DIGITAL MECHANICS (PVT) LTD

Versus

ZIMBABWE REVENUE AUTHORITY

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 30 JUNE 2021 & 15 JULY 2021

Opposed Application

Adv Phulu, for the applicant
T Marange, for the respondent

MAKONESE J: This is an application for a declaratur. The applicant seeks an order in the following terms:

"IT IS ORDERED THAT:

1. The conduct of the respondent to withhold the applicant's vehicle on condition that that he has to pay duty in foreign currency be and is hereby declared ultra vires the law prevailing at the time and therefore illegal.
2. The ordinary meaning of the phrase" within 42 days of importation "of goods in section 3 (3) of SI 252A, be declared not to be reckoned from 23rd November 2018, but from the date of importation.
3. The applicant qualified for exemption from payment of duty in foreign currency and as such the respondent should have released the vehicle to the applicant for assessment and payment in the local currency, the RTGS, without cross rating either on open market or interbank rate.
4. The applicant be and is hereby exempted from paying any storage charges levied by the respondent in respect of the applicant's vehicle.
5. The conduct of the respondent to sell the applicant's vehicle at a rummage sale be and is hereby declared unlawful and wrongful as it is premised on an illegal basis.
6. The respondent be and is hereby ordered to deliver to the applicant, within thirty (30) days of the date of this order, a motor vehicle of similar make with similar specifications as the one sold unlawfully.
7. The respondent shall pay the costs of suit on an attorney and client scale."

This application is opposed by the respondent who has raised certain preliminary objections, which, if upheld, would be dispositive of the matter.

FACTUAL BACKGROUND

The applicant imported a motor vehicle, an Audi A4, from Japan on 8th January 2019. The vehicle was purchased on 22nd November 2018 and consigned to Zimbabwe on 7th December 2018. The vehicle was detained at Plumtree border post by Zimbabwe Revenue Authorities on a Receipt for Items Held (RIH), Serial number 06230 pending clearance of the vehicle. The RIH advised the applicant to clear the motor vehicle within 3 months failing which the vehicle would be disposed of. On 8th January 2019 applicant applied to the respondent for exemption from paying duty in foreign currency. This was done upon reliance on the provisions of SI 252A of 2018. The statutory instrument provides in part that goods purchased on or before 22nd November 2018 and consigned on or before the 3rd of January 2019 shall be exempted from payment of duty in foreign currency. Approval for the exemption is to be obtained from the Ministry of Finance and Economic Development within 42 days from the date of importation of the goods. By letter dated 12th January 2019 applicant's request was turned down. Applicant made another similar application on 21 January 2019. It was turned down. A further request was again turned down by letter dated 22 January 2019. On 23rd January 2019 the applicant appealed to the Commissioner, Zimbabwe Revenue Authority against the decision denying it the option to pay duty in local currency. By letter dated 26th February 2019 the appeal was denied. On 12th April 2019 the Audi A4 motor vehicle was disposed of at a rummage sale as the 2 months within which the goods should have been cleared in terms of section 39 of the Customs and Excise Act (Chapter 23:02) had expired. Even the 3 months stipulated in the Receipt for Items Held (RIH) had expired. By e-mail dated 29th April 2019 applicant once again wrote to the Ministry of Finance for an exemption but nothing came out of that attempt. On 31st May 2019 applicant instituted civil proceedings under case number HC 1280/19 seeking a declaratur against the respondent compelling it to be allowed to pay duty in local currency. After the application was lodged with this court the parties attempted to resolve the matter out of court. A draft deed of settlement was prepared by the parties but eventually the parties could not agree.

On 14th June2019 respondent opposed the application. Applicant was advised that the application was not properly before the court as notice of intention to sue as required by section 196 (1) of the Customs and Excise Act had not been given. Applicant was advised that the motor vehicle had been sold at a rummage sale on 12th April 2019. Applicant withdrew its court application and proceeded to give the requisite notice of intention to sale

as required under section 196 (1) of the Act. Applicant did nothing until 5th June 2020 when it instituted these proceedings. The issues for determination in this application are these:

1. Whether or not the applicant's claims have prescribed
2. Whether or not there was material non-joinder of the Ministry of Finance and Economic Development
3. Whether or not the applicant is entitled to the declaratur being sought.

The first two issues have been raised as preliminary objections, whereas the third issue deals with the merits of the matter. I shall firstly deal with the points *in limine.*

WHETHER THE APPLICANT'S CLAIMS HAVE PRESCRIBED

Respondent contends that the claims have prescribed as proceedings were not brought within 8 months from the date on which the cause of action arose. Respondent avers that the cause of action in this matter arose from the date of the sale of the motor vehicle. Respondent argues that applicant had a cause of action from the date it was advised that the vehicle had been sold. In paragraph 20 of its Founding Affidavit applicant admits that it was advised of the sale of the vehicle on 19th June 2019 through both the Respondent's opposing affidavit in case number HC1280/19 and the letter dated 19 June 2019. This is confirmed by the letter dated 19th June 2019 that was received by applicant's legal practitioners on the same day which confirmed this position. The letter by respondent is in the following terms:

"19 June 2019
MESSRS NCUBE AND PARTNERS
BULAWAYO

RE: DIGITAL MECHANICS (PVT) LTD V ZIMBABWE REVENUE AUTHORITY HC 1280/19

1. We make reference to the above matter.

2. Our internal client advised us on 14 June 2019 that the vehicle at the centre of this dispute was sold by the Authority in terms of section 39 of the Customs and Excise Act (Chapter 23:02) sometime in April 2019.

