IN THE HIGH COURT OF JUSTICE GHANA

HELD IN ACCRA ON THE 11TH DAY OF MARCH 2005

BEFORE HER LORDSHIP MRS. IVY ASHONG-YAKUBU, J.

SUIT NO. BMISC 508/2004

THE REPUBLIC

VRS

THE COMMISSIONER, CUSTOMS EXCISE & PREVENTIVE SERVICE ………… RESPONDENTS

EX PARTE – GHANA NATIONAL ASSOCIATION OF POULTRY FARMERS ((GHANAPF) ………... APPLICANTS

R U L I N G

This is the Court's Ruling in a case in which Applicants, the Ghana National Association of Poultry Farmers (GHANAPF) hereinafter referred to as the Applicants/Association (or As for short), filed their motion pursuant to leave granted them on 22nd October 2004, seeking from the court an order of mandamus to compel The Commissioner, Customs, Excise and Preventive Service (CEPS), the Respondent (Resp. for short) herein, to implement and apply the duties contained in the provisions of the Customs and Excise (Duties and other Taxes (Amendment) Act 2003 (Act 641)

The grounds for the application are set out inter alia in the Statement annexed to As Motion paper, filed on 10th November 2004, as follows: viz.

a) That the Minister of Finance and Economic Planning in February 2003 in the Budget Statement and Economic Policy of government to Parliament, proposed to impose an additional duty of 20% on finished poultry products imported into the country

b) That Parliament enacted the Custom & Excise (Duties & Other Taxes) (Amended) Act, 2003 (Act 641), which amended the Customs & Excise (Duties, etc.) Act 1996 (Act 512) which, inter alia, increased the duties on finished imported poultry products from 20% to 40% of the CIF value.

c) That Act 641 was duly gazetted on the 17th April 2003, the date on which it was deemed by law to have come into force;

d) That the Customs and Excise (Duties & Other Taxes) Act, 1996 (Act 512) as amended by Customs and Excise (Duties, etc) Act 2003, (Act 641) imposed a duty on the Commissioner for CEPS to apply the duties/tariffs stipulated in Act 641 on all finished imported poultry products.

e) That Respondent commenced implementation of Act 641 on the 8th May 2003 but later suspended its operations by a letter under Reference No. H/TAR/1 dated 12th May 2003.

f) That the suspension of the operation of the import duty rate contained in Act 641 is in violation of the Act itself and also in contravention of the Constitution of Ghana 1992 (specifically Articles 174 (2) thereof).

g) That despite repeated demands, the Respondent has failed/refused to comply with the provisions of Act 641 (see Exhibit H1, H2)

By their instant application, as are praying that the Court orders the Respondent to comply with and apply the duties contained in Act 641. In the event, the first question I find myself faced with is whether the Applicant/Association has the right in law to commence this suit. I shall say more about this later. For now, I will say the Applicant/Association is a company incorporated under the laws of Ghana (precisely on 17th July 1995) as a members' association limited by guarantee. In this suit, it is represented by its Executive Secretary, Kofi Aaron Agyei Henaku. Having obtained leave of the court on 22nd October 2004 the aforesaid, Applicant/Association filed their

motion directed at Respondent, whom they described as the Government Agency responsible for collecting Customs duties and other taxes in the country. It is the Applicant/Association's belief that Respondents as the Agent, is the proper defendant.

At the hearing of their Motion, the Applicants/Association exhibited, inter alia, the said Act 641 of 2003 which spoke for itself as a valid statute of Ghana, having come into force on 17th April 2003 as Applicants/Association had earlier averred. There was no question either that the Act imposed a new tariff of 40% of CIF value on (finished, imported) poultry products. If one had any doubt about the ultimate implementor of the duty, that doubt was soon put to rest by the Application/Association's Exhibit D dated 7th May 2003, headed "(Tariff Interpretation Order No. 1/2003. Charges Arising from the 2003 Budget".

Among the instructions issued under the above-headed letter was that set out in sub-clause A headed "Imported Duty" which stated as follows:-

> "The import Duty, rates on some commodities in the 1st to Act 512 of 1996 (as amended) have changed."

"The chapters affected and details of commodities involved are attached as schedules to this order …………………". Again, listed under sub-paragraph (vi) of the aforegoing, one finds under the sub heading
(iv): Forty(40) per cent rate; the following statement, viz:

> "There is now imposed a new import duty rate of 40% on Poultry products falling within the H.S Code".

It directed its officers as follows:-

> "Officers are to take note of the new rate"

Presumably, therefore, with the aforegoing clear or unambiguous directive, CEPS 'officers' were duly empowered by their terms of reference, and at the instance of the Commissioner to implement the new levy.

