

MICHELLE MAENZANISE  
vs  
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE  
MUZENDA J  
MUTARE, 6 March 2023

### **Opposed Application**

*K.G Muraicho*, for the applicant  
*E Mukucha* for respondent

MUZENDA J: applicant made an application on 15 November 2022 seeking the following relief:

*“IT IS HEREBY ORDERED THAT:*

- 1. The decision made by the respondent confirming the decision of the forfeiture of the motor vehicle namely Toyota Granvia, Registration Number ABO 0825 Chassis Number KCH 100008159 be and is hereby set aside.*
- 2. The respondent is hereby ordered to release the motor vehicle Toyota Granvia Registration Number ABO 0825 Chassis Number KCH 100008159 to the applicant within (7) days from the date of this order, without any conditions.*

*Alternatively, if applicant is found guilty, the respondent be and is hereby ordered to release the vehicle on condition the applicant pays a fine.*

- 3. The respondent is hereby ordered to pay costs of suit.”*

Respondent opposes the application on the basis that the applicant has dismally failed to show that she was not aware that her employee was using the vehicle to transport smuggled bales of second hand clothes.

**Factual background**

On November 2021 Wisdom Chinongwa, applicant's driver was arrested near Mary Mount Teachers College conveying smuggled goods. He and the owner of the goods were prosecuted, convicted and sentenced. The goods and the motor vehicle were seized. Wisdom Chinongwa and applicant made representations to Zimra officials for the release of the motor vehicle but did not succeed. On 23 February 2022 the Commissioner General advised applicant of the forfeiture of the Toyota Granvia to the State. Aggrieved by that letter of forfeiture, applicant decided to lodge the application to this court.

Among the principal grounds for this application, applicant contends that she is the registered owner of the motor vehicle in question and had contracted Wisdom Chinongwa to drive the motor vehicle. She states that she was not aware that the car would be involved in illegal activities. She attached the contract of employment, affidavits of the driver as well as copies of representations made to the respondent. To her she is innocent and there is no valid reason why her car should be forfeited to the State. She further considers that the Commissioner General's decision was wrong, irrational and arbitrarily arrived at as it ignored the evidence or representations made to him or her by the applicant. She adds that she was totally unaware of the agreement between the owner of the goods and the driver. She prays for the unconditional release of the vehicle or alternatively that she be ordered to pay a monetary penalty and gets her car back.

The respondent raises prescription contending that calculating the period from the date of seizure, 19 November 2021 to the date of filing the application, 15 November 2022, it is a year and far in excess of 3 months envisaged by s 193 (12) of Customs and Excise Act, [Chapter 23:02]. The applicant did not seek condonation even if one would want this court to review the decision of the respondent, the period covered does not fall within a period of 8 weeks. They add that in effect what applicant is praying for is a mandatory interdict for the respondent to release her motor vehicle but she is out of time since time for her to do so has prescribed.

In response to the preliminary point on prescription applicant stated that she is in time since the decision to forfeit the motor vehicle was made on 10 August 2022 and calculated the 8 months envisaged in s 196 (2) from August 2022 to November 2022 to be within the statutory period to challenge the forfeiture of the motor vehicle.

On the merits respondent contends that the contract of employment between the offending driver and applicant is not clear to such an extent that applicant was aware that the

driver Wisdom Chinongwa was hired to ferry smuggled bales of second hand clothes. It added that looking at all the surrounding circumstances the applicant has failed to show on a balance of probabilities that she was not aware of her driver's shenanigans which led to the forfeiture of the Toyota Granvia. Respondent prays that the application be dismissed with costs.

### **Points in limine**

Applicant took respondent to task about the person who filed respondent's opposing affidavit alleging that there is no resolution filed authorising Mr Clifford Chamboko to state facts on behalf of the respondent. Applicant cited a host of authorities to motivate the preliminary point.

