

FORTUNATE MUTINGWENDE
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 6 March 2023

Opposed Application

T. Musara, for Applicant.
M. Mukucha, for the Respondent.

MUZENDA J: On 2 December 2022 applicant approached this court seeking the following relief:

“IT IS ORDERED THAT:

- 1. The decision made by the first Respondent confirming the decision of forfeiture of the motor vehicle namely Scania P270 Rigid Truck, chassis No VLUP4X2000909636379, be and is hereby set aside.*
- 2. The respondent is hereby ordered to release the motor vehicle being a Scania P270 Rigid Truck chassis No. VLUP4X2000909636379 to the applicant within (7) days from the date of this order without any conditions*
- 3. The Respondent are hereby ordered to pay costs of suit.”*

On 8 December 2022 respondent filed its opposing papers.

Background Facts.

Sometime in April 2021 Caleb Chihwa was arrested driving a truck loaded with 294 bales of second-hand clothes which had been smuggled into Zimbabwe. He was travelling from Mutare to Harare. The subject truck was not registered with the Central Vehicle Registry, applicant claims that it belongs to her. On 23 November 2022 Caleb Chihwa was prosecuted and fined. Meanwhile on 15 July 2021 a Notice of Seizure of the truck was issued by the Regional Manager and applicant was informed. Various representations were made from the station manager upwards in an effort to set aside the seizure and release the truck to applicant. She did not find joy. On 10 August 2022 she appealed to the Commissioner General. On 18

August 2022 the Commissioner General dismissed the appeal and in its decision stated that “your *truck was seized after it conveyed goods which were a subject matter of an offence, thereby contravening s 188 (2) of the Customs and Excise Act*” Applicant considered the Commissioner General’s decision “*capricious, injudicious and also disproportionate*” and resolved to lodge the current application.

In her founding affidavit applicant contends that she imported the truck from United Kingdom and attached the source documents. Caleb Chihwa was her driver whom she employed “*to manage and drive the truck*” on her behalf. On the date the offence was committed she stated that she was out of the country and the truck driver took advantage of her absence and decided to make “quick money”. Applicant attached the driver’s affidavit confirming this version. Applicant added that she was not aware that the truck driver embarked on transporting smuggled goods. She prayed that she be granted the relief she is seeking. She is adamant that the application is against forfeiture in terms of s 196 (2) of the Act and that her action or application is not prescribed.

The respondent in its opposing papers haphazardly raised a number of preliminary points some stand alone as points *in limine*, others appearing in contents of issue addressed on merits. The first preliminary point is that of prescription. To the respondent, applicant did not comply with s 193 (12) of the Act. It calculates, the period of 3 months from the date of seizure. It does not allude to the date of forfeiture. Respondent added that applicant’s application is that of a review nature and as such did not comply with the rules of this court which require a party to apply for review within a period of eight (8) weeks. Respondent further added that applicant’s matter is one for a mandatory interdict which cannot be granted since it is prescribed. The respondent also took applicant to task on the aspect of ownership of the truck.

On the merits respondent insisted that the vehicle was used to commit an offence. Applicant assigned her driver to look for work and assigned her driver to look for work and to be hired so the liability of the driver should equally visit her. Respondent does not see anything wrong done by the Commissioner General using his discretion to forfeit the truck whether applicant was prosecuted or not did not matter to the respondent. As long as it is accepted that the driver was officially assigned by applicant, respondent contended, then applicant is responsible for the acts of her driver.

Points *in limine*

As summarised above there were basically three points *in limine* raised by the respondent. The most pivotal point is that of prescription. Whether calculating time from April 2021, the date of notice of seizure the application be adjudged to have prescribed? The aspects of whether applicant should have applied for condonation or that this application is one of a review nature are but secondary to the aspect of prescription. Is the application arising from a seizure or forfeiture? Is it one coming from the seizure of the truck or it arises out of an order of forfeiture given by the Commission General? On 18 August 2022 the Commission General informed applicant of the forfeiture and not 16 July 2021 when the seizure was affected. I am satisfied that the application was being brought within eight (8) months after the cause of action arose and the date of the cause of action is 18 August 2022. Calculating from that date to 2 December 2022, applicant is well within the provisions of s. 196(2) of the Act and that s 193 (12) does not apply.

In the matter of *Twotap Logistics (Private) Limited v Zimbabwe Revenue Authority*¹, it was held that.