It is the Applicants/Association's case that as a group of persons directly affected by the government policy on poultry products imported into the country, they had expected the above directives to be implemented which would have given them a slight edge over their competitors who are often farmers in receipt of subsidies from their home governments. This was, however, not to be, and their expectations were soon dashed to the ground as on 12th May 2003 another letter issued from the office of the Commissioner, CEPS, headed "SUSPENSION OF TARIFF INTERPRETAITON ORDER NO. 1/2003 ON CHARGES ARISING FROM 2003 BUDGET to which Respondent became privy. This letter signed by the Assistant Commissioner, [S.O.B Quaye, Esq] was simply copied in the usual manner to "All Ports and Stations" (See exhibit E]. It is noteworthy that the earlier letter, Exhibit D, had been signed by the CEPS Commissioner, Brigadier Richardson E. Biaden and simply copied also to "All Ports and Stations.

Exhibit E's heading spoke for itself. It briefly announced in paragraph 1 as follows:

> "The implementation of Tariff Interpretation Order No. 1/2003 introduced on 8th May 2003 has been suspended with immediate effect, with particular reference to Act 641 of 2003".

Paragraph 2 continued thus;

> "This means that until further notice, the previous tax rates applicable prior to the introduction of Tariff Interpretation Order No. 1/2003 will continue to apply" …………..

"Be guided,"

Again, it is Applicant's/Association's case that although by a subsequent letter dated 8th August 2003 headed "Tariff Interpretation Order No. 2/2003. Charges arising from the 2003 Budget (Exhibit F), circulated under the signature of the Commissioner,

CEPS, there had been no specific reference to the duty on finished poultry products except to re-state at paragraph (iv) under the sub heading:
"Twenty (20) percent Rate" as follows: viz:-

> "(iv) A new 20% Import Duty is now levied on imported finished products …….under Chapter 98 of the H.S Code," implying the reimposition or reversal to the statute quo ante as existed prior to Act 641".

The gravaman of Applicant/Association's case, as spelt out in the submission of counsel, Niber, Esq. for and on behalf of the said Applicants/Association, is that in what clearly looks like approbating and reprobating in respect of the implementation of the 40% tariff imposed by Act 641, Respondents had violated not only the said Act 641, but in so doing, had also contravened Article 174 (2), of the 1992 Constitution.

The Article provides as follows: viz.

> "174(2) where an Act, enacted in accordance with Clause (1) of this Article, confers power on any person or authority to waive or vary a tax imposed by that Act, the exercise of the power of waiver or variation, in favour of any person or authority, shall be subject to the prior approval of Parliament by resolution".

Applicant/Association argued that in the absence of any such clear mandate from parliament to waive or vary the tax imposed by Act 641, the exercise of the said power of waiver or variation in favour of any person or authority (or for whatever reason), where such an act has been done without the specified "prior approval of parliament by resolution…"as envisaged by Article 174 (2), any such act (of waiver, etc.) shall be void and is void at law for infringing a clear and specified provision of the 1992 Constitution.

It is however clear from the Exhibits so far annexed that no such approval had been given by parliament, authorizing Respondents to waive or vary the tax. In any case, the onus rests on Respondents to prove otherwise. This I do not believe, Respondents

have yet done. It may thus be necessary to hear them on the issue prior to drawing my conclusions.

As an interested group holding themselves out as persons directly affected by the non-compliance with the provisions of Act 641, Applicants/Association wrote several times to Respondents requesting that they implement the 40% tariff but, their pleas fell on deaf ears.

Applicants/Association further exhibited invoices marked exhibit E1, E2 and E3 to show that Respondents had continued to ignore the provisions of Act 641. Yet again, Applicants/Association letters marked exhibit f1 and f2 addressed respectively to the Respondent and the Minister of Finance and Economic Planning, also appear to have been ignored by the addressees.

It is the Applicants/Association's prayer therefore, that to safeguard their livelihood as a group and thereby also promote the poultry business of local entrepreneurs here in Ghana, as well as protect them against unfair competition for subsidized export products coming into the country, there is the need to revert to the provisions of Act 641 providing for the higher 40% duty.

In their submission in reply to the Applicants/Association's arguments, counsel G.N.T Tagoe, Esq., for and on behalf of Respondents, took the view that by their prayer if granted, the Applicants/Association would be establishing a monopoly market for poultry products. Counsel stated further that by implementing the old rate of 20% as against the 40% sought to be imposed by Act 641, the price of poultry products would be maintained at a constant low rate of sale thereby making it possible for the "average or low income earner" in Ghana to afford poultry products and thereby reduce suffering and hardship to the general populace.

