IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 174/2014**

HOLDEN AT NDOLA

(CIVIL JURISDICTION)

B E T W E E N:

ZAMBIA REVENUE AUTHORITY	**APPELLANT**
AND	
FELLIMART INVESTMENT LIMITED	**RESPONDENT**

CORAM: MAMBILIMA, CJ, KAOMA AND MUTUNA, JJS
On 6th June, 2017 and 12th June, 2017

For the Appellant:	**Mr. G. K. Mwamba, In-house Counsel, Zambia Revenue Authority**
For the Respondent :	**Mr. I. Mulenga, of Iven Mulenga and Company, standing in for Mr. Suzyo Dzekedzeke, of Dzekedzeke & Company**

JUDGMENT

MAMBILIMA, CJ delivered the judgment of the Court.

AUTHORITIES REFERRED TO:

1. **HOLMAN V. FORD MOTORS CO. 239 50.2d 40, 43;**
2. **ZAMBIA REVENUE AUTHORITY V. ARMCOR SECURITY LIMITED, APPEAL NO. 72/2014;**
3. **VANCOUVER (CITY) V. BRITISH (ASSESSMENT APPEAL BOARD) (1996) B.C.J NO. 1062 (CA);**

4. NATURAL VALLEY LIMITED V. ZAMBIA REVENUE AUTHORITY, 2011/RAT06/C7E;
5. MOHAMMED HUSSEIN V. ZAMBIA REVENUE AUTHORITY, 1999/RAT/13;
6. BUCHIE INVESTMENT LIMITED V. ZAMBIA REVENUE AUTHORITY- 2001/RAT/25;
7. METCASH TRADING LIMITED V. THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE AND THE MINISTER OF FINANCE – CCT 3/2000;
8. NDOLA CITY COUNCIL V. CHARLES MWANSA (1994) ZR 128;
9. THE COMMISSIONER FOR INLAND REVENUE V. NCR CORPORATION OF SOUTH AFRICA (PROPRIETARY) LIMITED, 1988 (2) SA 764 (A); AND
10. PHILLIPS V. COMMISSIONER OF INTERNAL REVENUE, 283 U.S. 589 (1931).

LEGISLATION REFERRED TO:

a. TAX APPEALS TRIBUNAL ACT, NO. 1 OF 2015;
b. REVENUE APPEALS TRIBUNAL ACT, NO. 11 OF 1998;
c. CUSTOMS AND EXCISE ACT, CHAPTER 322 OF THE LAWS OF ZAMBIA;
d. INTERPRETATION AND GENERAL PROVISIONS ACT, CHAPTER 2 OF THE LAWS OF ZAMBIA;
e. REVENUE APPEALS TRIBUNAL REGULATIONS, STATUTORY INSTRUMENT NO. 143 OF 1998;
f. HALSBURY'S LAWS OF ENGLAND, 4TH EDITION, VOLUME 44(1), PAGE 805, PARAGRAPH 1341;
g. TAX APPEALS TRIBUNAL ACT, CHAPTER 345 OF THE LAWS OF THE REPUBLIC OF UGANDA;
h. HALSBURY'S LAWS OF ENGLAND 3RD EDITION, VOLUME 9, PAGE 581, PARAGRAPH 1352;
i. INCOME TAX ACT, CHAPTER 323 OF THE LAWS OF ZAMBIA;
j. VALUE ADDED TAX ACT CHAPTER 331 OF THE LAWS OF ZAMBIA;
k. HALSBURY'S LAWS OF ENGLAND 4TH EDITION, VOLUME 23, PAGE 1500, PARAGRAPH 1672;
l. VALUE ADDED TAX ACT 89 OF 1991;
m. CUSTOMS AND EXCISE (AMENDMENT) ACT NO. 2 OF 2008;
n. TAX APPEALS TRIBUNAL ACT, NO. 40 OF 2013;
o. INCOME TAX ACT 58 OF 1962; AND
p. TAX APPEALS TRIBUNAL BILL NO. 1 OF 2015.

OTHER AUTHORITIES REFERRED TO-

i. **MAXWELL ON INTERPRETATION OF STATUTES, (1969) 12TH EDITION, P. ST. J. LANGAN, LONDON, SWEET & MAXWELL.**

This is an appeal from a judgment of the High Court delivered on 11th August, 2014. The said Judgment followed an appeal against a Ruling of the then Revenue Appeals Tribunal (hereinafter referred to as "the Tribunal"), which has since been renamed the Tax Appeals Tribunal by the **TAX APPEALS TRIBUNAL ACT**[a]. The Tribunal was established under the **REVENUE APPEALS TRIBUNAL ACT**[b], which was repealed by the **TAX APPEALS TRIBUNAL ACT**[a] in 2015.

