

ROYAL TRADING LIMITED v ZAMBIA REVENUE AUTHORITY

Supreme Court
Bweupe, DCJ, Sakala and Chaila, JJS.
23rd November, 1999 and 12th January, 2000.
(SCZ Judgment No. 38 of 1999).

Flynote

Customs and Excise - Process - Meaning of - Section 164 of Customs and Excise Act- Judicial Review whether included in the meaning of process.

Headnote

This is an appeal from a ruling of the High Court refusing an application for judicial review pursuant to Order 53 rule 3, of the Supreme Court Practice. On 26th September 1997, the respondent detained the appellant's truck and trailer together with bales of second hand clothing.

Subsequently, the respondent advised the appellant that the truck and trailer had been seized in terms of the Customs and Excise Act on the ground that they were allegedly used as vessels to smuggle three consignments of second hand clothing on which duty and Value Added Tax (VAT) had not been paid by the importer.

On 23rd March, 1998, the appellant applied for inter alia, judicial review for an order of certiorari to quash the decision of the Commissioner-General to seize the appellant's truck and trailer. Counsel for the respondent raised a preliminary issue and drew the Court's attention to section 164(4) of the Customs and Excise Act which stipulates that every action shall be brought within three months.

The learned trial judge held that the application for judicial review was misconceived because section 164(4) of the Customs and Excise Act does not give the Court power to extend the period beyond three months.

Held:

- (i) That judicial review is a process and therefore falls within the ambit of Section 164(1) of the Customs and Excise Act, Chapter 322, of the Laws of Zambia.
- (ii) The Controller of Customs and Excise is also an officer for purposes of Section 164 of the Customs and Excise Act.
- (iii) Section 164(4) of the Customs and Excise Act operates like the Limitation Act of 1939, and the section does not give the Court any discretion to extend time within which such action shall be commenced.

Case referred to:

(1) *United Products Limited v The Attorney-General* (1976) Z.R 89.

Legislation referred to:

Customs and Excise Act, Cap. 322, s. 164.

R Simeza of Simeza Sangwa Associates for the appellant

C Shapi Legal Officer Zambia Revenue Authority for the respondent

Judgment

SAKALA JS delivered judgment of the court.

This is an appeal from a ruling of the High Court refusing an application for judicial review pursuant to Order 53, Rule 3, of the Supreme Court Rules on the ground that the application was misconceived.

The short facts of the sequence of events leading to this appeal are that on 26th September 1997, the respondent detained the appellant's Truck Registration No. AAK 8216 and Trailer Registration No. 3436 together with 387 bales of second hand clothing at Lusaka Port pending investigations.

On 10th October, the appellant's advocates wrote the respondents demanding the immediate release of the appellant's Truck and Trailer. Subsequently, the respondents issued a notice of seizure in respect of the contents in one of the containers. On 12th October 1997, the appellants' advocates were advised by the respondents that the Truck and Trailer had been placed under seizure in terms of the Customs and Excise Act on the ground that they were allegedly used as vessels to smuggle three consignments of second hand clothing on which Duty and VAT had not been paid by an importer called I and I Trading and that until and when the outstanding amounts of Duty and VAT on the three consignments had been paid, the Truck and Trailer would remain in the respondents' custody. On 29th October 1997, the appellants' advocates wrote to the respondent advising them that their clients were denying the allegations. On 1st December 1997, the appellants' advocates further wrote the respondent demanding the release of the Truck and Trailer forthwith.

On 23rd March, 1998, the appellants' advocates applied for leave to apply for judicial review seeking for an order of certiorari to remove into the High Court and to quash the decision of the Commissioner-General to seize the appellants' Truck and Trailer in issue. The appellants also sought for a declaration that the seizure and continued detention of the Truck and Trailer was unlawful and also sought damages. The grounds for review were illegality/procedural impropriety and irrationality.

It must be mentioned in fairness to the appellant that they did explain in the application the reason for the delay as being that they had wanted to exhaust statutory remedies and waited for a reply to their demand contained in the letter of 1st December 1997. On 4th May, 1998 the court granted the appellant leave for judicial review. When the matter came up for the hearing of the originating notice of motion for judicial review, counsel for the respondent raised a preliminary issue opposing the motion and drew the attention of the court to the provision of section 164(4) of the Customs and Excise Act which requires that "*Every action shall be brought within three months*". Counsel pointed out that the subject matter of the action was seizure for which a receipt dated 26th September 1997, was issued. Counsel submitted that the motion having been filed on 23rd March 1998, it was statute

barred in terms of section 164(4) of the Act. Counsel referred to the court's earlier ruling by the same court in similar circumstances but pending before this court. Counsel suggested that the appellants stay this action pending the appeal in the matter pending before the Supreme Court.

