

REPORTABLE (52)

ROCK TELECOM LIMITED
v
ZIMBABWE REVENUE AUTHORITY

SUPREME COURT OF ZIMBABWE
UCHENA JA, CHITAKUNYE JA & CHATUKUTA JA
HARARE: 23 NOVEMBER 2023 & 31 MAY 2024

T. Magwaliba, for the appellant

E. Mukucha, for the respondent

CHATUKUTA JA:

1. This is an appeal against the whole judgment of the High Court (the court *a quo*) handed down on 04 September 2023. The court *a quo* dismissed an application by the appellant for the review of the decision by the respondent's Commissioner General of 8 March 2023 declaring a consignment belonging to the appellant forfeited to the State.

FACTUAL BACKGROUND

2. The facts to this appeal are common cause. The appellant is a company duly registered in terms of the laws of the Republic of Zambia. The respondent is the Zimbabwe Revenue Authority, a body corporate established in terms of the Revenue Authority Act [Chapter 23:11] whose primary function is, *inter alia*, to act as the agent of the State in assessing, collecting and enforcing the payment of all revenue including customs taxes.

3. Sometime in October 2022, the appellant imported a consignment of 96 820 mobile phones from China. The consignment was to pass through Zimbabwe in transit to Zambia. The appellant engaged a transporter who lodged a manifest with the respondent at Forbes Border Post, being the point of entry into Zimbabwe. It also engaged a clearing agent, Allied Customs Freight, who registered a bill of entry declaring a consignment of 13 000 TECNO mobile phones with an invoice value of US\$ 9 000.00. On 3 November 2022, the respondent issued an F45 query notification for physical inspection of the consignment after noting that the consignment was grossly undervalued. On 4 November 2022, the clearing agent asked for a physical examination waiver. The request was denied. On 8 November 2022, the clearing agent made another request for a physical examination waiver which again was denied. On the same date, the respondent's officers clamped the appellant's truck as the clearing agent was not cooperating. The truck was finally moved to the physical examination bay on 18 November 2022.
4. The respondent conducted a physical examination of the shipment. It was discovered that the consignment was under declared by 81 540 mobile phones with a duty value of US\$352 792.80 and surety amounting to ZWL96 270 872.54. The under declaration rendered the consignment liable for seizure and forfeiture. Consequently, the whole consignment was seized on 22 November 2022.
5. Following the seizure, the appellant wrote to the respondent's Acting Regional Manager on 30 November 2022 seeking the release of the consignment. It stated that the clearing agent had been provided with all the proper paper work of the consignment. The clearing agent under declared the consignment without the appellant's knowledge and that the appellant was therefore not liable for the agent's conduct. The Acting Regional Manager, on

- 05 December 2022, responded to the appellant's letter stating that the consignment was liable to forfeiture to the State for the reason that an offence had been committed. It would be forfeited to the State at an appropriate time and without any further reference to the appellant. The appellant was advised to appeal to the Commissioner, Customs and Excise (the Commissioner), if it was not satisfied with that decision.
6. On 2 January 2023, the appellant noted an appeal to the Commissioner. On 30 January 2023, the Commissioner upheld the decision of the Acting Regional Manager and dismissed the appeal. He indicated that by virtue of s 218 of the Customs and Excise Act [*Chapter 23:02*] ("the Act"), a principal was liable for the acts of its agent and therefore the appellant was liable for the under declaration.
7. Disgruntled, the appellant approached the respondent's Commissioner-General arguing that the forfeiture was too drastic a punishment considering that the appellant was unaware of the clearing agent's unlawful deeds. On 8 March 2023, the Commissioner-General responded that the Commissioner had already made a pronouncement on the matter. Thereafter, the appellant approached the court *a quo* on an application for the review of purported decision of the Commissioner General.
8. I pause here to make the following observations. The Commissioner General's reply dated 8 March 2023 to the appellant's purported appeal was very precise. She said:

"Please note your appeal has been unsuccessful.

The commissioner has already made a determination on the case and his decision was communicated to your client Rock Telecom Limited in a letter dated 30 January 2023. The goods were declared forfeited to the State.

Your client was advised to approach the courts for redress if not satisfied with the decision made."

9. The person authorised by the Act to declare forfeiture of any seized goods is the Commissioner, Customs and Excise. As correctly stated by the Commissioner General, the declaration of forfeiture was made by the Commissioner, Customs and Excise on 30 January 2023. No appeal lies to the Commissioner General against the decision of the Commissioner, Customs and Excise. The appellant was therefore mistaken in seeking the review of the decision of the Commissioner General. The appropriate relief sought by the appellant should have been the setting aside of the decision of the Commissioner of 30 January 2023.

