

PITEOUS GWARA

Versus

**THE OFFICER IN CHARGE
(Zimbabwe Republic Police Anti-Corruption Unit, Bulawayo)**

And

DS NGWENYA No. 045898N

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 3 NOVEMBER 2021 & 11 NOVEMBER 2021

Court application

G. Sengweni, for the applicant
B. Moyo, for the respondents

DUBE-BANDA J: This is a court application. The relief sought is that the 1st and 2nd respondents be ordered to forthwith release applicant's vehicle, a Toyota Land Cruiser, and costs of suit on a legal practitioner and client scale. Applicant contends that the continued detention of the vehicle is unlawful and illegal. The application is opposed by the respondents.

This application will be better understood against the background that follows. On the 18 September 2020, respondents seized applicant's vehicle. A copy of the Exhibits Seizure Confirmation Receipt (Seizure Notice) shows that the vehicle was seized in terms of section 49 of the Criminal Procedure and Evidence Act [Chapter 9:07]. The Seizure Notice shows that the vehicle was seized for an offence of fraud. Applicant contends that he discovered that the respondents had no basis at law to detain his vehicle. There is neither a pending criminal case against him concerning the vehicle nor any criminal matter whose subject involves the vehicle. He then approached the respondents and sought that the vehicle be released and returned to him. His request was declined and he was aggrieved by such refusal. It is against this background that applicant has launched this application seeking the relief mentioned above.

This application is anchored on section 58A (1) of the Criminal Procedure and Evidence Act (CP & E Act). This is the statutory provision that regulates the release and return of articles seized by the police. In terms thereof the police are enjoined to carry out an investigation and cause the institution of criminal proceedings within twenty one days of seizure of an article. If

no proceedings are instituted within twenty one days and if no notice of at least seventy two hours prior to the expiry of the twenty one days is given to the owner or possessor of the seized article that it is intended to continue holding the article under seizure, then the seized article must be returned to the owner or possessor.

Applicant contends that the vehicle was seized on the 18th September 2020. At the time of filing this application the vehicle had been approximately seven months in the custody and control of the police. It is submitted that applicant has neither been summoned for prosecution nor has a statement of charge been lodged with the clerk of court in respect of this vehicle. It is contended that the vehicle is neither an article whose possession is intrinsically unlawful as provided in section 47 of the CP & E Act, nor listed as such in any regulations made by the Minister. No warrant has been issued for the continued detention of the vehicle. It is argued that the continued detention of the vehicle is *prima facie* unlawful and a violation of applicant's rights.

Respondents contend that the vehicle was handed over to the Zimbabwe Revenue Authority (ZIMRA) on the 20 April 2021. ZIMRA issued a notice of seizure in terms of the Customs and Excise Act [Chapter 21:02]. The vehicle is now in the custody and control of ZIMRA. It can only be released in terms of the provisions of the Customs and Excise Act. Further respondents contend that they cannot be ordered to release a vehicle which is not in their custody and control. *Per contra*, applicant contends that the vehicle was seized in terms of section 49 of the CP&E Act and in terms of section 58 of the Act such seized vehicle must be under the control of a police officer who seized it. It is submitted that to release the vehicle to ZIMRA without a court order would be illegal and unlawful. It is contended that the disposal of articles seized in terms of section 49 of the Act is only in terms of section 59 of the Act. Applicant argues that as long as the vehicle has not been disposed of in terms of the CP&E Act, the presumption is that it is still under the control of the police officer who seized it.

The power of seizure is limited to articles which are either involved in, used during, or may provide proof of the commission of an offence in Zimbabwe or elsewhere, or provide proof of the fact that the commission of the offence was planned. The right of detention of a seized article is not unlimited and thus does not confer upon the police the right to deprive a person of lawful possession of an article indefinitely. The provisions regulating seizure are crafted in strict terms to safeguard against an unjustified interference with the right to property

and other fundamental rights. The police in seizing property may only act within the framework of the empowering provisions of the CP&E Act.

The net effect of applicant's case is that the police must release and return the vehicle to him, and if ZIMRA has issues with the vehicle, it can then proceed in terms of the law. Whilst it is true that the release of seized property is strictly regulated by law, and that the police must release and return such property to the owner or possessor thereof, and that generally the property should have been released and returned to the applicant, the facts of this case require a further inquiry. The inquiry is whether the police can, notwithstanding the fact that the vehicle has been seized by ZIMRA authorise its release and return to the applicant?

What is problematic about applicant's case is that it assumes and wants this court to assume that the vehicle is in the custody of the police. This court cannot make such an assumption that the vehicle is under the control of the police officer who seized it. It is a fact that the police surrendered the vehicle to ZIMRA, and it was then seized in terms of the Customs and Excise Act [*Chapter 23:02*]. It is a fact that the vehicle is now in the custody of another statutory body – ZIMRA, which is regulated by the Customs and Excise Act. In seizing this vehicle ZIMRA was exercising its powers under the provisions of the Customs and Excise Act. In terms of the empowering legislation ZIMRA is empowered to seize any goods, ship or aircraft or article, which it has reasonable grounds for believing are liable to seizure. The officer making the seizure need only have reasonable grounds for believing that the articles are liable for seizure under the provisions of the Act.

In *casu* the notice of seizure is directed to the applicant, and informs him that the vehicle has been seized because it is believed on reasonable grounds that it is liable to seizure. It further informs him that the vehicle has been seized in terms of section 193 of the Customs and Excise Act, and that he may make written representation to the Station Master giving reasons why the vehicle should not be forfeited or why he should not pay an amount equal to the duty-paid value of the vehicle. The vehicle has been seized because it is believed on reasonable grounds that it is liable to seizure in terms of the Customs and Excise Act. It cannot be released from seizure and returned to the applicant outside the provisions of the empowering legislation, this is what applicant has to contend with.

The order sought is directed against the respondents. ZIMRA has not been joined into this proceedings. No doubt ZIMRA has a direct and substantial interest which may be affected

prejudicially in the event the order sought is granted in this case. It has a legal interest in the subject matter of the litigation. It has seized the vehicle in terms of the Customs and Excise Act, which empowers it to seize an article which it believes is liable to seizure. It is trite that no order can be made against a party not before court. Further an order for the release of the vehicle directed against the police would not be enforceable against ZIMRA. Mr *Moyo*, counsel of the respondent argued that an order sought by the applicant, if granted would be *brutum fulmen* and of no legal consequences. I agree. It is settled law that an order that is unenforceable is a *brutum fulmen*. A court cannot grant what clearly amounts to a *brutum fulmen*. It is for these reasons that this application must fail.

The conventional rule that costs follow the result is not applicable in this matter. The dismissal of this application does not amount to victory of the respondents, but a realisation that the vehicle has been seized by ZIMRA in terms of the law, and in the circumstances this court cannot order that it be released and returned to the applicant. It is for these reasons that I take the view that respondents are not entitled to costs in this matter.

Disposition

On the facts of this case, this court cannot accede to the order sought by the applicant. It cannot order the respondents who have no custody and control of the motor vehicle to release and return such vehicle to the applicant.

In the result, this application is and hereby dismissed with no order as to costs.

Sengweni Legal Practice, applicant's legal practitioners
Attorney General's office Civil Division, respondent's legal practitioners