

A **SHINYANGA TOWN COUNCIL v. TANZANIA
BREWRIES LTD**

B HIGH COURT OF TANZANIA
AT TABORA
(Mwita, J.)

C CIVIL CASE No. 5 OF 1999

Administrative Law – Administrative action – Challenging an administrative action for being unconstitutional – Whether an application under section 4 of the Basic Rights and Duties Enforcement Act 1994 is the only way of challenging such action.

Constitutional Law – Administrative Action – Resistance to an unconstitutional administrative action – Whether an application under section 4 of the Basic Rights and Duties Enforcement Act 1994 is the only way.

E The plaintiff sued the defendant for non-payment of an industrial cess imposed by the plaintiff by virtue of Government Notice Number 186 of 1998. In its defence, the defendant raised a counter claim seeking, *inter alia*, a declaration that the Government Notice was unconstitutional. There upon, the plaintiff raised an objection claiming that because the defendant was alleging contravention of basic rights under the Constitution, it should institute a separate suit under section 4 of the Basic Rights and Duties Enforcement Act 1994 which would require the Court to be composed of three judges in order to hear the case.

G **Held:** (i) The provisions of section 4 of the Basic Rights and Duties Enforcement Act do not preclude a person from seeking redress for contravention of the provisions of sections 12 to 29 of the Constitution by ways other than instituting an action under section 4 of the Act.

(ii) The validity of an administrative action can be challenged by way of defence to a criminal charge or, as in this case, defence to a demand for some payment.

I (iii) Under section 8(2) of the Basic Rights and Duties Enforcement Act 1994, the High Court may reject an application under section 4 of the Act if satisfied that

adequate means of redress for the alleged contravention are available to the applicant under some other law;

(iv) The defendant in this case has the right to challenge the validity of Government Notice Number 186 of 1998 by way of defence to the suit for payment of the industrial cess imposed under the said Notice.

Preliminary objection overruled

Cases referred to:

- (1) *Boddington v. British Transport Police* [1998] NLJ Law Reports 515
- (2) *Customs and Excise Commissioner v. Cure and Deeley* [1961] 3 All ER 641
- (3) *Daymond v. Plymouth City Council* [1975] 3 All ER 134
- (4) *Wandsworth LBC v. Winder* [1985] AC 461

Statutory provisions referred to:

- (1) Basic Rights and Duties Enforcement Act 1994, Act Number 33 of 1994, sections 3, 4 and 8(2)
- (2) Constitution of the United Republic of Tanzania 1977, sections 12 to 29.
- (3) Civil Procedure Code 1966, Order XIV, rule 2

Mr Kaunda, for the Plaintiff

Mr Mbwambo, for the Defendant

RULING

(Delivered 17 May 2001)

Mwita, J.: By virtue of GN Number 186 of 1998 Shinyanga Town Council (now Municipal Council) is empowered to impose industrial cess on certain industrial products, including beer, which are either locally produced or sold within the area of jurisdiction of the said Council. In exercise of its power under the said by law the said Council

A imposed a cess of TZS. 1 in respect of every bottle of beer sold within its area of jurisdiction with effect from July 1997. GN Number 186 of 1998 is deemed to have come into force on 1 July 1997.

B The defendant is among the sellers of beer within the area of jurisdiction of the said Council. For some time the defendant paid to the said Council cess at the rate of TZS. 1 per bottle of beer, then declined to pay any cess.

C On 24 May 1999 Shinyanga Town Council (plaintiff) instituted a suit against the defendant claiming the amount of cess then due. By its Written Statement of Defence the defendant disputed the plaintiff's claim on the ground that the cess demanded is equivalent to double taxation and in its counter-claim the defendant seeks a number of
D declaratory orders including a declaration that GN Number 186 of 1998 is *ultra-vires*, unconstitutional and unreasonable.

E When the suit came up for hearing on 30 June 2000 Mr Mbwambo, the defendant's advocate, raised a preliminary objection touching on the validity of GN Number 186 of 1998. On 25 of September 2000 I made an order to the effect that, in so far as the issue of the validity of the said by-law may dispose of the suit, in terms of rule 2 of Order XIV of the Civil Procedure Code 1966, the issue of the
F validity of GN Number 186 of 1998 be tried first. When the matter came up for hearing on 10 May 2001, Mr Kaunda, Advocate for the plaintiff, raised a preliminary objection to the effect that in so far as the defendant appears to raise the issue of contravention of its
G basic rights under the Constitution, then the defendant should institute a separate suit under section 4 of the Basic Rights and Duties Enforcement Act Number 33 of 1994. The implication of that is that this Court lacks jurisdiction to entertain the defendant's counter-claim as a suit
H under section 4 of Act Number 33 of 1994 must be tried by a Court composed of three judges.