PROCEEDINGS BEFORE THE COURT A QUO

10. The appellant argued that it was not liable for the under declaration by the clearing agent. The clearing agent had been given the paper work setting out the correct quantity of the consignment in transit. It acted on its own volition when it under declared the consignment. It was further contended that the penalty of forfeiture was not consistent with s 174 of the Act which provided for the imposition of a fine. It was argued that the respondent did not explain why a fine was inappropriate as the respondent had not suffered any prejudice since no revenue was due to it given that the consignment was in transit. By comparison, the appellant referred to the case of another company by the name of Gatbro International, Zambia, which had been penalised with the imposition of a fine for the under declaration of consignment also in transit to Zambia.
11. The respondent opposed the application. It was submitted that it was the responsibility of the appellant and the transporter (engaged by the appellant) to ensure that the correct declaration was made at the point of entry. The appellant was therefore liable for the agent's conduct. It further argued that the consignment was the subject matter of an

offence and was liable to forfeiture in terms of s 188(1) of the Act. The respondent considered each case on its own merits. The circumstances of Gatbro International, Zambia were distinguishable from the present as the nature of the consignment and point of detection of the under declaration were vastly different.

DECISION A QUO

12. The court *a quo* dismissed the application for review with costs. It held that the clearing agent had the express mandate from the appellant to clear its consignment. There was therefore a principal and agent relationship between the two. The actions of the agent were executed within the scope of that relationship and were binding on the appellant. It further held that the appellant failed to produce evidence to the effect that it gave the clearing agent the correct documents to clear the consignment but instead acted outside the scope of the agreement between the parties.
13. The court *a quo* went on to find that the circumstances pertaining to the seizure of the consignment of Gatbro International, Zambia could not be equated to those of the appellant as there was a genuine mistake on the part of its officials and agent in under declaring the consignment. The appellant on the other hand had intentionally attempted to smuggle the consignment into Zimbabwe.
14. The court *a quo* further found that s 188(1) of the Act fortified the respondent's decision to declare the consignment forfeited as it permits a consignment which is the subject matter of an offence to be liable to forfeiture. In the result, the court *a quo* dismissed the application with costs.

Further aggrieved, the appellant noted the present appeal on the following grounds:

GROUND OF APPEAL

1. The court *a quo* misdirected itself in law by committing a gross irregularity in contradicting itself by first holding that the appellant's ground attacking the harshness or excessiveness of the forfeiture of its goods was not a valid ground of review and thereafter proceeding to determine the merits of the same ground of review.
2. As an alternative to 1 above, the court *a quo*'s finding that the forfeiture of the appellant's goods was neither harsh nor excessive is irrational in the sense that it is so outrageous in its defiance of logic or common sense that no reasonable court applying its mind to the facts and circumstances of this case could ever reach a similar decision.
3. In dismissing the appellant's third ground of review relating to unequal treatment, the court *a quo* misdirected itself in law by committing a gross irregularity in contradicting itself by first finding that the appellant had not drawn the case of Gatbro International Limited, Zambia to the attention of the respondent and thereafter proceeding to make findings based on the respondent's recorded detailed response to that very same case.
4. As an alternative to 3 above, the court *a quo*'s finding that the forfeiture of the appellant's goods was not afflicted by unequal treatment vis-à-vis Gatbro International Limited, Zambia is irrational in the sense that it is so outrageous in its defiance of logic or common sense that no reasonable court applying its mind to the facts and circumstances of this case could ever reach a similar decision.
5. The court *a quo* misdirected itself at law by not establishing that the Notice of seizure No. 041064L dated 22 November 2022 was defective for failure to comply with

s 193(10) of the Customs and Excise Act [*Chapter 23:02*] in that it did not notify Appellant of its procedural rights, which would render the seizure and subsequently the forfeiture of the Appellant's goods void.

