

BAKERS TRANSPORT (PROPRIETARY) LIMITED
versus
ZIMBABWE REVENUE AUTHORITY
and
MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 6 February and 12 September 2023

Court Application

Prof *L Madhuku*, for the applicant
Mr *E Mukucha*, for the 1st respondent

CHINAMORA J:

Introduction:

This is a court application in which the relief sought is the following declaratory order:

1. That the decision of the first respondent declaring forfeited to the State property belonging to the applicant, the property in question being four motor vehicles and their trailers, namely TRUCK HLH056FS (TRAILER TVH294GP); TRUCK HLH051FS (TRAILER FZ25WGPP); TRUCK HLH049FS (TRAILER VDW723GP) and TRUCK HJZ 717FS (TRAILER JF58CWGP), be and is hereby declared null and void and of no force or effect.

AS CONSEQUENTIAL RELIEF, IT IS ORDERED:

2. That the decision of the first respondent declaring forfeited to the State property belonging to the applicant, the property in question being four motor vehicles and their trailers, namely TRUCK HLH056FS (TRAILER TVH294GP); TRUCK HLH051FS (TRAILER FZ25WGPP); TRUCK HLH049FS (TRAILER VDW723GP) and TRUCK HJZ 717FS (TRAILER JF58CWGP), be released to the applicant forthwith.

3. That the first respondent pays the costs of this application on an attorney and client scale, if it opposes the relief sought.

The application was filed of record on 25 July 2022. On the strength of the board resolution by the directors of the applicant, Progress Takawira Mafuratidze deposed to the founding affidavit in which he averred that:

“Applicant is a company duly registered in accordance with the laws of South Africa and also permitted to operate business in Zimbabwe in terms of the laws of Zimbabwe. It acquired the property in question through an installment sale agreement namely TRUCK HLH056FS (TRAILER TVH294GP); TUCK HLH051FS (TRAILER FZ25WG GP); TRUCK HLH049FS (TRAILER VDW723GP) and TRUCK HJZ 717FS (TRAILER JF58CWGP) (hereinafter referred to as ‘the trucks’).”

This application seeks to nullify the forfeiture of the said trucks to the State. On the other hand, the first respondent is resisting the application on the basis that its cause of action has prescribed and the applicant’s conduct warranted the trucks to be forfeited. The applicant’s case is that it is a transporter and was hired by a South African company known as Sasol (Pty) Ltd to transport fuel purchased by a client of Sasol. Sasol nominated an agent for customs clearance and to deliver the customs clearance documents to the applicant. The applicant submitted to the first respondent, the clearance documents given to it by the nominated clearing agent. According to the applicant, it was at this time that it discovered that customs clearing documents were fake and fraudulent. By a letter dated 25 December 2022, the applicant was advised that all the vehicles had been forfeited and was further advised to appeal to the first respondent’s Commissioner of Customs and Excise. It is common cause that the appeal to the Commissioner of Excise was not successful. After advice, the applicant unsuccessfully appealed to the Commissioner-General. Unrelenting, the applicant further filed an appeal to the Fiscal Appeal Court under Case No. FA 5/21. The said appeal was later withdrawn.

The applicant submits that a reading of s 193 of the Customs and Excise [*Chapter 23:02*], shows that only the Commissioner-General can declare property forfeited. Consequently, the declaration by the Regional Manager was unlawful and null and void. It is applicant’s case that the Regional Manager was not acting on behalf of the Commissioner-General, hence the following statement in the letter announcing the forfeiture:

“If you are not satisfied with this decision, you may submit your written appeal to the Commissioner Customs and Excise...”

The applicant further avers that there is neither a provision in the Act for an appeal to the Commissioner of Customs and Excise, nor for a further appeal to the Commissioner-General which shows that the processes were contrary to the Act. It is on these facts that the applicant seeks an order in terms of the draft order.

The first and second respondents opposed the application. A preliminary point was raised by the first respondent, namely, that the applicant’s claim for the release of its motor vehicles had prescribed. In this respect, it was contended that the vehicles claimed by the applicant were formally seized by the Zimbabwe Revenue Authority (“ZIMRA”) sometime in 2020. Consequently, in terms of s 193 (12) of the Customs and Excise Act, proceedings for the recovery of seized goods or payment of compensation in their respect, must be instituted within three (3) months of the date when the notice of seizure was issued. On the merits, the first respondent submitted that the vehicles in question were used to commit an offence of smuggling, hence the forfeiture was done in terms of the law. Furthermore, the first respondent stated that the Regional Manager did not declare the vehicles forfeited. Instead, the Regional Manager made a statement that the motor vehicles will be forfeited. In any case, the first respondent submitted that the Commissioner-General eventually declared the motor vehicles forfeited to the State. Based on its foregoing contentions, the first respondent prays for the dismissal of the application with costs. The second respondent filed an opposing affidavit, but did not take the matter any further.