Respondent defends the propriety of the opposing papers and urge the court to dismiss the point *in limine*. In as much as the point *in limine* is not vexatious, I perceive no prejudice to the applicant. All it needs is an order to have its motor vehicle released and if it succeeds Zimbabwe Revenue Authority would be ordered to do so, with or without costs. Applicant brought respondent to court and respondent nominated Mr Chamboko to prepare papers in its opposition, I see no basis to bar respondent from being heard and grant the application in default. I am satisfied that respondent's papers are in order and the point *in limine* by applicant is dismissed. Respondent in its preliminary point move the court to declare the application prescribed because applicant did not take action from 19 November 2021, the date of notice of seizure. It is not in dispute that the cause of action by applicant is 10 August 2022 when the Commissioner General informed applicant that the motor vehicle had been forfeited. What is of importance is once that is accepted by the respondent the period of prescription is thus 8 months provided for under s 196 (2) of the Act.<sup>1</sup> Accordingly the applicant is within time and the preliminary point by respondent has no merit and is dismissed.

### **On merits**

It is not controverted by the parties that applicant's driver ferried smuggled goods. It is also not in dispute that under the auspices of s 188 of the Act, such a vehicle so used in the commission of an offence is liable to forfeiture unless under s 188 (2a) the alleged owner was not aware that at the time such a vessel was being used. So what applicant must establish on a balance of probabilities is whether or not she was aware that Wisdom Chinongwa was using

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<sup>1</sup> See the matter of Twotap Logistics (Private) Limited v Zimbabwe Revenue Authority SC 3/23 per CHIWESHE JA at p. 6 of the cyclostyle judgment

her motor vehicle to ferry “dirty” or smuggled goods. Had applicant laid adequate facts before the court to prove that? Annexure “D” attached to the application (p13), contract of employment is surprisingly undated though it was presumably drafted in October 2021 and signed. So not a month had lapsed before the contract had been prepared. The termination of contract was signed by applicant on 22 November 2021 Annexure F (p20) Wisdom Chinongwa made representations to the agent of respondent for the release of the car on 23 November 2021, the question is if he had been dismissed by the applicant on 22 November 2021, in what capacity was he making representations on 23 November 2021? By 22 November 2021 Wisdom was not facing criminal charges, he had already been convicted and sentenced on 20 November 2021. So why would Wisdom present facts to Zimra if he was no longer employed by applicant? Why would applicant not make representations herself on 23 November 2021? I am satisfied that all these papers were specifically created on behalf of applicant in order to evade and avoid any aspect of knowledge by applicant in anticipation of this application. The affidavit of the applicant is quiet on where she was on the day in question, 19 November 2021 when Wisdom was arrested. If she was in Mutare Wisdom would have informed her about the goods. Given the number of bales, one ought to have asked for Customs clearance papers before loading them. I am not satisfied that applicant adequately instructed Wisdom Chinongwa against transporting smuggled goods. I also reject the probity of the contract of employment as one prepared purposively after the offence was committed in order to save applicant’s motor vehicle, otherwise there was no logic for Wisdom to approach Zimbabwe Revenue Authority for the setting aside of the seizure of the car well after he had been dismissed from his contract of employment. On 23 November 2021 Wisdom was still applicant’s employee driver and was authorised by applicant to make representations to Zimra on her behalf or on the driver’s own behalf.

I am persuaded by respondent that applicant has failed to establish that she was unaware of the frolics of her driver Wisdom Chinongwa. Quite wide leeway was given to Wisdom to undertake any job as long as it was paying and he did that.

Wisdom Chinongwa paid ZWL 32 000 which is a paltry amount compared to the value of the motor vehicle. I conclude that the seizure was legally valid but not the ultimate forfeiture. Applicant’s motor vehicle was used by an employee, there is no record of previous illegal use and it is the first offence. Applicant stands to lose the car and I see no harm that respondent assess a penalty against the applicant and once paid respondent to release the car forth with.

Accordingly it is ordered as follows:

- “1. The decision by respondent to forfeit applicant’s motor vehicle namely Toyota Granvia Registration Number ABO 0825 Chassis Number KCH 100008159 be and is hereby set aside.*
- 2. The respondent be and is hereby ordered to assess and charge a fine on the applicant and once that fine is assessed and paid, the respondent is ordered to release the car described in paragraph 1 above to the applicant forthwith.*
- 3. Each party to bear its own costs.”*

*Gonese and Ndlovu, applicant’s legal practitioners.*

*Zimra Legal Services Division, respondent’s legal practitioners.*