

TARUS FREIGHT SERVICES (PRIVATE) LIMITED
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 14 February and 27 April 2023

Court Application

Mr *T Tembani* for the applicant
Mr *E Mukucha*, for the respondent

MHURI J: This is an application for an order setting aside respondent's decision that applicant pays duty in the sum of US\$16 335.60 plus ZWL 349 488.03 for missing cases of castle lite beer, lost as a result of an accident.

Briefly, the factual background of this matter is that, applicant, a clearing company, was engaged by a Zambian company to clear a consignment of liquor that was passing through Zimbabwe from South Africa. On 31 July 2021 applicant cleared the consignment.

On 3 August 2021 at around 18:30 hours and at 312km peg along the Harare – Chirundu road, the truck carrying the consignment was involved in an accident. The two trailers unhooked from the horse, overturned and landed on the left side. As a result, some of the liquor cans were strewn all over.

Zimbabwe Republic Police and ZIMRA officers were contacted and they attended at the scene. After assessing the situation, respondent's officers advised applicant's representatives to reload the goods that were still intact and some damaged cans and drive the truck to Chirundu boarder customs yard where a physical examination was done resulting in the issuance of a special warrant on which duty in the amount of US\$16 335.60 and ZWL 349 488.03 was computed in respect of 1360.5 missing cases of castle lite.

Through a letter dated 9 August 2021, applicant applied to respondent's Chirundu Regional Manager to do a payment plan for the amount of duty as computed. The request was declined by the Regional Manager. Thereafter applicant applied for remission of the duty in terms of s 126 of the Customs and Excise Act [*Chapter 23:02*]. The application partially succeeded in that a total sum of duty in the amount of US\$ 2386.40 and ZWL 52 055.56 was remitted in full on 198.75 cases destroyed as a result of the accident.

An appeal to the Commissioner General was unsuccessful, leading to the institution of this application.

Respondent is averse to the granting of the application. Firstly, it raises the point in its notice of opposition which it motivates in its heads of argument to the effect that applicant's complaint points to the fact that respondent's decision to demand duty is unreasonable or unjustified and the relief sought under paragraph 1 of the Draft Order, that the decision be set aside is a remedy for review. That being the case, the applicant's application is for review which in terms of the High Court Rules SI 202/2021 ought to have been filed within 8(eight) weeks of respondent's decision. The application having been filed on 31 January 2022 i.e outside the 8 weeks and no condonation having been sought and granted, it is a nullity at law. Respondent's main argument was that assuming that the application is properly before the court, applicant had dismally failed to prove a valid case against it. It relied on s 126 of the Customs and Excise Act [*Chapter 23:02*] to substantiate its argument. It also submitted that by initially agreeing to pay duty as computed by respondent and asking for a payment plan, applicant is estopped from refusing to comply with the law. Applicant's refusal to pay the duty on the excuse that it realized later that it was not supposed to pay and was entitled to a refund is not sustainable, further argued respondent.

Respondent's prayer was the dismissal of the application.

This court application is an application for an order setting aside respondent's decision compelling applicant to pay duty, and as submitted by respondent, this application is in fact an application for review of respondent's actions and decision that led to the issuance of the special warrant. A reading of the applicant's pleadings clearly shows this. A review application ought to be filed within 8 weeks of the decision one is aggrieved by.

The decision was issued on 16 November 2021, therefore in terms of Rule 62(4) of this Court's Rules, 8 weeks expired on 31 December 2021 or thereabout.

In casu, the application was filed on 31 January 2022.

Applicant's response to this point as captured in para 9 of its answering affidavit is that in terms of s 196 of the Customs and Excise Act it could not institute proceedings before giving notice to respondent that in terms of sub section (2) of the said section the proceedings ought to be instituted within 8 months from the date of cause of action, therefore it was still within the requisite time frames.

Rule 62(4) provides;

"any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceedings in which the irregularity or illegality complained of is alleged to have occurred;

Provided that the court may for good cause shown extend the time."

Section 196 of the Customs and Excise Act provides;

"Notice of action to be given to officer

- (1) No civil proceedings shall be instituted against the State, the Commissioner or an officer for anything done or omitted to be done by the Commissioner or an officer under this Act or any other law relating to Customs and Excise until sixty days after notice has been given in terms of the State Liabilities Act [*Chapter 8:15*].
- (2) Subject to subsection (12) of section one hundred and ninety –three, any proceedings referred to in subsection (1) shall be brought within eight months after the cause thereof arose...."

Going by the provisions of the Act, applicant's application was filed within time, there was therefore no need for condonation. The application is properly before the court. This explains why respondent did not pursue this point in its oral submissions.

Section 126 of the Act, referred to reads as follows;

"Remission of duty upon loss or destruction of goods

If the Commissioner is satisfied that-

- (a) before their removal from customs control goods were destroyed by accident or lost by accident, without going into consumption, either on board ship or an aircraft or other vehicle or while in a pipeline or in landing, loading, transportation or handling; and
- (b) Every reasonable effort was made and precaution taken to prevent their loss or destruction; the Commissioner shall remit or refund the duty payable on the goods."

As conceded by the applicant, rightly so in my view, in considering remission of duty in terms of s 126 of the Act, the Commissioner will be exercising a discretionary power.

In casu, it is common cause that respondent's officials attended the scene of accident, assessed the situation, took pictures and advised applicant's representatives to reload the remaining goods that were still intact and capable of being exported and the damaged empty cans and drive the truck to Chirundu Customs yard to facilitate quantification of loss.

A physical examination was conducted and going by applicant's own version the physical examination was done in applicant's crew's presence.

The examination established that 961.25 cases were intact, 198.75 were damaged, and 1360 cases were missing resulting in the issuance of the special warrant. Some of the pictures relied upon by applicant show damaged cans thrown all over the place of the accident after the truck had been removed from the scene. This is despite applicant had been told to reload the damaged cans. Its explanation for not so doing was that it is dangerous to load damaged goods since it is a health hazard even to touch them. This clearly shows that applicant left some damaged cans deliberately. Some pictures show people just standing by and others collecting and loading the trailer.

It is noted that applicant was granted full remission on the 198.75 cases destroyed as a result of the accident but however was of the view that the 1360 cases that were not accounted for were consumed in Zimbabwe and not destroyed by the accident. Has there been an injudicious exercise of discretion in this case? Certainly not in my view.

In the result therefore I find that the application is without merit.

Accordingly it is and is hereby dismissed with costs.

Wom Simango & Associates, applicant's legal practitioners