6. The court *a quo* misdirected itself at law by not establishing that the forfeiture of Appellant's goods was a nullity for failing to comply with the provisions of s 193(6) of the Customs and Excise Act [*Chapter 23:02*] which requires only the Commissioner and not the Regional Manager to make a declaration of forfeiture.
7. The court *a quo* misdirected itself at law by not establishing that the forfeiture notice was issued prematurely in light of the provisions of s 193(9) of the Customs and Excise Act [*Chapter 23:02*] which provides that the Commissioner may not exercise his forfeiture powers whilst recovery or payment proceedings may still be instituted in terms of s 193(12) of the Customs and Excise Act [*Chapter 23:02*].
8. The court *a quo* misdirected itself at law by not establishing that the forfeiture notice was irregular in that it directed Appellant to follow procedures which are not provided for in the Customs and Excise Act [*Chapter 23:02*], to wit, to appeal in writing to the Commissioner Customs and Excise. ‘
9. The court *a quo* grossly erred and misdirected itself in finding that the respondent had the option not to punish appellant in terms of s 174 of the Customs and Excise Act [*Chapter 23:02*] and punish it under s 188(1) of the same Act despite the established rule of statutory interpretation that a specific provision overrides a general provision per the Latin maxim *generalia specialibus non derogant*.

PROCEEDINGS BEFORE THIS COURT

15. At the commencement of the hearing, the appellant applied to amend its grounds of appeal with the addition of grounds 5 to 9. The grounds were being raised for the first time on appeal. They raised points of law which went to the root of the matter and could be raised at any time. The application was granted with the consent of the respondent.

16. It would be remiss of the court not to remark on the inelegant drafting of the grounds of appeal 1 to 4. In terms of r 44(1) of the Supreme Court Rules, 2018, grounds of appeal must be set out clearly and concisely. The appellant's grounds 1 to 4 are prolix repetitive. They all impugn the court *a quo*'s decision on whether forfeiture was an appropriate penalty.

APPELLANT'S SUBMISSIONS

17. Mr Magwaliba, for the appellant, made the following submission: Section 193(10) of the Act requires that a person from whom articles have been seized or the owner of the articles, be notified in writing of the procedural rights provided for in s 193(12) of the Act. The notice did not comply with s 193 (10) of the Act. The provisions are peremptory and non-compliance thereof renders the notice of seizure defective and invalid.

18. The declaration of forfeiture of the appellant's consignment was contrary to law. The power to declare any consignment forfeited to the State rested with the Commissioner in terms of s 193(6). The forfeiture *in casu* was declared by the Acting Regional Manager in the letter dated 5 December 2022. The Commissioner confirmed the declaration of forfeiture in his letter of 30 January 2023. The forfeiture was therefore unlawful. Additionally, the declaration of forfeiture was permissible only after the lapse of a period of three months as provided in s 193(9) during which period the appellant had a right to

institute proceedings for the recovery of the seized consignment. The alleged forfeiture was declared before the lapse of the prescribed period rendering the declaration of forfeiture a nullity.

19. The respondent could only forfeit the consignment after the institution of criminal proceedings in terms of s 174 (2)(a) of the Act. The Commissioner General failed to furnish reasons why he instead opted to forfeit the consignment in terms of s 188(1) instead of proceeding in terms of s 174 (2)(a). The forfeited consignment was in transit and was not meant to be consumed in Zimbabwe. There being no prejudice to the fiscus, a fine was the most appropriate penalty. Forfeiture was grossly harsh.

RESPONDENTS SUBMISSIONS

20. *Per contra*, Mr *Mukucha*, for the respondent, submitted that the notice of seizure substantially complied with s 193(10) of the Act. He contended that the notice of seizure complied with the law in that the appellant was advised of the procedure and course of action to take if aggrieved by the respondent's conduct. It was further argued that the appellant exhausted all domestic remedies stipulated in the notice of seizure. It could not therefore attack the notice which it complied with.
21. It was further submitted that the declaration of forfeiture was made internally by the Commissioner hence the statement in the letter by the Acting Regional Manager that forfeiture was a possibility in the future and without any further reference to the appellant. It was argued that it is clear from that statement that the Acting Regional Manager did not declare the consignment forfeited. The respondent submitted in its heads of argument that the appellant failed to articulate how the declaration of forfeiture was premature.

22. It was argued that it is not a requirement that criminal proceedings must be instituted before goods can be declared forfeited to the State. It was further argued that s 174 (2)(a) applies where a person is charged with a contravention of the Act while s 188(1) relates to the fate of the goods which are the subject of an offence. It was also contended that s 193(2), which defines goods liable for seizure, clearly provides that a conviction is not a prerequisite for the forfeiture of any seized goods. Mr *Mukucha* therefore submitted that the respondent's decision to forfeit the consignment to the State was permitted at law.
23. As regards the distinction in the treatment of Gatbro International, Zambia, it was submitted that there was a difference in the gravity of the conduct of the two, the quantity of the under declared goods and their value, and the point at which the under declaration was detected. In the case of the appellant, it was at the port of entry and in respect of Gatbro International, it was at the port of exit. The security measures put by the respondent on Gatbro International trucks had not been tempered with between the port of entry and the port of exit. The under declaration was a genuine mistake by Gatbro International.