The facts of this case are simple and substantially not in dispute. The background to this matter is that on 29th December, 2010, the Respondent processed a Removal in Bond S 2403 from Lusaka Airport indicating that Dangote Industries Zambia Limited had imported laboratory equipment from Germany. According to the Appellant, the Customs Entry to finally enter the shipment into what they referred to as 'consumption' was only registered on 22nd November, 2011.

Following the alleged delay in paying for the importation, the Appellant blocked the Respondent in the Appellant's Asycuda System. On 26th February, 2012 the Respondent wrote a letter to the Appellant inquiring on why it had been blocked in the Asycuda System. On 27th February, 2012, the Appellant, through its Station Manager- Customs, based at the Ndola Office, wrote a letter of reply to the Respondent's letter. In that letter, the Appellant stated, among other things, that the fact that Dangote had signed an Investment Protection and Promotion Agreement with the Government of the Republic of Zambia could not be used as a leeway to delay the final clearing of the laboratory equipment. That the Appellant found it strange that in spite of the Respondent claiming that there was an Investment Protection and Promotion Agreement in place, the Respondent had failed to secure the necessary approvals and rebates certificates from the appropriate offices for more than 15 months. The Appellant went on to tell the Respondent that-

> **"Please note that the Authority has been ready and willing to listen to this case but you will note that we have not received any**

correspondence from Dangote Industries or even yourselves. Neither you nor Dangote Industries has written to explain away this unprecedented delay on this entry. Felimart Investments and Dangote Industries have been blocked on our Asycuda System in line with Section 183(1) and Section 183(3) respectively.

Kindly note that an immediate payment is required since your client has taken custody of the goods.

Should you have a query, please feel free to consult the undersigned or visit our nearest Tax Advise Centre. You may also wish to exercise your right of appeal with appropriate offices."

On 5th March, 2012, the Respondent appealed to the Tribunal, against the above decision, on the following grounds:

1. **that the decision against the Appellant is based on unfounded allegations to which the Appellant has not been given an opportunity to respond;**
2. **that mere allegations cannot be grounds for removing a Company from the Asycuda System; or**
3. **that the decision against the Appellant is based on the fact that the Appellant cleared the goods which belonged to the Appellant's client Dangote Industries Zambia Limited, a company that has an Investment Protection and Promotion Agreement with Zambia Development Agency as well as the Government of the Republic of Zambia which agreement offers certain incentives to Dangote Industries Zambia Limited. The Respondent has overlooked these incentives."**

In support of the Notice of Appeal to the Tribunal, the Respondent filed an Affidavit Verifying Appeal which was deposed to by a Mr. Martin SIWALE, a Director in the Respondent Company. Mr. SIWALE deposed that it was not true that the Appellant did not

get an explanation from the Respondent about the cause of the delay in doing the entry. According to him, there was correspondence between the two parties over the issue. He claimed that it was clear that the blocking of the Respondent from the Asycuda System was malicious because the reason given by the Appellant was an issue over which the Respondent had already been fined together with its client and the Respondent had paid the fine.

On the same day the Respondent filed the Notice of Appeal to the Tribunal, it also made an *ex-parte* application to the Tribunal for an order to stay the decision of the Appellant contained in the Appellant's letter of 27th February, 2012. The Tribunal, accordingly, stayed the decision of the Appellant to block the Respondent from the Appellant's Asycuda System.

On 16th March, 2012, the Appellant filed an application to raise a preliminary objection on a point of law and of fact. The preliminary objection was that the Tribunal did not have jurisdiction to grant an order of stay of execution. The Appellant

prayed that the Tribunal should dismiss the *ex-parte* order of stay of execution granted on 5th March, 2012. Having heard both parties on the application, the Tribunal expressed the view 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. "Stay Orders" are not in the true sense part of enforcement mechanisms."**

The Tribunal went on to hold as follows:

> **"We therefore hold that the Revenue Appeals Tribunal has inherent, implied and ancillary powers to grant Stays against the recovery of disputed demand of tax whilst seized of an appeal and for this Customs and Excise Appeal we place reliance on Section 5(2)(f) of the Customs and Excise (Amendment) Act, No. 2 of 2001...."**

It was against the above decision that the Appellant appealed to the High Court raising only 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 seized 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 the Revenue Appeals Regulations do not expressly provide for the power to grant stays."**

