

CLEMENCE MUBVUMBI
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 20 March 2023

Opposed Application

T Musara, for the applicant
D Tandiri, for respondent

MUZENDA J: This is an application made in terms of s 196 of the Customs and Excise Act, [*Chapter 23:02*] where an owner of a forfeited vehicle is seeking the following relief:

“IT IS HEREBY ORDERED THAT:

- 1. The application succeeds and the decision made by the second respondent confirming forfeiture of the motor vehicle made by its officials namely Toyota Hiace, Registration Number AFN 1195, Chassis Number LH 1780025152 be and is hereby set aside.*
- 2. The respondent be and is hereby ordered to release the subject vehicle particularised in paragraph 1 above to the applicant within seven (7) days from the date of this order, without any conditions.*

Alternatively, respondent be and is hereby ordered to assess a fine and once the fine is paid by applicant, respondent is hereby ordered to release the motor vehicle to the applicant.
- 3. In the event that the motor vehicle has been disposed of, respondent is hereby ordered to compensate the applicant in the sum of US\$9 000 within seven (7) days from the date of this order.*
- 4. The respondent is hereby ordered to pay costs of suit on attorney-client scale.”*

Factual Background

On 16 May 2022 applicant’s driver, Pardon Kanyonganise was intercepted by members of the Zimbabwe Republic Police along Harare-Mutare Highway conveying smuggled contraband of second hand clothes. He was charged and convicted for contravening s 182 of Customs and Excise Act. On 19 May 2022 the Zimbabwe Republic Police referred the vehicle and bales of clothes to respondent, the 39 bales of used clothing were handed over to respondent. Both the vehicle and the bales of clothes were seized and a notice of seizure was

given to applicant's driver. On 8 June 2022 respondent's Regional Manager informed applicant or his representative about the forfeiture of the motor vehicle. Pardon Kanyonganise and applicant made representations to respondent's employees up to the Commissioner General but got no relief about the release of the motor vehicle. On 22 July 2022 the Commissioner General upheld the forfeiture of the motor vehicle, aggrieved by this forfeiture applicant brought this application. The basis upon which applicant brought the application is that the decision made by respondent's Commissioner General is unfair, irrational and grossly unreasonable. Applicant blames his own employee for being on a frolic of his own, he attached an affidavit to that effect. He also pleads with the court to look at the prejudice he stands to suffer if the car is forfeited. He offered to pay a reasonable fine to be assessed by the respondent.

The respondent in its opposing papers raised a defence of prescription and contends that given the date of seizure in conjunction with the date when the application was filed 11 November 2022, the application is well out of time. It also further adds that assuming that applicant is seeking the review of Commissioner General's decision to forfeit, again in the absence of an application for condonation for late application for review, that route suffers a still birth, for it is equally out of time. On the merits respondent contends that the subject vehicle was seized and forfeited because it was illegally used to ferry uncustomed goods. Its fate was forfeiture and there is nothing irregular about how the respondent's officers used their wide discretion to order the car's forfeiture. Respondent prays for the dismissal of the application.

Preliminary points

The issue of prescription based on s 193 of the Customs and Excise Act has invariably centrally occupied every opposing affidavit of the respondent. The whole issue being based on the distinction between an action brought against Zimbabwe Revenue Authority arising out of seizure and one arising out of a forfeiture. It is apparent from the papers filed of record that the cause of action arises from the forfeiture date which is 22 July 2022 and the 8 months start to clock from 23 July 2022. From 23 July to 11 November 2022 applicant is well within time either to bring an application to have respondent's decision reviewed by this court or to sue the respondent. The preliminary point has no merit it is dismissed.

On merits

Most facts that led respondent to forfeit applicant's motor vehicle are common cause. The motor vehicle in question was used to convey goods liable for forfeiture and equally so the motor vehicle is also liable for both seizure and forfeiture in terms of the law. Applicant pleads ignorance of the frolics of his employee driver and indeed was not prosecuted for the criminal offence. That is not relevant, his (applicant's) motor vehicle was involved and he had allowed the driver to take it to Manicaland on duty. The motor vehicle itself is tainted by the mere use of it to commit an offence. Applicant was aware of this fact when he made this application especially when he offered to pay a fine for him to get the car back. What is of critical importance is to decide whether the order for forfeiture was the only penultimate sentence open to the respondent? Given the circumstances of the matter, the provisions of the statute and reasons proffered by applicant, would one say the order for forfeiture was rationally, fair and reasonable?

Applicant's motor vehicle has been used by applicant's driver for the first time to commit an offence. Its market value is US\$9 000 and it is used to deliver applicant's goods throughout Zimbabwe from Harare. On the day in question it had been booked out on officially authorised trip. The driver of the car paid a fine of ZWL 50 000. The 39 bales of used clothes were forfeited to the State and owner paid a fine. The Customs and Excise Act, [Chapter 23:02] provides for a fine up to level 4 for an owner of the motor vehicle used to ferry uncustomed goods. In my view like a sentence of imprisonment in a criminal matter likewise forfeiture must be the last resort more so if it is a repeat offender. Otherwise like a first offender applicant must be treated differently. Given the enormity of loss he stands to lose forfeiture of the motor vehicle is too drastic a penalty, unfair and unreasonable. The whole idea to send a message to owners of vehicles who allow drivers to convey smuggled goods can still be sent by form of monetary penalties in order to deter like offenders.

I am satisfied that applicant has laid grounds adequate to interfere with respondent's order for forfeiture of the motor vehicle and return the following order.

It is ordered that:

- “1. The order for forfeiture of the motor vehicle namely Toyota Hiace Registration Number AFN 1195 Chassis Number LH 1780025152 be and is hereby set aside.*
- 2. Respondent be and is hereby ordered to assess an appropriate fine for applicant to pay and after such payment, respondent is ordered to release the applicant's motor vehicle specified in paragraph 1 above of this order.*

3. *Applicant to pay statutory storage charges from 22 July 2022 to date of release.*
4. *Each party to pay its own costs.*”

Gonese and Ndlovu, applicant’s legal practitioners.

Zimbabwe Revenue Authority, Legal Services Division for Respondent.