

JETHRO Z CHIMBIKO
And
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 19 June 2023

Opposed Application

M. Maraeenadzo, for Applicant.
D. Tandiri, for Respondent.

MUZENDA J: Applicant approached the court seeking the following relief:

“IT IS ORDERED THAT:

- 1. The decision made by the respondent confirming forfeiture of motor vehicle namely MAN TRUCK TGM 18.280 Registration Number AFM 8448 be and is hereby set aside.*
- 2. The respondent be and is hereby ordered to release the vehicle in clause 1) above to the applicant within seven (7) days from the date of this order without any conditions.*
- 3. Respondents to pay costs of the application.”*

Facts

Applicant owns a truck and on 28 August 2021, applicant’s vehicle was intercepted by police along Mutare-Tanganda-Chipinga road conveying 211 bales of used clothes and 7 sacks of second-hand footwear. Trymore Matima, applicant’s employee driver parked the truck after being pursued by police and fled from the scene. He later handed himself to the police, was prosecuted and paid a fine of ZWL85 000. The uncustomed goods were all forfeited to the state. On 28 August 2021 the truck was placed under seizure. Applicant wrote a letter to the Station Manager pleading for the release of the motor vehicle. In that letter he contended that he had assigned his driver to ferry cement to Chipinga, on his way back he was hired by unknown person to ferry the goods at Tanganda. He attached to the letter the employee driver’s affidavit. Applicant added that he had instituted disciplinary charges against the driver. He pleaded for the release of the motor vehicle and expressed his willingness to pay a fine if any.

On 15 September 2021 the Station Manager responded to the letter as follows:

“The facts of the matter have been considered very carefully, however, it cannot be over looked that the vehicle was used for the removal of goods which are liable to forfeiture These imported goods were not accounted for as required in terms of customs and exercise, herby making them liable for forfeiture. Any vehicle used for the removal of goods liable to forfeiture, consequently becomes liable to forfeiture in terms S. 188 (2) of the Customs and Exercise Act [Chapter 23:02] it is unfortunate that the vehicle cited shall not be released from seizure but shall be forfeited to the state at the appropriate time without any further reference to you....”

Applicant after receiving the Station Manager’s response decided to make an appeal to the Commissioner General of respondent. In his letter of appeal he made representations identical to those he had made to the Station Manager but added that if the truck was released he would assure respondent that he would “*improve on the monitoring side*” of his trucks . On 11 February 2022 the Commissioner General responded to applicant’s letter as follows:

“After a careful analysis of the facts and your submissions, I did not find any new information that warrant a deviation from the decision already communicated to you by the Regional Manager. In view of the above, I regret to advise you that your appeal was not successful in this instance. The vehicle remains forfeited to the state.”

In essence the Commissioner- General adopted the grounds and basis used by the Station Manager to justify the forfeiture, that is the fact that applicant’s truck was used to convey smuggled goods.

On 30 September 2022, applicant filed a court application in terms of s4 (1) as read with s 3 (1) of the Administrative Justice Act, [*Chapter 10:28*] and in his affidavit emphasised that he had not authorised Trymore his driver to ferry dirty goods. He expressed ignorance of the trip that involved carrying of the 211 bales and 7 sacks of used footwear. He curiously averred in his affidavit as follows, “*Sometimes he would receive orders himself or I would direct him to go to a customer whenever I receive an order. The rule was that whenever he is going out of Mutare environs he will contact me and advise*” he further alleges that respondent’s officials did not consider facts of his matter and did not apply relevant law as such the decision was arbitrary and irrational and respondent breached its duty as an administrative authority to determine a dispute reasonably and in a fair manner. He reiterated the fact that he was not aware of the illegal goods being conveyed and that he was not prosecuted. he prayed for unconditional release of the motor vehicle.

The respondent in opposing the application raised as usual the preliminary point of prescription setting its date for cause of action on 28 August 2021 and that the applicant acted in a dilatory manner. On merits respondent virtually repeated the sentiments expressed by the

Station Manager and confirmed by the Commissioner General that because the applicant's motor vehicle was used to ferry smuggled goods, it ought to be forfeited.

The Law and Issues

Respondent contends that the application is prescribed. The issue on the point of law is whether the application is prescribed applying S. 193 (12) or S. 196 (2) of the Act.

In the case of *Twotap Logistics Private Limited v Zimbabwe Revenue Authority* SC 3/23 it was held on p. 8 of the cyclostyled judgment per CHIWESHE JA :

“The prescription period of three (3) months given under s 193 (12) of the Act only applies with regards to proceedings against seizure of property. In any proceeding in terms of the Act other than proceeding to seizure, the prescriptive period of eight (8) months given under s 196 (2) of the Act shall apply. Accordingly we hold that forfeiture of property falls under the purview of s 196(2) of the Act for purpose of prescription. The appellant's suit having been launched before the eight month prescriptive period have lapsed, the court *a quo* erred in upholding the respondent's plea in bar.”

Section 4 (1) of the Administrative Justice Act, [Chapter 10:28] provides as follows:

Section 4(1) Subject to this Act and any other law, any person who is aggrieved by the failure of an administrative authority to comply with section three may apply to the High Court for relief.