After considering the submissions of Counsel, the lower Court stated that it was clear from the preamble and Section 3 of the **REVENUE APPEALS TRIBUNAL ACT**[b] that the Tribunal could hear and determine appeals under the **CUSTOMS AND EXCISE ACT**[c]. It

pointed out that in essence, the Tribunal is given power to grant orders. In the Court's view, the **REVENUE APPEALS TRIBUNAL ACT**[b] was clear that granting an order to stay was incidental to the functions of the Tribunal. The Court reinforced this view by referring to Section 25 of the **INTERPRETATION AND GENERAL PROVISIONS ACT**[d], which 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."**

On the basis of the above, the Court found that the Tribunal was on firm ground when it held as it did. In the Court's view, to hold otherwise would be to emasculate the Tribunal from fully performing its functions as by law provided. The Court stated that it was erroneous to think that the Tribunal could be given authority to hear matters without the law inferring some enforcement mechanisms to ensure compliance with orders of the Tribunal.

The Court also agreed with the position established in the case of **HOLMAN V. FORD MOTORS CO.**[1], where the Court said that an

order would be empty if orders and judgments could not be stayed pending review.

Accordingly, the lower Court upheld the holding by the Tribunal. The Court specifically held that-

> **"... the Revenue Appeals Tribunal, whilst seized of an appeal, has inherent, implied and ancillary powers to grant Stays of Execution against the recovery of disputed demand of tax."**

It is against this determination, that the Appellant has now appealed to this Court advancing only one ground of appeal which is that-

> **"The Court below erred in law and in fact when it held that the Revenue Appeals Tribunal whilst seized of an appeal has inherent, implied and ancillary powers to grant Stays of Execution against the recovery of disputed demand of tax."**

Since the filing of this appeal on 3rd November, 2014, this Court has decided the issue raised by the Appellant's ground of appeal. We pronounced ourselves on the said issue on 19th January, 2017 in the case of **ZAMBIA REVENUE AUTHORITY V. ARMCOR SECURITY LIMITED**[2]. We specifically said the following in that case:

> **"It is, therefore, our firm view that in the absence of express provision under both the RAT Act and the RAT Regulations that specifically vests the RAT with power to grant a stay of execution**

pending appeal, the RAT cannot assume jurisdiction to grant a stay pending appeal as such power is not provided for under the enabling legislation. Allowing the RAT to do so would amount to sanctioning the RAT to clothe itself with power/jurisdiction which the Legislature did not give it. In other words, the RAT cannot be said to exercise jurisdiction which it has not been clothed with by the law under which it operates and was established. It is also our firm view that had that been the intention of the Legislature to empower the RAT to grant stays pending appeal, such power would have been expressly provided for under the RAT Act or indeed the RAT Regulations. Therefore, in the absence of express provision granting such power, the RAT has no jurisdiction or power to grant a stay of execution pending determination of an appeal before it."

The learned Counsel for the Appellant, Mr. MWAMBA, filed his written heads of argument on 3rd November, 2014, before our decision in the **ARMCOR SECURITY LIMITED**[2] case. In support of his lone ground of appeal, Mr. MWAMBA submitted that the lower Court erred in law and in fact when it held that the Tribunal has jurisdiction to grant stays of execution against the recovery of the disputed demand of tax. Counsel expressed the view that the Tribunal has no jurisdiction, express or implied to grant an Order of stay of execution. According to Counsel, the Tribunal could only exercise the powers expressly conferred on it by the **REVENUE APPEALS TRIBUNAL ACT**[b] and the **REVENUE APPEALS TRIBUNAL REGULATIONS**[e]. Counsel contended that if indeed it

was the intention of the Legislature for the Tribunal to have powers to grant stays of execution, it would have expressly provided for such power in the enabling legislation. In support of the foregoing arguments, Counsel relied on the case of **VANCOUVER (CITY) V. BRITISH (ASSESSMENT APPEAL BOARD)**[3] where the Court stated that-

> **"In many statutes where the legislature has seen fit to permit certain boards to hold proceedings in camera, it has expressly conferred the power in enabling Acts .... It has not done so in the case of Assessment Act. Given the absence of express provision for the camera hearings in the Assessment Act, and the public nature of the assessment process, I find it impossible to say that by necessary implication the Board must have the jurisdiction to conduct a portion of its hearings in camera".**

Counsel also relied on **HALSBURY'S LAWS OF ENGLAND**[f], where the authors have stated that-

> **"A power to do something extends only to that thing; so a purported exercise of the power that extends to a different thing is to that extent not an exercise of the power at all and in so far as it purports to depend on the power, it is void as being ultra vires."**

Counsel went on to argue that the Tribunal is an administrative agency and not a Court and that it cannot, therefore, have inherent jurisdiction. That any order it grants must be stated

in the enabling legislation. In Counsel's view, only Courts have inherent jurisdiction.