ISSUES FOR DETERMINATION

24. The grounds of appeal and submissions by the parties raise three issues for determination:
1. Whether or not the notice of seizure was invalid.
 2. Whether or not the declaration of forfeiture was invalid.
 3. Whether or not the forfeiture was an appropriate penalty.

APPLICATION OF THE LAW TO THE FACTS

1. **Whether or not the notice of seizure was invalid**

25. The appellant submitted that the notice of seizure was fatally defective for failure to express thereon, the appellant's procedural rights, as provided under s 193(10) as read with s 193(12) of the Act. Section 193(10) of the Act stipulates that:

“(10) Subject to subs (11), whenever articles are seized in terms of this section the officer so seizing shall give to the person from whom the articles have been seized or the owner of the articles a notice in writing specifying the articles which have been seized and informing such person of the provisions of subs (12).”

Section 193(12) of the Act states that:

“(12) Subject to section one hundred and ninety-six, the person from whom the articles have been seized or the owner thereof may institute proceedings for

-
- (a) the recovery of any articles which have not been released from seizure by the Commissioner in terms of paragraph (a) of subs (6); or
- (b) the payment of compensation by the Commissioner in respect of any articles which have been dealt with in terms of the provision to subs (6);

within three months of the notice being given or published in terms of subs (11), after which period no such proceedings may be instituted.”
(own emphasis)

26. According to the above-mentioned provisions, for a notice of seizure to be valid, it must inform the owner of the goods of:

- i. the articles being seized.
- ii. their right to institute proceedings within three months of the seizure for the recovery of the consignment or payment for reparations.

27. The appellant was particularly aggrieved that he was not advised of his right to institute court proceedings. The respondent argued that the notice of seizure informed the appellant of its procedural right.

28. Upon scrutinizing the notice of seizure in its entirety, at the bottom of the notice it is stated as follows:

“In terms of s 193 of the Act, the Commissioner General may-

- (a) release these goods from seizure; or
- (b) declare them to be forfeited; or
- (c) in the case of dangerous or perishable goods, direct that they may be sold out of hand...

If you wish, you may, within three months from the date of this notice, make representations to the Station Manager of the station where your goods were seized, stating your reasons why the goods should not be dealt with in the manner prescribed in paras (b) and (c) above.

Additionally or alternatively you may, within the three months from the date of this notice and **subject to the submission of written notification 60 days beforehand in terms of s 196 of the Act, institute proceedings for the recovery of the goods from the Commissioner General**, or for the payment of compensation in respect of goods which have been disposed of by the Commissioner General.

If the Commissioner General does not release the goods following representations made by you or if you do not institute proceedings within the period specified, any goods declared to be forfeited shall become the property of the State without compensation.” (Own emphasis)

29. It is evident from the above that the appellant was not only advised of its right to institute court proceedings, it was also advised of the need to give the respondent notice of the intended proceedings in terms of s 196 of the Act. It is therefore inexplicable that the appellant would not have been aware of the domestic remedies when both those remedies and the right to institute court proceedings appear *ex facie* the notice of seizure, one after the other. The notice goes beyond the substantial compliance referred to in the respondent’s submissions. There was complete and exact compliance with s 193(6).

The notice of seizure was therefore valid.

2. Whether or not the declaration of forfeiture was invalid

30. It was the appellant's position that the consignment was forfeited to the State firstly by an unauthorised official. Secondly, the declaration of forfeiture was premature as it was declared before the lapse of the three months stipulated in s 193(9) of the Act. It was further argued that the respondent should have instituted criminal proceedings against it in terms of s 174 (2)(a) of the Act instead of proceeding in terms of s 188(1) of the Act.