I come now to the issue of the capacity of Applicants/Association to bring this action against the Respondent. It is a legal principle that even in the absence of a contractual relationship between parties, where a statue casts upon a defendant an

obligation or duty to act, if by the defendant's failure or neglect to so act, any person is injured as a result of by the breach or failure or neglect to act, such a person may bring an action for damages for breach of statutory duty. This liability is separate and apart from any act, giving rise to any criminal sanction.

Whether a plaintiff has the right to sue under the aforegoing, will depend upon whether on a proper construction of the statue, a right of civil action is conferred on the plaintiff.

"Injury" as is well established includes financial damage or loss. The basic proposition however, remains that a breach of statutory duty does not by itself give rise to a private law action. Such an action can arise, however, if it can be shown that on the proper construction of the statue, the duty was imposed for the protection of a limited class of the public, and that Parliament intended to confer upon members of that class, a right to sue for breach.

In any case, the members of Applicants/Association's constitutional right to employment cannot be gainsaid. It is also not in doubt that they have a duty to protect that right. In the instant case, there is no question that the Applicants/Association falls within that limited class of the public envisaged by the Act under consideration. That class had intended or envisaged that by the introduction of the new tariff, their business interests as a group, would be taken care of by government. Government had come into power under the wing of the slogan: " the private sector is the engine of growth" - or words to that effect, raising the hopes of businessmen and women who may have relied on such words of exhortation, to contract loans at exorbitant rates of interest to revamp old business, or start new ones. They cannot be blamed for taking such bold steps, particularly if Parliament would go so far as to pass Act 641. And thereby further raise their hopes. What is curious is the seven (7) days notice given of the "suspension" of the new tariff. However, as Article 274 (2) clearly spells out, such suspension, waiver or variation can only be by a further act of Parliament – that is by the "prior approval of Parliament …..by resolution" (See Article 174 (2) & (3), 1992 Constitution.

As is well documented, it is provided under the Ghana Constitution 1992 as follows:

> "This Constitution shall be the Supreme law of Ghana and any other law found to be inconsistent with any provision of the Constitution shall, to the extent of the inconsistency, be void" (See Article 1(1)

Article 2(1) further provides as follows:

"Article 2(1): A person who alleges that

(a) An enactment or anything contained in or done under the authority of that or any other enactment or

(b) Any act or omission of any person is inconsistent with, or is in contravention of a provision of this constitution may bring an action in the Supreme Court for a declaration to the effect"

Thus, clearly, so far as Article 1(1) is concerned, any Act of Parliament found to be inconsistent with any provision of the Constitution, then that Act, to the extent of the inconsistency shall be void. It is my humble view, however, that so far, neither the CEPS Commissioner nor the Minister of Finance and Economic Planning has applied the provisions of any law found to be inconsistent with the 1992 Constitution. Indeed, there is nothing unlawful about the form and content of Act 641 other than the fact that the application of its provisions was unlawfully suspended.

I have stated earlier that so far as the provisions of Article 2(1) and (2) go, it is provided that any persons aggrieved pursuant to a breach of those provisions, shall have recourse, no to the High Court, but to the Supreme Court, which is empowered under those provisions, to grant the necessary reliefs.

In the circumstances, therefore I shall limit myself to the Commissioner's failure or refusal to abide by the Provisions of Article 174(2) and having done so, if I find that, indeed there has been such a breach, make my declaration as appropriate. The point at issue is whether by the failure of Respondent's to seek the prior approval of Parliament before sending out their letter suspending the operation of Act 641, contrary to the clear

and mandatory provisions of Article 174(2) of the 1992 Constitution, they acted unlawfully. In such a case, I might be able to grant Applicants/Association the relief they seek.

The consequence of unlawful or illegal acts is to render all such acts and all other acts consequential thereto void, and of no effect whatsoever. In making this declaration, I rely on the classic case of **Mc Foy v UAC Ltd.** [1961] 3 All ER 116 P.C., where Denning J, (as he then was) delivering the advice of the Privy Council and affirming the decision of the West Africa Court of Appeal (WACA), succinctly stated:

> "……..if an act is void, then it is in law a nullity. It is not only bad, but also incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it, is also bad and incurably bad"

Thus, it is clear that Respondents had a statutory duty to implement the provisions of Act 641. They chose a wrongful way to go about it and in so doing breached a provision of the 1992 Constitution. Their whole act thereby became tainted with illegality, and even in the absence of a definite court order setting aside such an act, the act still remained void for all time. It was unaffected by lapse of time, nor did it require an order of the court to so declare it. [See Rep. V High Court, Accra, Ex parte Abban, [1992-93] GBR, 702.

