention was also drawn to the case of **Davies Jokie Kasote v. The People (6)**, where the Supreme Court held, inter alia

> *"(i) The principle of "stare decisis" is essential to a hierarchical system of courts. Such a system can only work if, when there are two apparently conflicting judgments of the Supreme Court, all lower courts are bound by the latest decision.*
>
> *(ii) A lower court is not entitled to say simply because the Supreme Court in a judgment has not mentioned an earlier decision of the same Court that the earlier*

*decision was overlooked and that the later decision was therefore given per incuriam."*

According to the learned State Counsel, it follows therefore that the decision in Mung'omba & Others applies and that therefore the provisions of the Customs and Excise Act cannot be invoked to prescribe procedural aspects of the judicial review proceedings with regard to time for commencement and steps to be taken before issuing the court process. That in the same way the High Court rules are completely discarded in judicial review proceedings, so are the provisions of the Customs Act thus the preliminary objection is misconceived. Regarding the arguments by the respondent that the application or action is statute barred, it was submitted that after the Commissioner General's decision on 1st October 2013, the Applicant attempted to exhaust administrative procedures within the Department. This was done by way of appeal to the Commissioner General on 30th October 2013 and he only responded on 7th November 2013. Leave for judicial review was obtained on 22nd January 2014. That between 7th November 2013 and 22nd January 2014, about two months had passed and there was therefore no undue delay in making the application to court.

process not the merits of the actual decision being challenged. Further, that to argue that the applicant first needed to give 30days notice to the respondent would result in a conflict between the provisions of *Order 53* and the procedural provisions under the Act. Applying *section 164* of the Act to judicial review proceedings would inevitably have the result of ousting mandatory procedure in *Order 53* which was approved by the Supreme Court in the Mung'omba case, which would be an entirely undesirable result.

The learned State Counsel also contends that the cases of **Germins Motorways Ltd v. ZRA (7)** and **Admark Ltd v. ZRA** supra, which also decided that the provisions of *section 164 (4)* of the Act are mandatory, are distinguishable from the instant case in that those two cases were commenced by writ of summons. Therefore, they were governed by the procedural requirements under *section 164 of the Act.* The case in hand is a judicial review application which is governed solely by its own code of procedure under *Order 53 of the Supreme Court Rules (White Book).*

Learned Counsel also submitted on the question, whether judicial review proceedings are an action or civil

proceedings within the meaning in *section 164*. According to Counsel *section 164* is more appropriate to actions involving disputes between parties who seek to enforce private rights against the Respondent and not to those which involve applications to the Court to review the conduct of the respondent in matters of public Law. That the use of the word *'writ', ' cause of action'* under *section 164* are indicative of the fact that the said provisions of the Act were not intended to cover applications for judicial review. Accordingly, an application for judicial review is not an action and is not concerned with a dispute between the parties but rather is directed at the decision making process. The case of **Froylan Gilharry SR dba Gilharry's Bus Line and Transport Board and Others (Gilharry's Bus Line)** where the Belize Court of Appeal, considered the issue whether *section 3(1) of the Public Authorities Protection Act (PAP Act*) applied to applications for judicial review, it was held that: "*there can be no question that, as the cases all indicate, there is no lis between the parties in judicial review proceedings. Such proceedings are directed at the decision itself rather than the parties who made it ... What is vulnerable in such proceedings is the decision and not the decision maker. It is in this sense, it seems to me, that Carey JA took the view in Belize Water Services that*

*an application for judicial review is not a dispute... The PAP Act does not apply, either on principle or on authority, to applications for judicial review ...*

Learned counsel pointed out that section *3(1) and (2) of the PAP Act mirror section 164 (1) and (2) of the Customs Act.*

It was also submitted that the prerogative remedies afforded in applicants for judicial review and the applications themselves cannot be placed within the ambit of what is termed a proceeding or an action under any statute. Denning LJ was quoted in **R v. Medical Appeals Tribunal, Ex parte Gilmore (8)** that, '*remedy of certiorari is never to be taken away by statute except by clear and explicit words.*' Further, that in **Kabimba v. The Attorney General and Lusaka City Council (9)**, the Supreme Court held that:

> *"of course in same respects an application for judicial review appears to have similarities to civil proceedings between two opposing parties, in which an injunction may be ordered by the Court at the suit of one party directed to the other. When correctly analysed however, the apparent similarities disappear. Proceedings for judicial review in the field of public law, are not a dispute between two parties, each with an interest to protect, for which an injunction maybe appropriate. Judicial review by way of an application or certiorari, is a challenge to the way in which a decision has been arrived at. The decision maker may appear to argue*

> *that his decision or its decision was reached by an appropriate procedure. But the decision maker is not in any true sense an opposing party, any more than an inferior court whose decision is challenged is an opposing party."*

Accordingly, that where an action has been brought challenging the decision of the respondent's as a public officer by way of judicial review, the procedure to be followed in those proceedings is *Order 53 of the White Book* which is a comprehensive code of procedure.

In conclusion counsel reiterated that the procedural provisions of the Act have no place in applications for judicial review and the Applicant need not comply with *sections 164(1) and (4) of the Act.* The Preliminary objections therefore lack merit and should be dismissed with costs to the applicant.

At the hearing, Ms. Kasese relied on the affidavit in support and the skeleton arguments. She reiterated her arguments that the matter was irregularly before Court for failure to comply with *section 164(1) of the Customs Act.* Further, that the court process was served outside the three months period provided in section 164(4) of the Customs Act. And that under that section the Court does not have discretion to extend time within which the action shall commence. A plethora of High Court

decisions were cited as authorities. It was the Respondents prayer that the matter be dismissed with costs.