Counsel submitted that in jurisdictions where the legislature intended to give the Tax Appeals Tribunal power to grant a stay of execution, the enabling legislation specifically provided for that power. By way of example, Counsel cited Section 28 (1) of the Ugandan **TAX APPEALS TRIBUNAL ACT[g],** which expressly clothes the Uganda Tax Appeals Tribunal with power to grant stays of execution as follows:

> **"28(1) Where an application for review of a taxation decision has been lodged with a tribunal or an appeal against a decision of a tribunal has been lodged with the High Court, the reviewing body may make an order staying or otherwise affecting the operation or implementation of the decision under review or appeal, or a part of the decision, as the reviewing body considers appropriate for the purposes of securing the effectiveness of the proceeding and determination of the application or appeal"**

Counsel advanced the opinion that since the Tribunal in the instant case was not given powers of stay of execution by enabling legislation, Section 25 of the **INTERPRETATION AND GENERAL PROVISIONS ACT[d]** could not be used to conclude that the Tribunal had implied power to grant a stay of execution. Counsel maintained

that granting a stay of execution when there was no express power to do so was *ultra vires* the enabling legislation. To reinforce his arguments, Counsel relied on **HALSBURY'S LAWS OF ENGLAND**[h], where the authors have said that-

> **".... no tribunal by a misinterpretation of the law which gives it jurisdiction can purport to exercise a greater jurisdiction which it does not in fact possess."**

Counsel also cited the decision of the Tribunal in the case of **NATURAL VALLEY LIMITED V. ZAMBIA REVENUE AUTHORITY**[4], where the Tribunal 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. The Tribunal in that case refused to grant Natural Valley Limited a default judgment on the ground that the **REVENUE APPEALS TRIBUNAL REGULATIONS**[e] did not provide for the process of default Judgment. The Tribunal observed that if it were the intention of the Legislature to allow for this procedure, there would have been a specific regulation to that effect.

Counsel further referred to the case of **MOHAMMED HUSSEIN V. ZAMBIA REVENUE AUTHORITY**[5], where the Tribunal declined

to issue a writ of *fieri facias* on the basis that the enabling statute did not give that Tribunal jurisdiction to issue a writ of *fieri facias*. Counsel went on to cite another decision of the Tribunal in the case of **BUCHIE INVESTMENT LIMITED V. ZAMBIA REVENUE AUTHORITY**[6], where the Tribunal dealt with the question of whether it had jurisdiction to grant a stay of execution. Counsel stated that the Chairman in that case said that-

> **"When I scrutinized the documents in chambers, I declined to sign the ex-parte order to stay enforcement and ordered an impromptu inter-partes hearing for the appellant to address the Tribunal on whether the stay of execution can be granted.....After the appellant failed to present any legal authorities on whether this Tribunal could grant the relief sought, I promptly dismissed the application with reasons to be given in a written ruling later. I now give the reasons.... As we stated in Mohammed Hussein vs. Zambia Revenue Authority – 1999/RAT/13, the jurisdiction of the Tribunal is to be found in the enabling statute. The enabling statute is clear and unambiguous... the Tribunal cannot grant a stay pending the hearing of an issue ...."**

Counsel added that the intention of the Legislature was not to give the Tribunal power to grant stays of execution. In support of this argument, Counsel referred us to an extract from **MAXWELL ON INTERPRETATION OF STATUTES**[i], at page 28, where it is stated that the rule of construction is **"to intend the Legislature to have meant what they have actually expressed."** According to

Counsel, the foregoing is buttressed by Section 77(4) and (6) of the **INCOME TAX ACT**[i], which provide, respectively, that-

> **77(4) "Any tax payable by any person under an assessment made under subsection (3) of Section sixty-three or Section sixty-four shall be due and payable on the date notice of the assessment is given to the person under Section sixty-five."**
>
> **(6) Subsection (4) shall have effect notwithstanding that the person assessed objects to or appeals against that assessment."**