The special resolution referred to in Article 174(2) is defined in Article 174(3) as follows:

> "Article 174(3): Parliament may by resolution supported by the votes of not less than two/thirds of all members of Parliament exempt the exercise of any powers from the provisions of Clause (2) of this Article".

It is however worthy of note that the resolution must precede the act of the waiver etc. I have not heard of or had put before me, any such resolution and I am inclined to

believe that there is none. If this is so, then, clearly Respondents acted not only unlawfully, but also contravened the highest law of the land. In this regard, then, no amount of pleading, be it of ignorance or other, can avail them. Their acts would thus be void at law and incurably bad and of no effect.

I agree with Respondents entirely that as a public body deriving its powers from statute, the CEPS comes under the Executive wing of Government and specifically under the auspices of the Attorney General and Minister for Justice, as regards its legal status despite the fact that CEPS may have its own internal arrangements as to legal advisory services and representation. It is also subject to the directives of the Minister of Finance and Economic Planning as necessary. This being so, I find that any orders I might deem necessary to make at this stage in these proceedings, ought to take the above factors into consideration, which means bringing the principals into the matter as necessary. Applicants/Association have prayed the court for an order of mandamus to issue to compel the Respondents to comply and apply the provisions of Act 641 of 2003. I do not find there to be much merit in granting the order at this stage where I to be so minded. This is partly because with the effluxion of time, (it is now March 2005) and even though Applicants/Association cannot be said to have been "tardy", or have unduly delayed in instituting the instant action, it has nonetheless taken the court this long to get to this point of the proceedings. It would have been different if in a case such as the present, a court is empowered to take on only that one case, deal with it and deliver its judgment with the full co-operation of the judicial administration, prior to moving on to the other cases. With the way things are however, this case has had to take its turn amidst all the other cases listed and pending before this court, no special arrangement having been made by the judicial administration for a truly speedy trial of this particular case. In the circumstances, therefore I would need to know the current position and also to hear from the principals in respect of whom Respondents may be described as Agent. That way, I shall be certain of the guidance and full co-operation of all interested parties in this case.

Further and additionally, and the matter being one bordering on considerations of public policy, I find it would be more useful, indeed productive, if both the Attorney

General and Minister of Finance and Economic Planning were to be joined in this action as 2nd and 3rd respondents to enable them make their representations as appropriate and to be heard. In this regard, I fully endorse the concerns raised by Respondents' Counsel and set out in their written submissions in reply to the Applicants/Association's.

Accordingly, I order that the said Minister of State, viz.;

1) The Hon. Attorney General and Minister of Justice and
2) The Hon. Minister for Finance and Economic Planning, be and are hereby joined respectively as 2nd and 3rd Respondents, in this action.
3) They are to be served in early course, with copies of all process to date.

I do not believe that I am bound by the provision of Section 10, State Proceedings Act 1998 (Act 555) which requires a private person seeking to sue the government or any of its agents, to serve a 30 days' notice on the Attorney General as the legal adviser to the government. The section specifically states as follows:-

> "Section 10(1): Subject to ….persons who intend to institute civil action against the state shall serve on the Attorney General a written notice of their intention at least 30 days before the commencement of the action"

It makes sense to me, however, that by giving formal notice as prescribed, though not for 30 days, I stand a better chance of obtaining the fullest co-operation of these two very busy ministers of state. So far as Section 10(1) goes, however, it is now a notorious fact that Respondents sue and defend by their own internal legal arrangements, and thus a strict compliance by the instant Applicants/Association with the said provisions of Section 10(1) Act 555 would have been considered superfluous.

Accordingly I order that the Registrar issue and serve on the said proposed Respondents, viz. The Minister of State aforementioned, copies of the within court order for joinder together with notice of the within proceedings, such notices to include an order that notice of the within proceedings be served on the two (2) proposed

Respondents, stating (a) the cause of action (b) the names and addresses of the parties, (c) with a further note that they would be served with proceedings to date at the earliest and (d) directing that they enter appearance, serve on the court notice of their respective intentions to defend the action as 2nd and 3rd respondents within 14th days of receipt of the notices aforesaid, subsequent whereto copies of proceedings to date will be made available to them.

Wherefore, I order that the Registrar, High Court, issue and serve or cause to be served on the said proposed Respondents viz. the Ministers of State aforementioned, copies of the within court order for joinder together with the Notices aforesaid.

I adjourned the proceedings in the first instance to a date 14 days hereof. Adjourned to 25th March 2005.

(SGD)
IVY ASHONG-YAKUBU (MRS.) J
JUSTICE OF THE HIGH COURT

COUNSEL

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CLARENCE TAGOE FOR RESPONDENT