

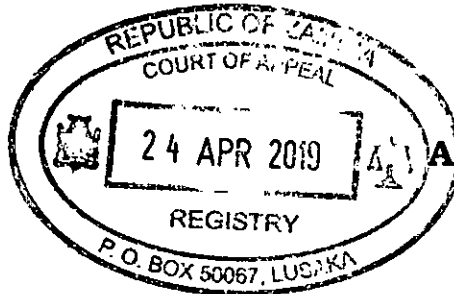
**IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 96/2018
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

BETWEEN:

ZEGA LIMITED

AND

ZAMBIA REVENUE AUTHORITY



APPELLANT

RESPONDENT

CORAM: CHASHI, LENGALENGA AND SIAVWAPA, JJA

On 23rd January and 24th April 2019

FOR THE APPELLANT: NOT IN ATTENDANCE

FOR THE RESPONDENT: NOT IN ATTENDANCE

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases Referred to:

1. Independent School Dist. v. Independent School District 170 N.W.2d 433, 440 (Minn.1969)
2. People v. O'Rourke 124 Cal. App. 752, 759 (Cal. App.1932)
3. Zambia Revenue Authority vs. Fellimart Investments Limited SCJ No. 24 of 2017
4. Hakainde Hichilema and Geoffrey Bwalya Mwamba v Edgar Chagwa Lungu and Others Ruling No 33 of 2016
5. Wahl v Round Valley Bank 38 Ariz. 411 300 p 955 (1931)
6. State v Richie 20 S.W. 3D 624 (Tenn. 200)
7. Elliot v Piersol, 1 Pet. 328 – 340. 26 U.S. 328, 340 (1828)

Legislation Referred to:

1. Tax Revenue Appeals Act of 2006 of Tanzania
2. Revenue Appeals Tribunal Regulations, S.I. No. 143 of 1998 of Zambia
3. Constitution of Zambia (Amendment) Act No. 2 of 2016

This is our Judgment concerning the appeal by ZEGA Limited (hereinafter referred to as the (Appellant) against the Ruling of the Tax Appeal's Tribunal of 14th August 2017.

A brief synopsis of the issues that were before the Tribunal is that the Appellant appealed against a value added tax assessment in the sum of K 1,620,652,188 raised by the Zambia Revenue Authority (hereinafter referred to as the (Respondent') against them. The business that they are engaged in as a company is the provision of ground handling or ramp services for cargo and passenger aircrafts at designated international airports in Zambia. Being dissatisfied with the assessment, the Appellant appealed to the Tribunal on the following grounds:

- a) **The provision of Ramp services to facilitate the movement of goods to or from an air carrier for the purposes of export and freight (as envisaged under the Second Schedule to the Value Added Tax Act) is zero rated; and**
- b) **The provision of Ramp services to facilitate embarkation and disembarkation of persons travelling by air or from an air carrier (as envisaged under the First Schedule of the Value Added Tax Act) is a VAT exempt service.**

The Tax Appeals Tribunal allowed ground one but dismissed ground two. Dissatisfied with the Tribunal's ruling, the Appellant advanced three grounds before this Court namely:

- **That the Tax Appeals Tribunal erred in law and in fact when it found that the provision of ramp services to facilitate the embarkation and disembarkation of persons travelling by air from an air carrier by ZEGA is an ancillary service not covered under Paragraph 5(a) of the Act.**
- **That the Revenue Appeals Tribunal erred in law in failing to fully determine the matter by not ordering how the parties should proceed in light of its findings;**
- **That the inordinate delay by the Revenue Appeal's Tribunal in determining the matter and delivering its Ruling is wrongful and unconstitutional.**

Before we could hear the appeal, the parties filed a consent judgment with respect to grounds one and two and also withdrew the said grounds of appeal. This judgment is therefore, in respect of ground three only.

The gist of the Appellant's arguments in the third ground is that the Tribunal was in gross violation of Article 118 (2) of the Constitution of Zambia by delaying to deliver the ruling. It has also argued that the Tribunal was in violation of Regulation 16 (1) of the Revenue Appeals Tribunal Regulations Statutory Instrument No 43 of 1998 as well as section 10 of the Tax Appeals Tribunal Act.

Section 10 of the Act provides that the Tribunal must render its decision within sixty days of conclusion of the hearing. Regulation 16 (1) however, permits the Tribunal to render an oral ruling after the hearing but that such ruling shall be reduced into writing and availed to all the parties within fourteen days of delivering the ruling.

In this case, the Tribunal concluded its hearing on 15th August 2006 and rendered an oral ruling on 22nd June 2007. This already was contrary to Regulation 16 (1) which allows the Tribunal to render such a ruling at the end of the hearing and not almost a year later. The oral ruling rendered ought to have been in writing as the Tribunal had already exceeded the time limit under section 10 of the Act.

The Tribunal however, did not even reduce the oral ruling into writing until 14th August 2017 which was eleven years after the end of the hearing and almost ten years after it rendered its oral ruling. Regulation 16 (1) provides as follows;

“The Tribunal may deliver its decision at the end of a hearing, but in any case the decision shall be put in writing and sent to all parties to the appeal within fourteen days of delivering the decision.”

The import of the regulation is that whereas the rendering of a ruling at the end of the hearing is not mandatory, however, once it

chose to, it became mandatory for it to reduce the ruling into writing within fourteen days and send it to the parties.