Counsel submitted that the Legislature could not have intended to give the Tribunal power to grant a stay of execution when the **INCOME TAX ACT**[i] provides that the tax payable under an assessment shall be due and payable notwithstanding that the taxpayer has objected or appealed against the assessment. That furthermore, the **INCOME TAX ACT**[i], the **CUSTOMS AND EXCISE ACT**[c] and the **VALUE ADDED TAX ACT**[j] provide for elaborate refund provisions where tax is over paid or paid in error. Counsel reinforced his submissions by referring us to **HALSBURY'S LAWS OF ENGLAND**[k], where the authors have said that-

> **"Except as otherwise provided, where specified appeals have been made to the General Commissioners or the Special Commissioners, the tax charged by the assessment is due and payable as if there had been no appeal"**

Counsel went on to contend that in the case of **METCASH TRADING LIMITED V. THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE AND THE MINISTER OF FINANCE[7],** the Constitutional Court of South Africa upheld the **"pay now, argue later"** provision in the **VALUE ADDED TAX ACT[1],** which obliges the taxpayers to pay the assessed amount notwithstanding the noting of an appeal. Counsel pointed out that the Court specifically held that-

> **"Neither the noting of the statutory "appeal" to the Special Court (or the board) nor noting of any subsequent appeal in itself suspends the vendor's obligation to pay accordingly to the tenor of the assessment and accompanying imposts.**
>
> **The first part of the section is simply not concerned with anything other than the non-suspension- notwithstanding demur- of the obligation to pay the assessed VAT and consequential imposts chargeable under the Act.**
>
> **It follows that none of the grounds for contending that Section 36 (1) of the Act fails foul of the constitutionally protected right of access to the Courts can be supported."**

The learned Counsel for the Respondent did not file any written heads of argument in response. However, at the hearing of this appeal on 6th June 2017, Mr. MULENGA who was standing in for Mr. Suzyo DZEKEDZEKE, conceded that, in view of this Court's

judgment in the **ARMCOR SECURITY LIMITED**[2] case, he had no contention against the appeal.

Much as we have already pronounced ourselves on the jurisdiction of the Revenue Appeals Tribunal to grant Orders for Stay of Execution in the **ARMCOR SECURITY CASE**[2], we would like to develop the jurisprudence on this point further in view of the arguments that the Appellant has raised. As alluded to above, the appeal, in this case, raises only one issue, namely, **"whether the Tribunal has inherent, implied and ancillary powers to grant an order of stay of execution against the recovery of disputed tax."**

It is not in dispute that the **REVENUE APPEALS TRIBUNAL ACT**[b] and Regulations made under that Act did not make express provision for the Tribunal to grant an order of stay of execution. It is also not in dispute that even the **CUSTOMS AND EXCISE ACT**[c] does not contain any express provision empowering the Tribunal to stay a decision of the Appellant. The lower Court in this case inferred power for the Tribunal to grant a stay of execution from

Section 3(a) of the **REVENUE APPEALS TRIBUNAL ACT[b]; the** preamble to that Act; and Section 5(2)(f) of the **CUSTOMS AND EXCISE (AMENDMENT) ACT[m].** In fact, with regard to the **REVENUE APPEALS TRIBUNAL ACT[b]**, the Court below expressed the view that **"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."**

Counsel for the Appellant in his arguments, has faulted the lower Court for having inferred the power to grant an order of stay of execution from the other provisions of legislation. In Counsel's view, the Tribunal can only exercise powers expressly given to it by its enabling legislation. Counsel has submitted that if it was the intention of Parliament to give the Tribunal power to grant orders of stay of execution, Parliament would have done so expressly in the relevant tax statutes.

The preamble to the **REVENUE APPEALS TRIBUNAL ACT[b]** is couched in the following terms:

> **"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."

Section 3(a) of the **REVENUE APPEALS TRIBUNAL ACT**[b] provides that-

"3. 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; ...."

Another provision that the lower Court relied on is Section 5(2)(f) of the **CUSTOMS AND EXCISE (AMENDMENT) ACT**[m]. To put it in its proper context, we will reproduce the entire Section 5(2). It provides that-

> **"5(2) The Tribunal shall hear and determine appeals under this Act in respect of any of the following matters:**
> **(a) in the circumstances set out in paragraph (a) of section three of the Revenue Appeals Tribunal Act;**
> **(b) the refusal to grant, renew or the cancellation of a licence for the manufacture of excisable goods;**
> **(c) the refusal to grant, renew or the cancellation of a licence for a bonded warehouse;**
> **(d) the refusal to grant, renew or the decision to suspend or cancel a Customs Agent's licence;**
> **(e) the application of any administrative decision on a matter arising from a seizure of goods under this Act; or**
> **(f) any other matter against which an appeal shall lie under this Act."**

