**Catholic Diocese of Moshi v Attorney-General**

**Division:** High Court of Tanzania at Dar-es-Salaam

**Date of Ruling:** 28 January 1998

**Case Number:** 3/97

**Before:** Mapigano J

**Sourced by:** A Bade

**Summarised by:** C Kanjama

*[1] Administrative law – Delegated legislation – Tax remission order had not been published in the*

Gazette *– Revocation of order before publication in the* Gazette *– Whether the order had legal validity*

*prior to publication in the* Gazette*.*

*[2] Evidence – Doctrine of estoppel – Representation as to future conduct – No contractual obligation –*

*Whether estoppel would operate against the Minister.*

*[3] Judicial review – Natural justice – Decision of Minister to give waiver of duty for goods revoked –*

*Whether Minister took into account irrelevant considerations – Whether Applicants entitled to be heard*

*– Whether there was a failure of natural justice.*

**RULING**

**MAPIGANO J:** The Applicants have come to this Court to fault the decision of the Minister for

Finance revoking the remissions of import duty and sales tax he had granted in respect of certain goods.

They are seeking an order of *certiorari* to quash it and an order of *mandamus* compelling the Minister and his subordinates to act with fairness and according to law.

It is not in dispute that sometime in 1994 the Moshi District Council passed a resolution to solicit contributions in money and in kind from the general public and various institutions toward the rehabilitation of the Mandaka-Kilema road. Pursuant to that resolution such contributions were sought from the Catholic Diocese of Moshi. The Diocese positively responded and promised to do so from the proceeds derived from the sale of used clothes to be imported by it from abroad. It suggested that remissions of the sales tax and import duty payable on the goods be procured from the government.

Whereupon one Mr James Mbatia, a member of Parliament, approached the government and succeeded to obtain such waiver. In July 1996 the Minister for Finance proceeded to prepare and sign orders to that effect, and the Applicants then appointed agents to clear the goods from the port of Dar-es-Salaam and transport the same to Moshi. But before the publication of the orders in the *Gazette* the Applicants were notified by the Second Respondent that the Minister had reneged on the remissions and that the Diocese was bound to pay the whole duty and sales tax on the goods which had arrived at Dar-es-Salaam. Not only that. The Second Respondent later advertised an auction sale of the goods.

From the submissions made by Mr *Ismail*, learned advocate, and Mr *Mwidunda*, learned State

Attorney, on behalf of the Applicants and the Respondents, respectively, there are five points of law which pose for determination in this case. The first relates to the political status of Mr James Mbatia; the second is the assertion that the Diocese was denied natural justice; the third is about the applicability of the doctrine of estoppel; the fourth concerns the legal validity of the unpublished remission orders; and the fifth, which is urged in the alternative, is whether *Gazette* Notices 175 and 176 of 1973 can be resorted to.

I will start with the last point. The question is whether the remissions should have been granted under those two *Gazette* Notices in any event. Mr *Ismail* points out that the Diocese being a religious institution was entitled to be exempted from payment of import duty and sales tax by virtue of those *Gazette*

Notices. Accordingly, he argues, if the Minister no longer wished to grant the remissions in terms proposed by the Diocese, he should have directed the Diocese to comply with the condition set out in the two *Gazette* Notices, namely, not to sell or otherwise dispose of the goods in return for any material consideration. This seems to me to be a sensible proposition. Mr *Mwidunda* says however that if the diocese was a beneficiary under those *Gazette* Notices, then it should not have sought the remissions. The simple and obvious answer to that is that remissions under those *Gazette* Notices would have benefited the road rehabilitation project. The Diocese’s idea was to sell the goods and put the amount realized into the project. But as just pointed out, the conditions attached to the exemption given by the *Gazette* Notices is that the goods should not be sold or otherwise disposed of in return for any material consideration.

I turn to the first question, which is whether the Minister’s failure to keep his word was induced by an irrelevant and improper consideration that is the fact that Mr James Mbatia was a member of an opposition political party. I must agree with Mr *Mwidunda* that it is sheer speculation that the Minister’s decision was induced by the political status of Mr Mbatia. For one thing, we have been told that Mr Mbatia was in the forefront in the seeking of the exemptions, and I cannot bring myself to believe that the Minister was not aware that Mr Mbatia was a member of an opposition political party before he made the decision to give the exemptions. So my reply is in the negative.

The second question is whether the withdrawal of the remissions constituted a breach of the rules of natural justice. It is said that the Applicants were not afforded any opportunity of making representation before the Minister took the decision to revoke the remissions, and it is pointed out that the Minister did not state any reason for doing so. On his part, Mr *Mwidunda* submits that there was no occasion to bring the rules of natural justice into play. And he makes the allegation that official investigations carried out revealed gross misuses of exemptions which had been granted to religious bodies.