(2) Upon an application being made to it in terms of subsection (1) the High Court may, as may be appropriate ---

(a) confirm or set aside the decision concerned

(b) refer the matter back to the administrative authority concerned for consideration or reconsideration

(c) -----

(d) -----

(e) give such direction as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with section three

(3) (b)

Applying the Law to the facts.

Whether applicant's application is prescribed.

The respondent's Commissioner General informed the applicant about the dismissal of applicant's appeal on 11 February 2022. Applicant's legal practitioners notified the respondent of its intention to sue in terms of the State Liabilities Act. On 30 September 2022 applicant's papers were duly stamped by the deputy registrar of this court. The calculation of the eight months period from 11 February 2022 shows that the eight months would end on 11 October 2022. It is the confirmation by the Commissioner General of forfeiture of applicant's motor vehicle that triggered applicant to lodge the application purely in terms of s 196(2) of the Act. The respondent raised a preliminary point on prescription and in its heads correctly cited the

appropriate legal authority of the Supreme Court but then fell into error of computing the duration of eight months commencing from 11 February 2022. If respondent had correctly calculated that period it could not have pedantically and in stereotype fashion raised and insisted in its heads with the arguments by 30 September 2022 the date the application was issued at this court applicant had 11 more days within time respondent conceded the error. I thus conclude that the application is not prescribed. The preliminary point has no merit and is dismissed.

Whether the decision of the Commissioner should be interfered with.

After applicant wrote to the Station Manager about the release of the motor vehicle, the decision of the Station Manager which was subsequently upheld by the Commissioner General emphasised the illegal involvement of the applicant's truck in conveying the smuggled goods. The decision also extensively and strictly relied on the provision of the statutes. It is apparent that the decision of the respondent's officials did not consider mitigatory factors in applicant's favour. The decision is imbalanced and heavily weighs in favour of the state and public. A public official appointed by statute to make decision to punish or correct or sanction an offence in using his or her discretion should mention in the body of its decision that it had weighted interest of both parties. The decision must *ex-facie* reflect that rigorous exercise just as a criminal court does before passing sentence. The very Customs and Exercise Act reposes on the decision making very wide discretion in so determining an appropriate penalty. In the case of *S v Immelman* 1978 (3) SA 726 (a) at 729 B-B DAVIS AJA stated:

“It seems to me that, with regards to the sentence of the court in cases where the trial judge enjoys a discretion, a statement of the reasons which move him to impose the sentence which he does also serves the interests of justice. The absence of such reasons may operate unfairly as against both the accused person and the state. One of the various problems which may be occasioned in the court of appeal by the absence of reasons as that in a case where there has been a plea of guilty but evidence has been led, there may be no indication as to how the court resolved issues of fact thrown up by the evidence or on what factual basis the court approached the question of sentence.”

In casu the statute speaks of an offender as well as a fine and when the forfeiture is imposed as a penalty it is a form of a sentence and the decision must contain both aggravatory and mitigatory features and the decision maker ought to comment in his or her reasons for forfeiture why he or she dismissed those mitigatory factors. An order of forfeiture is likened to

a prison term and the decision maker in the shoes of respondent's commissioner must show as to why forfeiture is but the only suitable punishment.

I have looked at the reasons given by the respondent and have come to a conclusion that it was arbitrary and irrational and the Commissioner General as well as the Station Manager did not consider that this was the first-time applicant's car had been involved in conveying smuggled goods. Applicant offered to pay a fine in a bid to salvage his source of income and livelihood. The offender was prosecuted and fined, the offensive goods were released by police to respondent to be dealt with in terms of s 193 of the Act. It is repeated that respondent was established by statutes to maximise collection of revenue for the fiscus for good governance but in so doing it must exercise fairness and justice to all stakeholders and not to do so with an iron fist. It must remain open to heed to cries of loss of those people who may be subjects or victims of mischievous drivers or employees and that is why section 188 of the Act speaks of 'knowledge' that the vehicle, ship or aircraft is being used for such an illegal activity.

Applicant's own papers disclose that he allowed his employee to make decisions on his own in some instances and Trymore Matimba exactly did so. Applicant did not provide restrictions enough to guide the driver. In his papers he went on to offer a fine for the offence of his car being used to convey the goods, applicant deserves to be given another chance as he indicated in his affidavit. I am not satisfied that forfeiture is the only penalty that meets the justice of the matter and a monetary penalty can still achieve the same objective to collect revenue for fiscus.

Accordingly, the following order is returned

- 1. The application is granted.***
- 2. The decision made by the respondent confirming forfeiture of motor vehicle namely MAN TRUCK TGM 18.280 Registration Number AFM 8448 be and is hereby set aside.***
- 3. The respondent be and is hereby directed to assess an appropriate fine which has to be paid by the applicant and that fine must be assessed within a period of seven days from the date of this order.***
- 4. The respondent be and is hereby ordered to release the motor vehicle MAN TRUCK TGM 18.280. Registration Number AFM 8448 after payment of the fine by applicant.***
- 5. No order as to costs.***

Chikamhi Mareanadzo Legal Practices, Applicant's Legal Practitioners.
Zimbabwe Revenue Authority Legal Services Division, Respondent's Legal Practitioners.