The learned Judge in the lower Court basically inferred the power to grant a stay of execution from the fact that the above provisions give the Tribunal jurisdiction to **'hear and determine'** appeals under the **CUSTOMS AND EXCISE ACT**[c]. In this regard, the Court agreed with the ruling of the Tribunal, that it would be erroneous to think that the Tribunal could be given authority to hear matters without the law inferring some enforcement mechanisms to ensure compliance with orders of the Tribunal. The Court held, after taking into account Section 5(2)(f) of the Customs and Excise (Amendment) Act No. 2 of 2001 and Section 5 of the Interpretation and General Provisions Act, that ***"the Revenue Appeals Tribunal, whilst siezed of an appeal, has inherent,***

implied and ancillary powers to grant Stays of Execution against the recovery of disputed demand of tax."

Section 25 of the Interpretation and General Provisions Act states 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 reasonably necessary to enable the person to do or enforce the doing of the act or thing."**

We have carefully studied the provisions of the **REVENUE APPEALS TRIBUNAL ACT[b]**, **CUSTOMS AND EXCISE ACT[c]** and the **INTERPRETATION AND GENERAL PROVISIONS ACT[d].** We reiterate our position in the **ARMCOR SECURITY CASE[2]**, that there is no provision in any of these statutes from which a power to stay execution can be inferred. In our opinion, if Parliament wanted the Tribunal to have power to grant a stay of execution, it would have provided for that power expressly. A cursory scrutiny of Section 3(a)(i) of the **REVENUE APPEALS TRIBUNAL ACT[b]** establishes that under that sub-paragraph, the opposite was the position; it required an importer to pay the demanded amount of tax or provide security for its payment before the importer can appeal to the

Tribunal. In effect, the Tribunal only had jurisdiction to hear and determine an appeal under that sub-paragraph after the importer had paid the demanded amount of tax or deposited security for its payment.

We, therefore, do not agree with the lower Court that power to grant a stay of execution can be inferred from the **REVENUE APPEALS TRIBUNAL ACT[b].** The jurisdiction of the Tribunal to hear and determine appeals from the Appellant, does not invariably mean that the Tribunal has power to stay decisions of the Appellant. Under our legal system, it is trite law that an appeal does not operate as a stay of execution. Relevant pieces of legislation contain provisions pursuant to which a litigant must apply to the Court to stay execution of the decision appealed against. In addition, a stay of execution is not granted as a matter of right; the Court's power in this regard is discretionary. We reiterated this position of the law when we decided the case of **NDOLA CITY COUNCIL V. CHARLES MWANSA[8].**

In that case, we stated the following:

> **"It is trite law that an appeal *per se* from the Subordinate Court's decisions to the High Court do not operate as stay of execution. This is specifically provided for in the High Court Act. The appellant must apply for stay to the High Court and the matter becomes discretionary. The same situation applies to the appeals to the Supreme Court. There is a specific provision to the effect that the appeal does not operate as stay of execution, it must be applied for and the decision is discretionary. We have considered the wording of Section 100 of the Local Government Act. We are of the view that if the appeal against the decision of the Local Government Service Commission would *per se* operate as stay of execution then it will produce absurdity."**

We, therefore, are of the considered opinion that, in the absence of an express legislative provision giving the Tribunal power to stay the execution of decisions of the Appellant, the Tribunal does not have that power.

In jurisdictions where Tax Appeals Tribunals have powers to grant orders of stay of execution, enabling statutes contain express provisions to that effect. The learned Counsel for the Appellant referred us to Section 28 of the **TAX APPEALS TRIBUNALS ACT, CHAPTER 345 OF THE LAWS OF UGANDA**[g], which provides that-

> **"28. Where an application for review of a taxation decision has been lodged with a tribunal or an appeal against a decision of a tribunal has been lodged with the High Court, the reviewing body may make an order staying or otherwise affecting the operation or implementation of the decision under review or appeal, or a part of the decision, as the reviewing body considers appropriate for the purposes of securing the effectiveness of the proceeding and determination of the application or appeal."**

Similarly, Section 18 of the Kenyan **TAX APPEALS TRIBUNAL ACT**[n] provides that-

> **"18. Where an appeal against a tax decision has been filed under this Act, the Tribunal may make an order staying or otherwise affecting the operation or implementation of the decision under review as it considers appropriate for the purposes of securing the effectiveness of the proceeding and determination of the appeal."**