I regret to say that Mr *Mwidunda’*s assertion is untenable. There is no evidence to support it. Even if it is true that such investigations took place and that the Diocese was implicated in the alleged misuses, fairness demanded that it be given the opportunity of being heard about the matter, considering that it stood to be prejudiced by the revocation of the remissions, for it had already spent money on the transportation of the goods.

The next question is whether the doctrine of estoppel operated against the Minister’s denial of the validity of the unpublished remission orders, and Mr *Mwidunda* is right in saying that estoppel is a rule of evidence by which a party litigant is precluded, as against the other party, from contradicting in that litigation the truth of any representation previously made by him to such other party with the object and result of inducing him to alter his position to his detriment.

Mr *Ismail* contends that it was in reliance on the Minister’s representation that the Diocese committed itself to make the contributions, and proceeded to import the goods and to pay the freight thereon. If I understood him correctly, the representation consists in the Minister’s promise that he would have had the remission orders published in the *Gazette*. On the other hand, Mr *Mwidunda* maintains that the doctrine of estoppel cannot operate in this case.

Mr *Mwidunda* is right. Indeed Mr *Ismail*’s contention reminds one of the caution given by one learned text writer that perhaps no other technical legal term is more loosely used than the term “estoppel’. As I understand the law, in order to give rise to an estoppel a representation must relate to an existing fact or past event. A mere statement of intention or a promise to do something in future does not create an estoppel. As was stated in the old case of *Alderson v Maddison* LRS Ex D 293, and I quote:

“There is a class of false representation which have no legal effect. Those are cases in which a person excites expectations which he does not fulfil, as for instance; where a person leads another to believe that he intends to make him his heir, and then leaves his property away from him. Though such conduct may inflict greater loss on the sufferer than almost any breach of contract, and may involve greater moral guilt than many common frauds, it involves no legal consequences, unless the person making the representation not only excites the expectation that it will be fulfilled, but legally binds himself to fulfil it, in which case he must, as it seems to me, contract to fulfil it”.

I need hardly say that the Minister’s representation was essentially a promise *de futuro* and that there is no suggestion here, let alone evidence, that the Minister contracted to fulfil it. I regret to say, therefore, that estoppel cannot operate.

I finally come to the question whether the non-publication of the remission orders in the *Gazette* affects the legal validity of the same. This, in my view, is the all-important question in this case. There is also the subsidiary question whether, if the orders had been published, they would have had legislative effect.

Mr *Ismail* would have me answer both the principal and subsidiary questions in the negative, and he relies on the provisions of section 26 of the Interpretation of Laws and General Clauses Act of 1972. By that provision any subsidiary legislation must be published in the *Gazette*, unless it is otherwise expressly provided in the parent Act, or relates to the appointment of any person to any office; or relates to any matter not having legislative effect. And it is to be observed that the definition given to the term “subsidiary legislation” by section 3(1) of the Act includes any order or notice made under any Act or other lawful authority. Mr *Ismail* has expressed the view that even if gazetted such remission orders do not have any legislative effect.

Mr *Mwidunda* holds the opposite view. He contends that had the orders been published they would have had a legislative effect. More importantly, he points out that the orders could only have been made by the Minister under the power conferred upon him by section 7(1) of the Customs Tariff Act of 1976 (Act 12 of 1976) and section 28(1) of the Sales Tax Act of 1976 (Act 13 of 1976). He contends that under those provisions such remissions must be given by publication in the *Gazette*, and that such publication is a prerequisite of validity of the remissions. Accordingly, he submits that there was no remission of duty and tax given to the Diocese in the contemplation of law, and that therefore this application is wholly misconceived.

On the question whether such remission orders have legislative effect when gazetted, it is important to bear in mind the point made by Professor Wade in his work on administrative law that there is an infinite series of gradations between what is plainly legislation and what is plainly administration. My considered and firm opinion is that remission orders made by the Minister under the two statutory provisions are administrative acts and have no legislative effect whatever.

On the principal question whether publication is an absolute precondition of the remissions having legal validity, I go by the view expressed by Professor Wade, who cites the decision in *Jones v Robson* [1901] 1 QB 673, that the requirement that such orders be given publicity in the *Gazette* is no more than directory, and a failure to comply with the directive will not affect the validity of the orders. As the eminent professor reminds us in the same book, the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or of persons likely to be affected by it, thereby making the legal maxim “ignorance of the law does not excuse” more rational, in view of the growing stream of delegated legislation. It is, however, food for reflection whether our *Gazette* is really the ideal or efficient medium for such publicity in Tanzania. I have in the result come to the conclusion that the Minister’s decision to revoke the remissions was improperly taken and that it should be quashed and that though the remissions were not gazetted, they are nevertheless legally valid and should thus be honoured by the Second Respondent. It is so ordered.

For the Applicants:

*Mr Ismail*

For the Respondents:

*Mr Mwidunda*