I In terms of section 3 of Act Number 33 of 1994 that Act applies only to an allegation in the defendant's counter-claim that appears to be capable of being within the ambit of Part III of Chapter One of

A the Constitution since the allegation is that G.N Number 186 of 1998 is discriminatory, the issue is whether redress for such constitutional contravention can only be obtained by instituting a suit under section 4 of Act Number 33 of 1994.

B Section 4 of Act Number 33 of 1994 provides:

C If any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress.

It is clear from the above provision that it is not mandatory that redress for contravention of any of the provision of section 12 to 29 of the Constitution must necessarily be sought by instituting a suit under section 4 of Act Number 33 of 1994. In other words section 4 does not preclude a person from seeking redress for contravention of the said provisions of the Constitution by other lawful action open to him apart from instituting a suit under section 4.

The next issue is whether the defendant in this matter has other lawful action open to him apart from instituting a suit under section 4. In other words, whether challenging the validity of GN Number 186 of 1998 in the manner it is being done in this suit is proper.

In **Administrative Law** by Wade, (4 ed), at page 285 it is stated:

... the Court will treat an administrative act or order as invalid only if the right remedy is sought by the right person in the right proceedings. The question now is what are the right proceedings in which the validity of the act or order can be challenged. It may be challenged directly, as in proceedings for *certiorari* to quash it or for a declaration that it is unlawful. But it may also be challenged collaterally, as for example by way of defence to a criminal charge, or by way of defence to a demand for some payment.

A firm may resist a demand for purchase tax by showing that the assessment is made under and invalid regulation; *Customs and Excise Commissioner v. Cure and Deeley* (1); and a rate payer may similarly resist a rate demand: *Daymond v. Plymouth City Council* (2).

- A In *Boddington v. British Transport Police* (3) the House of Lords held that in the absence of a clear parliamentary intention to the contrary, a defendant is entitled to raise a defence to a criminal charge the contention that subordinate legislation under which he is prosecuted, or an administrative decision made thereunder is *ultra vires* and unlawful and that if he establishes that he has committed no crime.

Lord Irvine LC said:

- C In approaching the issue of statutory construction the Courts proceed from a strong appreciation that ours is a country subject to the rule of law. This means that it is well recognized to be important for the maintenance of the rule of law and preservation of liberty that individuals affected by legal measures promulgated by executive public bodies should have a fair opportunity to challenge these measures and to vindicate their rights in Court proceedings. There is a strong presumption that Parliament will not legislate to prevent individuals from doing so.

- E It is clear, therefore, that a defendant in civil proceedings and an accused person in criminal proceedings is entitled to raise a defence by way of collateral challenge in respect of by-laws that affect their rights. The principle in Civil Cases was demonstrated in *Wandsworth LBC v. Winder* (4), where a defendant was permitted to raise, by way of defence to possession proceedings brought by council for non-payment of rent, the argument that he was not liable for arrears because certain resolutions and notices of increase were *ultra vires* for unreasonableness.

Sub-section (2) of section 8 of the Basic Rights and Duties Enforcement Act 1994 provides:

- H The High Court shall not exercise its power under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexatious.
- I In the instant matter the defendant, having been sued for non-payment of cess imposed under GN Number 186 of 1998, is entitled to raise

a defence by way of collateral challenge relating to the validity of the said by-law. Since the defendant has adequate means of redress available to it an application under section 4 of Act Number 33 of 1994 may be rejected.

For the above reasons the preliminary objection by the plaintiff is overruled.

CRDB BANK LIMITED v. DAMAS JOSEPH MALLIYA

HIGH COURT OF TANZANIA
AT DAR ES SALAAM
(Kalegeya, J.)

COMMERCIAL CASE No. 63 OF 2000

Banking – Collecting bank – Collecting bank sends cheque to drawee bank for payment – Collecting bank observes the value date procedure – After expiry of 14 days allows payee to draw – Within a span of hardly two weeks payee withdraws almost all the money deposited – After such withdrawals it is discovered the cheque has disappeared – Whether the bank may recover the money paid out.

Banking – Bank pays money to payee by mistake believing a cheque sent for collection has been paid – Later it is discovered cheque has disappeared – Whether bank can recover money paid out by mistake from the payee.

Banking – Bank pays money to payee by mistake – Basis of recovery of money paid out by mistake.

Banking – Bank pays money to payee by mistake – Whether bank can exercise the right of set-off – Whether bank can combine a personal account and an account of a company in which defendant is director.