The position under the South African tax law is the opposite of the position under the Ugandan and Kenyan tax laws. Under the South African tax law, tax legislation expressly provides that the obligation to pay tax should not be suspended by an appeal unless the Commissioner directs to the contrary. The South African tax laws are based on the **"pay now, argue later"** principle. In this regard, for instance, Section 36(1) of the **VALUE-ADDED TAX ACT**[l] of South Africa provides, in relevant parts, that-

> **"36(1) The obligation to pay and the right to receive and recover any tax, additional tax, penalty or interest chargeable under the Act shall not, unless the Commissioner so directs, be suspended by any appeal or pending the decision of a court of law, but if any assessment is altered on appeal or in conformity with any such decision ... a due adjustment shall be made, amounts paid in excess being refunded with interest ... and amounts short-paid being recoverable with penalty and interest calculated as provided in section 39(1)."**

864

The wording of the said Section 36(1) of the **VALUE-ADDED TAX ACT**[1] is substantially the same as the wording of Section 88 of that Country's **INCOME TAX ACT**[o]. The Supreme Court of South Africa pronounced itself on Section 88 of the **INCOME TAX ACT**[o] when it decided the case of **THE COMMISSIONER FOR INLAND REVENUE V. NCR CORPORATION OF SOUTH AFRICA (PROPRIETARY) LIMITED**[9]**.** That case was an appeal concerning the proper interpretation of Section 88. The Supreme Court said the following:

> **"Be all this as it may, the meaning of the first portion of section 88 is, in my opinion, clear. It enacts in effect that, subject to a contrary direction by the Commissioner, a taxpayer's obligation to pay tax to which he had been assessed (and the Commissioner's correlative right to receive and recover such tax) are not suspended by the fact that the tax payer may have appealed to the special court against the Commissioner's disallowance of an objection to the assessment, or by the fact that, the special court having given its decision concerning the assessment, there is an appeal pending in terms of sec 86 or sec 86A, at the instance of either party, against the decision of the special court."**

Further, in the case of **METCASH TRADING LIMITED**[7]**,** referred to us by Counsel, the Constitutional Court of South Africa considered the constitutional validity of, among others, Section 36(1) of the **VALUE ADDED TAX ACT**[1]. The Court noted that-

> **"In its textual context and on its plain wording the subsection is concerned with ensuring two separate but related objectives: first, that the obligation of aggrieved vendors to pay their tax and associated imposts is not delayed by their pursuing their remedies under Part V of the Act and, second, that where necessary, refunds plus interest, will be made later."**

The Constitutional Court went on to explain the rationale for the **"pay now, argue later"** rule contained in Section 36(1). The Court said the following:

> **"The applicant argues that to the extent that section 40(5) does limit access to a court prior to the full airing of the issues before the Special Court and does prevent a disgruntled taxpayer from obtaining interdictory relief to suspend the operation of the "pay now, argue later" rule, it is in breach of section 34 of the Constitution. I am prepared to assume in favour of Metcash for the purposes of this judgment that section 40(5) does occasion such a limitation. The question that then arises is whether that limitation is justified in terms of section 36 of the Constitution.**
>
> **In considering justification it is important to remember that the limitation under section 40(5) is limited in its scope, temporary and subject to judicial review. There are three additional features. First, the public interest in obtaining full and speedy settlement of tax debts in the overall context of the Act is significant. In their affidavits the Commissioner and the Minister mentioned a number of public policy considerations in favour of a general system whereby taxpayers are granted no leeway to defer payment of their taxes. These are in any event well-known and self-evident. Ensuring prompt payment by vendors of amounts assessed to be due by them is clearly an important public purpose. ...**
>
> **Secondly, the principle "pay now, argue later" is one which is adopted in many open and democratic societies. In many of these jurisdictions, as well, some scheme for immediate execution against a taxpayer is provided to ensure that the rule is efficacious. Given its prevalence in many other jurisdictions, it suggests that the principle is one which is accepted as reasonable in open and**

democratic societies based on freedom, dignity and equality as required by section 36."