On behalf of the appellants, counsel disputed that the matter pending before the Supreme Court was not similar to the present one. Specifically dealing with Section 164, counsel submitted that the section refers to "*process*" commenced by way of writ or summons while the present action has been commenced by notice of motion for judicial review and that the section referred to actions commenced against individual customs officers. Counsel referred to the definition of "*officer*" in the Act and submitted that the present action was against the respondent as an institution and not against an individual officer. He contended that in the circumstances it was misleading to submit that the action was statute barred. Counsel further submitted that the application was properly before court and must be allowed to be heard on merit.

The learned trial judge considered the arguments and examined the provisions of Section 164 of the Customs and Excise Act. The learned judge observed that "*actions*" always mean "*civil actions*" and apart from Commissioner-General being a legal person, ZRA is also a legal person. The court held that Section 164(4) does not give the court power to extend the period beyond three months and that in the instant case the proceedings were commenced too late although for genuine reason. The court concluded that the requirement of section 164(4) was mandatory and refused the application as misconceived.

In this court, Mr. Simeza on behalf of the appellant, while repeating his submissions that he advanced before the lower court complained that the lower court did not understand his argument that section 164 refers to actions commenced by a writ or summons and that the same must be against an individual officer of the respondent. He contended that the action was dismissed by the lower court on different and wrong grounds as the word "*person*" was not the issue raised in the preliminary point; the issue having been the word "*officer*". Counsel argued that actions for judicial review do not fall within Section 164 of the Customs and Excise Act as they are self contained in Order 53 which makes provision for extension of the three months period. Mr. Simeza also pointed out that the word "*process*" as used in Section 164 does not refer to originating notice of motion but only refers to a "*writ*" or a "*summons*".

Ms Shapi on behalf of the respondent also repeating her submissions advanced before the lower court disagreed with Mr Simeza. She contended in this court that Section 164 applies to the present case because the process in this case was commenced against the Commissioner-General as per originating notice of motion for judicial review. She submitted that in terms of section 2 of the Customs and Excise Act and other relevant statutes, the Commissioner-General is an "*officer*" and as such the action is statute barred as it was commenced outside the prescribed three months period. Ms Shapi cited the case of *United Products Limited v Attorney-General* (1) in support of the arguments that the Commissioner-General is an "*officer*".

The appellants' application was unsuccessful on the basis of a preliminary issue based on Section 164 (1) (4) of the Customs and Excise Act Chapter 322 of the Laws of Zambia. The appeal before us succeeds or fails depending on the interpretation we place on that section. Section 164(1) reads: "*A writ or summons shall not be issued against nor a copy of any process served upon any officer for anything done by him under this Act or any other law relating to customs or excise until one month after notice in writing has been delivered to him, or left at his usual place of abode, by the person, or his legal practitioner, who intends to issue such writ, summons, or process.*"

According to Mr Simeza this section is restricted to civil actions commenced by a Writ or Summons against an individual Officer of the respondent not the institution. He contended that it is for that reason that the Section requires that notice of action in writing be "*delivered to him or left at his usual place of abode....*". We have carefully examined the Section. We are satisfied that Mr Simeza's interpretation cannot be correct. The section begins as follows:- "A writ or summons shall not be issued against nor a copy of any process served" The Section ends as follows:

"..... who intends to issue such writ, summons or process".

We take note that Mr. Simeza had difficulties to explain the words "*any process*" and "*or process*" as used in the Section.

We are satisfied that judicial review is a "*process*" and therefore falls within the ambit of Section 164(1) of Chapter 322 of the Laws. The Commissioner-General is an "*officer*". He has a place of residence. Hence notice of action whether by writ or summons or process can be "*delivered to him or left at his usual place of abode*".

We affirm the decision in *United Products Limited v The Attorney-General (1)* when Cullinan J. inter-alia held that:

The controller of Customs and Excise is also an "*officer*" for the purposes of Section 164 of the Customs and Excise Act, Cap. 662; in as much as under section 4 of the Act he has charge of the Department he can be said to be an "*officer of the department*".

The provisions of Section 164 of the Customs and Excise Act apply to an action instituted against an officer.

The controller of Customs and Excise is now the Commissioner-General. This settles the interpretation of Section 164(1). The last argument related to the provisions of Section 164(4) upon which the court relied to refuse the application. Section 164(4) in part reads: "*Every such action shall be brought within three months after the cause thereof arose.*"

As we see it, the provisions of Section 164(4) could operate as the Limitation Act 1939 to defeat an action. Indeed, the section does not give the court any discretion to extend time as provided in Order 53/4 of the White book. This must have been for good reasons as actions brought under the Customs and Excise Act generally relate to seizure of goods some of which may be perishables which the respondent cannot keep indefinitely. This makes the distinction in the limitation of time within which to commence an action between the provisions in this Section and Order 53 of the Supreme Court Rules which gives the court a discretion to extend time. The delay in the instant case was conceded. The learned trial judge was therefore on firm ground in holding that the action was statute barred. This appeal is therefore dismissed with costs to be taxed in default of agreement.

Appeal dismissed.