Mr. Simeza, SC, submitted, on behalf of the applicant, that the matter is an action for judicial review, a process which is regulated and governed by rules which are unique to itself. He reiterated his skeleton arguments that there are no rules under our jurisdiction that govern judicial review proceedings. The case of Mung'omba & Others, supra was relied upon. He argued that the Royal Trading case relied upon by the respondent had been overtaken by the Mung'omba case and that it dealt with the definition of process, which is not the issue in casu.

The learned SC also reiterated that the three weeks delay in commencing the action within three months was explainable. He submitted that following the decision of the Commissioner General, the Applicant could not come straight to court without exhausting administrative procedures under the Act, which required some form of appeal. The applicant then made representations on 30th October 2013 and only got a response on 7th November 2013 which was the time the three months started running. And since the action was commenced on 22nd

January 2014 a period under two months, the action was not statute barred.

That even the one month notice required in *section 164(1) of the Customs Act* does not come in force in casu because there is no such requirement for judicial review proceedings under *Order 53*.

In response, Ms. Kasese submitted that the Mung'omba case is not on all fours with this case. That the Mung'omba case was not commenced pursuant to the Customs & Excise Act. Though a judicial review action, there were no other statutory provisions which were relevant or applicable to the procedure. She also contended that the Supreme Court in Royal Trading held that judicial review is a process and fell within the ambit of *section 164(1) of the Customs Act*.

And that in the Mung'omba case there was an attempt to use the High Court Rules which was not allowed because Order 53 provides for the procedure in detail. In casu, there was no application under the High Court Rules, but a prescribed rule that is *section 164 of the Customs Act*.

On the issue of the Applicant exhausting administrative processes, Ms. Kasese contends that the appeal was made to the same office, so administrative channels were exhausted on 30th October 2013 and not 7th November, 2013.

The issue as I see it is whether or not judicial review proceedings are affected by statute providing for mode of commencement or procedure to be adopted when suing an institution such as the respondent.

I have considered the arguments by both Counsel. I wish to state from the outset that the Mung'omba case can be distinguished from the instant case. As canvassed by Ms. Kasese, the Mung'omba case was not dealing with a relevant or enabling Act, as in casu. It was a general case of judicial review which was not affected by any statute. In this case there is the Customs Act which provides specifically that 30days notice be given before the respondent is sued and also that the action should be brought within three months from the cause of action.

In **Newplast Industries v. Commissioner of Lands (9), Sakala, ADCJ**, as he then was, observed, "that it is not entirely correct that the mode of commencement of any

action largely depends on the reliefs sought. The correct position is that the mode of commencement of any action is generally provided by the relevant statute. In addition that "the English White Book could only be resorted to if the Act was silent or not fully comprehensive."

The Customs Act, in particular *section 164* appears to be quite comprehensive. It provides for the mode of commencement, firstly by 30days prior written Notice which must clearly and explicitly contain the cause of action, the name and place of abode of the person who is to bring the action, how proceedings are to be conducted at trial and that the action is to be brought within three months after the cause arose. I note also and concur with the authorities cited by Ms. Kasese that failure to comply with *section 164(1) and (4) of the Customs Act* is fatal and that the Court has no discretion to exercise on these matters.

I note also the arguments by SC Simeza and the cases cited that section 3 of the PAP Act which mirrors section 164(1) of the Customs Act, do not apply to judicial review proceedings and that the remedy of certiorari cannot be taken away by statute except by clear and explicit words (per Lord Denning in R v. Medical Appeals Tribunal).

I wish to point out that on the one hand SC argued that he had to comply with the respondent's administrative procedures by appealing to the Commissioner General but on the other he contends that the Customs Act does not apply to this case being a judicial review action. I see a contradiction in this regard. It is like when it suits the applicant it is willing to comply with the respondent's precondition requirements like appealing and when it comes to meeting the precondition of 30days prior notice before suing it, the Act does not apply. I note that the respondent is actually not saying that the applicant should not have applied for judicial review but that the Act should be complied with. Such that although it is amenable to judicial review 30days notice should have been given. It is trite law that judicial review does not lie where there is failure to take out a necessary precondition in relation to entitlement to seek review such as the 30days notice in casu.

Consequently, Mr. Simeza, SC's argument that time started running on 7th November 2013 after the response from the Commissioner General, rejecting the applicant's appeal and I do agree with him on this score, cannot aid his case. This is because the applicant did not comply

with *section 164(1)* such that even though the action was brought after two months plus following the letter from the Commissioner General, *section 164(1)* requiring the respondent to be given 30days written notice before suing it, was not complied with, which is fatal to the Applicants case. I therefore, am unable to agree with SC's arguments and the cases cited on the PAP Act.

Section 164(1) is categorical that:

> *"A writ of summons shall not be issued against nor a copy of any process served upon the Authority for anything done under this Act or any other law relating to customs or excise until one month after notice in writing has been delivered to the Authority, by the person, or the person's legal practitioner, who intends to issue such writ, summons or process."*

I have no right to add to the requirements of the Act nor take from the requirements enacted. The sole guide must be the Act itself.

The Supreme Court in Royal Trading was explicit that "Judicial review is a process and fell within section 164(1) of the Customs Act" as canvassed by Ms. Kasese.

I do appreciate Mr. Simeza's submissions on stare decisis but as aforementioned the Mung'omba case is distinguishable from the matter in hand.

Accordingly, I find merit in the Respondent's preliminary objection on a point of law and I uphold it. The matter is accordingly dismissed with costs to the Respondent, to be taxed in default of agreement. Leave to appeal is granted.

Delivered at Lusaka this 21st day of Nov 2014.

**J. Z. MULONGOTI**
**HIGH COURT JUDGE**