3. In terms of section 39 of the Customs and Excise Act, goods that have not made entry within sixty days of importation are sold by public auction.

4. Further, the Receipt for Items Held issued to your client on 8 January 2019 explicitly states that if goods remain uncleared for three months from the date of the notice, they will be sold in terms of section 39 of the Customs and Excise Act.

5. Your client failed to comply with the provisions of section 39(1) and its vehicle was sold in a rummage sale.

6. Regrettably we only became aware that the vehicle had been sold following further engagements with the internal client, and after you had prepared and forwarded the draft deed of settlement for our consideration. Naturally, we have had to file opposing papers to your client's application as the vehicle was sold pursuant to your client's failure to comply with its statutory obligations within the prescribed timeframes.

7. In view of the foregoing, we regret to advise that the matter cannot be resolved in the manner the parties had initially contemplated since your client only approached the court long after the vehicle had been lawfully disposed.

Yours Faithfully

LEGAL OFFICER

FOR COMMISSIONER GENERAL"

It seems to me to be quite evident that from the 19th June 2019 the applicant had 8 months within which to institute proceedings against the respondent as required under section 196 (1) of the Act. The 8 months period ended on the 19th February 2020. Applicant did not institute civil proceedings within the stipulated period as provided in the Act. In my view, applicant's conduct was characterized by a sluggardness that is difficult to comprehend. After being advised on 19th June 2019 that its motor vehicle had been disposed of and that there was need for it to give notice of intention to sue, applicant decided to do nothing for two and half months. Applicant only gave 60 days' notice of intention to sue on 29 August 2019. The 60 days' notice expired on 29 October 2019. From the 29th October the applicant still had three and half months within which to institute civil proceedings, up to 19th February 2020. However, notwithstanding the expiry of the notice period the applicant still sat on its laurels and did not institute civil proceedings within the statutory period. Applicant only commenced the current legal proceedings on 5th June 2020 well after 3 months after the expiry of the 8 months period. I have no doubt that applicant's claim has hopelessly prescribed. On this ground alone, and on this point *in limine*, this court must not entertain the claims by virtue of the operation of prescription.

In *Murphy v Director of Customs and Excise* 1992 (1) ZLR 28 the learned Judge had this to say at p 34:

"*With regard to the whisky that was seized on 18 September, the notice given in terms of s178 gave, as the cause of action, the unlawful seizure of the whisky. In terms of subs (9) of s 176 of Chapter 177, the plaintiff could institute proceedings for the recovery of the whisky within three months of the notice of seizure that was given to him. He failed to do so and therefore it must follow that his cause of action based on unlawful seizure has prescribed* (Emphasis added)

In a more recent case, this court dealt with a similar matter in *Betty Dube v Zimbabwe Revenue Authority* HB 2/14. An importer applied for a declaratur declaring that she was entitled to an immigrant's rebate which had been denied by the Zimbabwe Revenue Authority. The application for a declaratur was filed well after the 8 months period stipulated in section 196 (1) of the Act. The court held that the importer's claim had prescribed and the claim for a declaratur could thus not be granted. The learned judge had this to say:

"The rights that the applicant *sought to invite this court to determine were prescribed and extinguished. Cadit question. There are no existing rights, future or contingent rights to determine."*

See also; *Machacha* v *Zimbabwe Revenue Authority* HB 186/11.

The ratio in the above case applies with equal force in this matter. The rights applicant is seeking to enforce are prescribed. It would be an exercise in futility to attempt to determine rights that no longer exist by operation of law. There are no rights that can flow from such a determination. I am satisfied that this preliminary objection does have merit. This point *in limine* is accordingly upheld. Applicant argued that this court is empowered to exercise its discretion in terms of section 14 of the High Court Act (Chapter 7:06) to enquire into and determine any existing, future or contingent right or obligation. This court, however, is not empowered to override the provisions of other legislation in the land. In particular the mandatory provisions of sections 196 (1) and 196 (2) of the Act. Further, and in any event, in terms of section 39 of the Act goods that are not cleared within 60 days of importation are to be sold by public auction. See: *Betty Dube* v *Zimbabwe Revenue Authority* (*supra*).

For the aforegoing reasons reasons, I conclude that the applicant's claims are indeed prescribed. It shall not be necessary to deal with the second preliminary objection raised by the respondent, that is, the issue of material non- joinder. I observe that Rule 87 of the High Court Rules, 1971 provides that "No cause or matter shall be defeated by reason of the misjoinder or non -joinder of any party and the court may in any cause or matter determine the issues or question in dispute so far as they affect the rights and interests of the persons

who are parties to the cause or matter". The non-joinder of the Ministry of Finance was not fatal to these proceedings.

Accordingly, and in the result, it is ordered that the application be and is hereby dismissed with costs.

Ncube & Partners, applicant's legal practitioners