“Commented to the above is the fact that the cause of action contemplated under s 193 (12) is the seizure of the appellant’s truck, trailer and its contents. Under s 196 (2) the cause of action is different and wider than just seizure of property. Section 196 (1) provides for the sixty day notice requires to be given to the respondent and the officers before any civil proceedings arising from their actions or omissions under the Act are instituted. Section 196(2) provides that for such civil proceedings (other than against seizure) the period of prescription shall run for eight months reckoned from the date that the cause of action arose. As the term “civil proceedings” is all embracive it must include proceedings against forfeiture of property. The period of prescription is thus the eight months provided for under s 196 (2)”

I totally subscribe to the learned Judge of appeal’s analysis of s 193(12) and s 196(2) and accordingly dismiss the preliminary point raised by the respondent. I also dismiss the aspect of condonation as being unfounded. The issue of review does not arise and the two are equally dismissed. I am satisfied that the application is properly before me.

Applicant in its heads challenged the respondent’s affidavit and claim that the deponent is not clothed with respondent’s authority through an affidavit. Applicant brought respondent to court and it filed its opposing papers within time, in my view Zimbabwe Revenue Authority can delegate any one of its officials to state facts on its behalf. In any case I perceive no prejudice on the applicant. It would be weird in my view to treat the application as unopposed given the importance of this matter to both parties, for applicant she lost her only source of

¹ SC 3/23 Act pp. 6 per CHIWESHE JA

income and for the respondent, it is statutorily mandated to ensure that all goods that come into Zimbabwe pay duty and secure the revenue for the country. The point in *limine* has no basis and is dismissed.

The merits

On the merits of the application most issues are common cause. Applicant's driver drove the truck from Mutare to Harare to carry goods that were not cleared by respondent. He was intercepted, arrested and prosecuted. He wrote an affidavit absolving applicant of any wrongdoing or knowledge of the illegal load. It is also not in dispute that s 188(2a) of Customs and Excise Act² provides as follows:

“Any person who makes available her ship, air craft or vehicle for use by another person for the removal of goods referred to in sub-section (2)(a) or (b) shall be guilty of an offence and liable to a fine not exceeding level fourteen or to imprisonment for a period not exceeding one year or both such fine and such imprisonment, ***unless he or she prove that he or she was unaware that the ship, aircraft or vehicle would be so used.***”³ (my own emphasis)

Respondent apports blame to the applicant on a presumption that once applicant delegated duties to the owner then any faults of the driver should be visited upon the applicant owner. Respondent is simply surmising, there is no factual basis for such an accusation. To the contrary applicant attached an affidavit of Caleb Chihwa who confirms applicant's version. In light of s 188 (2a) I am persuaded by the applicant that at the time Caleb Chihwa was hired to ferry the 294 bales of second hand clothes from Mutare to Harare applicant was not consulted nor did she have any knowledge. Indeed respondent is correct on point of law that the truck was involved in committing the crime in terms of s 188 of the subject Act and it forms part of subject of forfeiture. However s 188 (2a) places a critical condition that an owner must satisfy to avoid forfeiture. He or she must prove on a balance of probabilities that he or she was unaware that the vehicle would be so used. After analysing facts placed before me by the applicant I am satisfied that applicant was unaware that the her driver would be hired to embark on an illegal transportation of smuggled bales of second hand clothes. She ought to succeed as prayed on the draft order but with no costs.

On the issue of costs, applicant spoke of allowing the driver to “manage” the truck without clearly outlining how he was going to do it. I strongly believe that the respondent

² Chapter 23:02

³ See also s 34(2) of the Customs and Excise Act on the liability of owner of the vehicle, ship or aircraft for goods imported.

looked at how the applicant gave her employee the mandate on the use of the truck. Looking specifically on this aspect, one would not apportion blame to respondent for vigorously opposing the application. One would not say further that Zimbabwe Revenue Authority acted recklessly or unreasonably to justify an award of costs against it. It is because of these reasons that there be no order as to costs.

As a result the following order is granted:

“The decision made by Zimbabwe Revenue Authority forfeiting applicant’s motor vehicle namely Scania P270 Rigid Truck, Chasis Number VLU 20009096 36379 is hereby set aside and Zimbabwe Revenue Authority or its assignee is ordered to release the said motor vehicle to the applicant within (7) days from the date of this order without any conditions.”

Gonese & Ndlovu, Applicant’s legal practitioner
Zimbabwe Revenue Authority legal Services Division, respondent’s legal practitioners