

MAYNER INVESTMENTS (PVT) LTD T/A
MAYNER CUSTOMS CLEARING SERVICES
& FORWARDING SERVICES (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY
and
MINISTER OF HEALTH AND CHILD CARE OF
ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
BACHI-MZAWAZI J
HARARE, 17 & 25 January 2023

Urgent Chamber Application

M Tshuma, for the applicant
E Mukucha, for the respondent

BACHI MZAWAZI J: Applicant, a duly incorporated clearing agent registered with the first respondent, an administrative revenue collection authority, in terms of the laws of Zimbabwe, has approached this court on an urgent chamber basis, seeking an interim relief suspending the decision by the first respondent of suspending its agents clearing bond. The second respondent is the Minister, in charge of the Ministry responsible for health compliances at ports of entry at border posts.

The common cause facts are that, the first respondent is the legal entity, in terms of the Customs and Excise Act [*Chapter 23:02*], in charge of the customs duty and relevant levies charged at the ports of entry of the country, amongst other designations. It is also not in dispute that, the applicant as a clearing agent, has an agent clearing bond registered by the first respondent, upon application, in terms of the said Customs and Excise Act. It has also emerged from the submissions of the parties filed of record that, one of the applicant's functions is to then enter into various contracts with different importers and exporters and then act as an intermediary or go between of those Companies and the first respondent. One of the applicant's primary duties is to ensure that the various transactions comply with the statutory requirements stipulated in the Customs and Excise Act.

Not contentious is also the fact that, there are health inspections conducted on all food imports and exports, at the port of entry done by the health officials of the second respondent in terms

of s 6 of the Public Health Act, [*Chapter 15:09*], as read with, Statutory Instrument 78 of 2016. What has dawned further and not in contention is that, the first respondent has a standing statutory mandate to collect the health fees and any other amounts related thereto on behalf of the second respondent in terms of S I 78 of 2016, above. These fees are also known as Port Health charges.

Further, it is a common fact that the business of inspection and the billing thereafter, is processed with the involvement of the applicant who in turn remits the amounts to the first respondent as per S I 78 of 2016. From the facts on record, it is the applicant who knows and keeps records of the vehicles they would have cleared for passage after complying with all the governing laws' requirements.

The dispute however has arisen from the fact that, the first respondent allegedly, discovered through their internal investigation mechanisms that, a post clearance verification report conducted on transactions done by applicant when processing entries on behalf of National Foods Limited had a shortfall of non- remitted health port fees, amounting to US 42,400.00, dating from year 2019 . This was brought to the attention of the applicant by way of a letter dated the 7th of December, which opened discourse between the parties through several letters, culminating in this urgent chamber application filed by the applicants.

Applicants are challenging, the computation of the ultimate figure demanded as health port charges, proof of the number of vehicles inspected, when they were inspected and fees levied or raised. They are also demanding to know the legal basis of the prescribed fee of \$20 inspection fee per vessel. They are further, disapproving the suspension of their agents clearing license issued in terms of the Customs Act [*Chapter 23:02*], for an offence outside the Act itself, but in terms of the Public Health Act, cited above. In other words, they are saying that, in terms of the Customs and Excise Act, under which they had been suspended, the non-payment of port health fees is not provided for, therefore, they should have been given the penalty of a fine in terms of the Health Act, not the drastic measure of suspension pending cancellation of their agents clearing bond provided by the Customs and Excise [*Chapter 23:02*]. It is the applicant's further averment that, the suspension of their license has brought their clearing business to a halt as they had several operational clearing contracts that had been concluded on the faith of the now suspended clearing bond. As such, they tend to suffer irreparable imminent harm if the court does not grant the provisional order. In addition, they argue that the balance of convenience favors the granting of the interim relief pending the finalization of the matter. They also content that, they acted urgently by instituting this action

in that, after their receipt of the suspension letter on 10 January 2023 they had been engaged in constant discourse with the first respondents through a litany of correspondence calling for their right to make representations and obtain answers to their queries. They therefore, submit that they acted promptly and the efforts to negotiate illustrated that they had an interest in resolving the matter.