In its answering affidavit, the applicant asserted that the matter had not prescribed. Additionally, the applicant submitted that an application for declaratory relief has no time limit and, as such, s 193 (12) of the Customs and Excise Act does not apply in this matter. I seem to follow the applicant’s argument for the following reasons. The applicant is seeking a declaration of its rights in terms of the Customs and Excise Act. It is well established that a declaratory order is the most appropriate remedy where rights and interests are in question. See *Madzara v Stanbic Bank Zimbabwe Ltd and Ors* HH 546-15. In essence a declaratory order is not subject to time – limits because a nullity is a nullity nothing flows from it. In this connection, in *Kandawasvika and Anor v Sheriff of Zimbabwe and Ors* SC 95-22, the court held that any disregard of peremptory provisions of a statute is fatal to the validity of the proceedings affected. In other words, everything

done contrary to peremptory provisions is a nullity. See also *Schierhout v Minister of Justice* 1926 AD 99 at 107. On the basis of settled law, the first respondent's preliminary point on prescription lacks merit and should be dismissed.

On the merits, the starting point is s 14 of the High Court Act [*Chapter 7:06*], which allows this court to examine if the applicant has an interest in an existing, future or contingent right. Furthermore, in deserving cases, the court can exercise its discretion in favour of granting the relief sought. In this context, in *Munn Publishing (Pvt) Ltd v ZBC* 1994 (1) ZLR 337 (S) at 343, the Supreme Court held that:

“... any interested person with a direct and substantial interest may approach the court for determination of an existing, future and contingent right which could prejudicially affected by the decision of the court as the first step. The second rung of the test, is that the court must decide whether or not the case in question is one it should properly exercise its discretion.”

In *casu*, the applicant's property was purportedly declared forfeited to the State by an official not authorized at law to perform such a function. As argued on behalf of the applicant, it is only the Commissioner-General of the first respondent who has the power to declare a forfeiture of property seized. With this in mind, it is incumbent upon this court to determine the rights of the applicant with regards to the property. This approach was adopted in *Mushishi v Lifeline Syndicate & Anor* 1990 (1) ZLR 289 (H) at 289, where GREENLAND J, enunciated that:

“...still as the facts reveal a competition for rights in respect of claims, justice, common sense, and good order require judicial confirmation as this issue and the seeking of a declaratory order was indicated.”

I also note that the cases of *Adbro Investments Co. Ltd v Minister of the Interior and Ors* 1961 (3) SA 283 (T) at 285B-C and *Johnsen v AFC* 1995 (1) ZLR 65 (H) are illustrative of this position, that, despite the fact that no consequential relief is sought, justice or convenience demands that a declaration be made as to the existence of or the nature of a legal right claimed by the applicant. In terms of the Customs and Excise Act, seizure and forfeiture are two distinct acts. Section 193 (1) of the Act states that an officer may seize an article on reasonable grounds of believing the article is liable to seizure, while s 193 (5) provides that after the seizure, the officer is required to report the fact of seizure to the Commissioner. Then, s 193 (6), *inter alia*, requires the Commissioner on receipt of the report of seizure, to do one three things. First, he may order

release of the article from seizure. The second option is to declare the article forfeited to the State. Finally, if the article cannot be found, the Commissioner may declare that the person concerned pays an amount equal to the duty-paid value of such article. It is clear from the law that only the Commissioner may declare an article forfeited. Therefore, the declaration made by the Regional Manager was in the circumstances unlawful and null and void. In my view the present application ought to succeed and, accordingly, the order that I grant is as follows:

1. The decision of the respondent declaring forfeited to the State property belonging to the applicant, the property in question being four motor vehicles and their trailers, namely TRUCK HLH056FS (TAILER TVH294GP); TRUCK HLH051FS (TRAILER FZ25WGPP); TRUCK HLH049FS (TRAILER VDW723GP) and TRUCK HJZ 717FS (TRAILER JF58CWGP), be and is hereby declared null and void and of no force or effect.

AS CONSEQUENTIAL RELIEF, IT IS ORDERED

2. The decision of the first respondent declaring forfeited to the State property belonging to the applicant, the property in question being four motor vehicles and their trailers, namely TRUCK HLH056FS (TAILER TVH294GP); TRUCK HLH051FS (TRAILER FZ25WGPP); TRUCK HLH049FS (TRAILER VDW723GP) and TRUCK HJZ 717FS (TRAILER JF58CWGP), must be released to the applicant subject to the following conditions:
 - (a) Payment of a fine as determined by the respondent.
 - (b) Payment of storage charges.
3. Each party shall bear its own costs.

E Gijima Attorneys, applicant's legal practitioners
ZIMRA Legal Division, the first respondent's legal practitioners