Black's Law dictionary at page 1375 defines the word "shall" as follows;

"As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command and one which has always or which must be given compulsory meaning."

In the case of Independent School Dist. v Independent School District¹ the Court held that, **"when used in statutes, contracts, or the like, the word "Shall" is generally imperative or mandatory."**

And in the case of People v O'Rourke², the Court stated as follows:

"In common, or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command, and one which has always, or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears; but the context ought to be very strongly persuasive before it is softened into mere permission."

In Zambia Revenue Authority v Fellimart Investments Limited³, the Court held as follows:

"To minimize the effects of delays on tax payers, which was pointed out by the Committee, Section 10 of the Tax Appeals Tribunal Act

has provided that the Tribunal must render its decision within sixty days after conclusion of the hearing the matter.”

In response to ground three, the Respondent’s argument was brief and to the point. It is contended that even though there had been no written ruling, there was an oral ruling delivered on the 22nd of June 2007 which informed the parties on the position of the Tribunal regarding provision of ramp services. In a nutshell the Respondent argued that since the Appellant knew that it was supposed to be charging VAT on ramp services from that date, they shouldn’t have neglected to do so just because there was no written ruling.

The Regulations were made pursuant to Act No. 11 of 1998 of the Appeals Tribunal Act. The Act empowered the Tribunal to hear, inter alia appeals relating to Tax assessment. The Regulations do not however, provide any sanctions for breach and neither do they declare the status of a decision delivered in breach of regulation 16(1). In the case of Tanzania, Section 24 of the Tax Revenue Appeals Act of 2006 is word for word with our Regulation 16(1). It does not go further either.

We have considered the argument advanced by the Respondent to the effect that an oral Ruling was delivered. The issue is that Regulation 16(1) of the Statutory Instrument clearly stipulates that the ruling should be reduced into writing and handed over to the respective parties. The Tribunal was therefore, obliged to put the

oral decision in writing within fourteen days and hand it down to the parties.

It took the Tribunal eleven years to hand down its written ruling and so the question is; what is the legal status of a ruling or decision made outside the time set by the law? In the case of Zambia Revenue Authority v Fellimart Investments Limited (supra), the Court did not state what would be the effect of breaching section 10 of the Tax Appeals Tribunal Act.

In our considered view, a decision delivered outside the time specified by a statutory provision is null and void. Our understanding of the intention of such a provision in a piece of legislation is to attach jurisdiction to time so that beyond the set time, jurisdiction to perform that stated act is lost.

We draw inspiration from the majority decision in the case of Hakainde Hichilema and Geoffrey Bwalya Mwamba v Edgar Chagwa Lungu and Others⁴. In that case, the Constitutional Court was faced with the question whether, it could hear the Presidential Election Petition outside the fourteen day period prescribed under Articles 101 (2) and 103 (2) of the Constitution.

In resolving that issue, the majority decision of the Court made a number of statements whose effect was that at the expiration of the

fourteen day period, the Court lacked jurisdiction and any hearing after that period would be a nullity.

At page R5 of its Judgment, the Court stated as follows;

“This is because if a Court proceeds to hear a matter without jurisdiction, the resulting trial or hearing would be a nullity”

At page R7, the Court stated as follows’

“This means that if this petition were to be heard outside the fourteen days period, the proceedings will be a nullity”

Finally, at page J15 of the judgment, the Court made the following statement’

“Article 101 (2) and 103 (2) of the Constitution, limit the period within which a Presidential Election Petition must be heard by this Court to fourteen days after filing of the Election Petition. The Court cannot competently hear a petition outside this period”

We are cognizance of the fact that the Constitutional Court was dealing with a different type of case. What we believe however, is that the principle is the same. Whenever, the legislature prescribes a time frame within which an act is to be done, doing it outside that time frame renders the act done a nullity for want of jurisdiction.

Away from our jurisdiction, we considered some pronouncements from the United States of America by both the Federal Court and State Courts. In the case of Wahl v Round Valley Bank⁵ it was held that after the expiry of a stipulated time, a tribunal loses jurisdiction as to the subject matter. This was the same position held in the case of State v Richie⁶.

It is also the position in many United States of America State Jurisdictions that a judgment rendered by a Court lacking jurisdiction as to either the subject matter or the parties is void as such a court lacks the power to render such a judgment.

For instance, in the case of Elliot v Piersol⁷, the Supreme Court made the following statement;

“Without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void and form no bar to a recovery sought even prior to a reversal in opposition. They constitute no justification and all persons concerned in executing such judgments or sentences, are considered in law as trespassers”

In view of the above cited authorities, it is clear in our minds that the ruling rendered by the Tax Appeals Tribunal eleven years outside the sixty day period stipulated under section 10 of the Tax Appeals Tribunal Act and almost one year after it rendered its oral ruling pursuant to Regulation 16 (1) of Statutory Instrument No 143 of 1998, is a nullity. This is because in either case, the Tribunal had lost its jurisdiction as it was out of time.

The resulting effect would be that the parties would require to make a fresh appearance before the Tribunal to ensure compliance with the law. However, in this case, that will not be necessary as the dispute was resolved by consent with the two grounds having been withdrawn accordingly. This Judgment therefore, serves no purpose