The position under the American tax law also gives priority to the Government's right to promptly collect taxes. In the case of **PHILLIPS V. COMMISSIONER OF INTERNAL REVENUE**[10], the Supreme Court of the United States of America explained that-

> **"The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained. ... Property rights must yield provisionally to governmental need. Thus, while protection of life and liberty from administrative action alleged to be illegal may be obtained promptly by the writ of habeas corpus, ... the statutory prohibition of any 'suit for the purpose of restraining the assessment or collection of any tax' postpones redress for alleged invasion of property right if the exaction is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue."**

It is clear from the above discussion of foreign tax law provisions that in jurisdictions where tax appeals tribunals have power to stay execution, that power has been given expressly in enabling legislation. In our view, the absence of an express provision for the Tribunal in the instant case to have power to grant an order of stay of execution was not inadvertent. The absence of an express provision for stay of execution simply means that

Parliament did not intend to clothe the Tribunal with jurisdiction to stop the Appellant from collecting disputed tax in cases where there is an appeal lodged with the Tribunal. The **CUSTOMS AND EXCISE ACT**[c] contains provisions for refund where it turns out that the tax paid should not have been paid or that only a lesser amount should have been paid. To this effect, Section 92 of that **ACT**[c] provides as follows:

> **"92. (1) Except as otherwise provided in this Act, refunds of duty shall only be made in accordance with the provisions of this section.**
> **(2) Application for refund of duty overpaid shall be made to the Customs Division in the prescribed form.**
> **(3) If the Commissioner-General is satisfied that the applicant has paid duty exceeding the amount due, he shall authorise refund to be made to the applicant of the amount overpaid:**
> **Provided that the Commissioner-General may, before authorising any refund to be made to the applicant, require that the applicant should produce sufficient evidence or give satisfactory assurance that he has remitted or shall remit to the purchaser of the goods the amount of such refund.**
> **(4) No refund of duty paid in excess or in error shall be granted in terms of this section unless the application therefor is received by the Customs Division within a period of two years from the date when such duty was paid."**

A review of Section 92 shows that the tax laws of this Country are based on the **"pay now, argue later"** rule of taxation. This conclusion becomes even more plausible when one considers the manner in which Section 3(a)(i) of the **REVENUE APPEALS**

TRIBUNAL ACT[b], which we have already reproduced in this judgment, was couched. Further, the **"pay now, argue later"** principle is particularly embodied into Section 77(4) and (6) of the **INCOME TAX ACT[i],** which provides that-

> **"77(4) Any tax payable by any person under an assessment made under subsection (3) of section sixty-three or section sixty-four shall be due and payable on the date the notice of the assessment is given to the person under section sixty-five.**
> **(6) Subsection (4) shall have effect notwithstanding that the person assessed objects to or appeals against that assessment." (emphasis by underlining is ours.)**

It is worth noting that during the process of repealing the **REVENUE APPEALS TRIBUNAL ACT[b],** and replacing it with the current **TAX APPEALS TRIBUNAL ACT[a]**, Parliament recognized the fact that the Tribunal did not have power to grant a stay of execution. In its report, on the **TAX APPEALS TRIBUNAL BILL[p]**, the Parliamentary Select Committee on Economic Affairs, Energy and Labour made the following observation-

> **"Your Committee also observed that when an assessment is made by the Zambia Revenue Authority, the tax has to be paid upon assessment, even if it is under dispute and is appealed to the Tribunal. Depending on the amount under dispute and the time taken to resolve the matter, tax assessments have the potential to financially cripple an individual or a business."**

The Committee went on to recommend as follows:

> **"Under Clause 8 a new subsection should give powers to the Chairperson and the Vice-Chairperson to deal with interlocutory applications which may include application for stay of execution and enforcement of tax assessments pending the determination of the appeal before the Tribunal and subject to such terms and conditions that may be deemed to be appropriate."**

A study of the **TAX APPEALS TRIBUNAL ACT**[a] establishes that the recommendation of the Committee was not incorporated into that Act. The Act still does not contain any express provision empowering the Tribunal to grant a stay of execution. To minimise the effects of delays on tax payers, which was pointed out by the Committee, Section 10 of the **TAX APPEALS TRIBUNAL ACT**[a] has provided that the Tribunal must render its decision within sixty days after the conclusion of the hearing of the matter. It can, therefore, be safely concluded that Parliament purposefully decided not to grant the Revenue Appeals Tribunal, the jurisdiction to grant Orders to Stay Execution against recovery of disputed demand of tax.

In view of our decision of 19th January 2017 in the case of **ZAMBIA REVENUE AUTHORITY V ARMCOR SECURITY LIMITED**[2] and what we have stated above, this appeal was bound

to succeed. The decision of the lower Court cannot stand and is therefore, quashed. Costs shall be for the Appellant to be taxed in default of agreement.

I.C. Mambilima
CHIEF JUSTICE

R.M.C. Kaoma
SUPREME COURT JUDGE

N.K. Mutuna
SUPREME COURT JUDGE