In response, the first respondent, submits that, it did not act outside the scope of the governing Act, Customs and Excise Act [*Chapter 23:02*], when it penalized applicant in the manner it deed. It is their argument that, the Act should not be read in isolation with S I 78/2016, which empowered them to collect the said revenue in conjunction with S I 200 of 1995. They further state that, upon raising the issue with the applicant with whom they have a contract in terms of the Customs and Excise Act, they made it clear that applicant, as a clearing agent had a schedule of 2112 vehicles with outstanding port health fees dating to year 2019. They state further, that applicant has already paid some of the owing port health fees upon demand, thereby accepting liability without querying, leaving a balance of US42, 400.00.

Whilst conceding that the suspension of the license is not sanctioned in terms of s 94E, of the Customs and Excise Act, they argue that it is in terms s 216A (9)(b) of the same. Section 216A (9)(b) from their perspective, the Commissioner may suspend a clearing agent for persistently failing to comply with any provision of the said Act or any other law. The first respondent states that, in any event, the applicant has an alternative remedy in that, on 11 January 2023, they had written a letter to the manager, in response to the letter of 10th of January 2023 deactivating their bond. That being the case, they argue that the response of the manager is underway, meaning there is room to negotiate further on the issue before the final cancellation decision is made. In that regard, they submit that there is that course open to the applicants as they have not exhausted the local remedies at their disposal.

From the given set of facts and arguments, the issue to be considered is whether or not the applicant has made a case for the relief sought? What has to be taken into consideration in applications of this nature is the element of urgency. This has been spelt out in several cases amongst them *Document Support Centre Ltd v Mapuvire, 2006(1) ZLR 232(H)*, *Tripple C Pigs and Anor v Commissioner General, ZLR, 2007 (1) ZLR 27 (H)*. However, in the present matter, the respondents did not make submissions on urgency. It also follows that, the parties proceeded to argue on the merits as if the issue of urgency was not in contest. For that reason, it is a forgone conclusion that the application is urgent and the applicants acted timeously when the cause of action arose. I need not elaborate any further.

In an application for an interim relief, the applicant has to satisfy the established requirements of a *prima facie* right, actual or apprehended harm or injury, the absence of any other remedy and that the balance of convenience favors the granting of the relief sought. See, *Setlogelo v Setlegelo* 1914AD 221 and *Choruma Blasting and Earthmoving Services (Pvt) Ltd v Njainjai and Others* 2000, ZLR85 (S) 89E-H amongst others.

On analysis, it is clear, that applicant has a *prima facie* right, emanating from the agents clearing bond it entered with the first respondent. It is also evident that, it had entered several clearing contracts with other third parties who stand to be affected by the suspension of the said bond by the first respondent. In that regard, there is imminent irreparable harm as it has been stated that some of the vehicles are already held up at the port of entry.

Further, since, the license or bond has already been suspended, there seem to be no immediate remedy to allow the smooth flow of its operations pending any further negotiations between the parties. That being the case, the balance of convenience favors the applicants as they are the ones to incur unprecedented costs due to their suspended operations.

The reasons for the above findings are that, though the applicant's agent clearing bond is registered in terms of the Customs Act, the non-fulfilment of port health fees is not one of the offences penalized in terms of that Act. Though it is recognized that the first respondent can legally collect revenue on behalf of the second respondent, it is the second respondent's governing laws, that had been violated and there are penalty provisions embodied in those laws. The first respondent's argument on the provisions of s 216(A) in respect to the infringement of any other law, in my considered view apply when the legislature had not made explicit provisions in those other laws. The penalty provision in S I 200 of 1995 are specifications in the circumstances of this case. Further, Administrative actions, in terms of the Administrative Justice Act [*Chapter 10:28*], an enabling Act of s 68 of the right to Administrative Justice Constitutional provisions, are not without censor, parties should be allowed to make representations.

As a result, it is my finding that the applicant has made a case for the provisional order sought as amended.

Accordingly, the provisional order is granted as amended.

Messrs Gill, Godlonton & Gerrans, applicant's legal practitioners