31. The declaration of forfeiture of goods seized by the Commissioner is in terms of s 193(6) (b). Section 193(6) reads:

“Subject to subs (9), where an officer has reported in terms of subs (5), the Commissioner may—

(a) either unconditionally or subject to such conditions, whether as to the payment of a fine imposed in terms of subs (1) of section *two hundred* or otherwise, as he may fix, order all or any of the articles to be released from seizure; or

(b) **declare all or any of the articles to be forfeited;** or

(c) if the articles could not be found or recovered, declare that the person from whom the articles would have been seized shall pay to the Commissioner an amount equal to the duty-paid value of such articles:”

Section 193(9) of the Act to which s 193 (6) is subjected to provides, in part, that:

“(9) The Commissioner shall not exercise his powers in terms of –

(a) Paragraph (b) of subs (6) while proceedings may be instituted in terms of paragraph (a) of subs (12) or, if such proceedings have been instituted, until they have been concluded in his favour;”

32. The foregoing provisions should be read together with s 193 (12) of the Act. Section 193(12) accords the owner of the goods the right to institute proceedings for the recovery of goods which would have been seized by the respondent. In *Patel v Controller of Customs and Excise* 1982 (2) ZLR 82 (H) the court remarked at p 87 A that:

“An individual who is affected by the seizure of articles is able to protect his rights against the possibility of their subsequently being declared to be forfeited, by instituting proceedings for their release from seizure.”

See also *Twotap Logistics (Pvt) Limited v Zimra* SC3/23.

33. The proceedings must be instituted within three months of the date of giving or publication of notice of seizure. Section 196(1) sets out the procedure that the owner must comply with before instituting the proceedings. The Commissioner is empowered in s 193 (6)(b) of the Act to declare goods which are the subject of an offence, forfeited to the State. Section 193(9) specifically precludes the Commissioner from exercising those powers before the lapse of three months within which the owner of goods may institute proceedings. The limitation of the Commissioner's powers is clearly intended to allow the owner of seized goods to exhaust all the procedures open to them to recover the seized goods before the Commissioner can declare the goods forfeited to the State. Section 193(9) is couched in unambiguous and peremptory language. It must be strictly complied with. The rationale for the section is found in the remarks in *Patel v Controller of Customs and Excise (supra)* where it was held that:

“Secondly, it is clear from the provisions of s 176 (10) that the intention of the lawmaker was that finality should attach to a declaration of forfeiture by the Controller of articles which have been seized. Once the articles are forfeited they vest in the President and may, by the direction of the Controller, be sold or destroyed or appropriated to the State. There is no period of grace between the making of the declaration and the passing of ownership.”

34. It is within the discretion of the owner to institute the proceedings as long as they do so within the stipulated period. Once the prescribed period has lapsed before the owner has instituted the proceeding, the Commissioner is compelled to issue a declaration of forfeiture. Thereafter “there is no period of grace” extended to the owner to challenge the forfeiture as is prescribed in the case of a notice of seizure. A declaration of forfeiture made before the lapse of the three months is inconsistent with the dictates of the Act as it denies an owner their right to challenge the notice of seizure. It would therefore be invalid.

35. *In casu*, seizure of the goods was on 22 November 2022. The respondent contended that the declaration of forfeiture was on 30 January 2023. A declaration of forfeiture was therefore effected after two months of the date of giving the notice of seizure, therefore falling short of the three months. The declaration of forfeiture was clearly premature. It was still within the discretion of the appellant to institute proceedings for the recovery of the seized goods. The Commissioner should have allowed the prescribed time to lapse. The declaration of forfeiture was therefore invalid.
36. The above finding is dispositive of the appeal. It is therefore not necessary to determine the other issues, *viz* whether the declaration of forfeiture was made by the Commissioner or the Acting Regional Manager. Neither is it necessary to determine whether or not forfeiture ought to have been made in terms of s 174 (2)(a) of the act and not s 188(1).

COSTS

37. The appellant had sought punitive costs. It however did not justify why such costs were being sought. The appellant, having partially succeeded, it is only proper that each party bears its own costs.

DISPOSITION

38. The notice of seizure was indisputably valid. All the procedures both internal and external to the respondent appear *ex-facie* the notice. The notice of seizure therefore complied with provisions of s 193(10) as read with s 193(12). Given the court's finding, it follows that the consignment remains under seizure as from the date the notice of seizure was given.
39. In the result, it is ordered as follows:

1. The appeal succeeds in part.
2. The judgment of the court *a quo* is set aside and substituted with the following:
 - “1. The application for review partially succeeds with no order as to costs.
 2. The decision of the respondent made on 30 January 2023 declaring the appellant’s goods forfeited to the State be and is hereby set aside.”
3. Each party shall bear its own costs.

UCHENA JA : I agree

CHITAKUNYE JA : I agree

Dube, Manikai & Hwacha, appellant’s legal practitioners

Zimbabwe Revenue Authority Legal Services Division, respondent’s legal practitioners