

HUBERT KASONGO MBWEMBWE
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE 15, 16, 17 June 2021 and 5 July 2021

Urgent Chamber Application

E Samkange, for the applicant
E Mukucha, for the respondent

CHINAMORA J:

Background facts

The applicant filed an urgent chamber application on 9 June 2021 seeking the release of his consignment of abalone fish which the respondent seized on 27 May 2021 under Notice of Seizure Number 032789L, and an Atego Rigid Truck, Registration Number JR94CCGP held under Notice of Seizure Number 032788L, which was carrying the abalone consignment. The aforesaid notices also, informed the applicant that the Commissioner General, Customs and Excise, in terms of s 193 of the Customs and Excise Act [Chapter 23:02], may *inter alia* release the goods from seizure or declare them to be forfeited. Additionally, both notices bore on their face the following endorsement:

“For possible release of goods you may write to the Regional Manager, Beitbridge border post, P Bag 5746, Beitbridge”.

According to the applicant, he purchased the abalone fish on 16 May 2021 from Irvine Africa (Pty) Ltd, South Africa, for export to Zambia. He further averred that he obtained an export permit from Western Cape Government in South Africa. The permit was for movement of fish from the Western Cape to Gauteng for export to Zambia. Both the purchase invoice and the export

permit were attached to the applicant's founding affidavit. The applicant stated that the consignment was seized when it arrived at Beitbridge on 24 May 2021.

On its part the respondent submitted that the rigid truck aforesaid was seized for ferrying smuggled goods in breach of section 188 of the Customs and Excise Act. The respondent further stated that the abalone fish was seized for being imported without a permit contrary to 76 of the Parks and Wildlife, imports and Exports Regulations, Statutory Instrument 76 of 1998. It was also alleged that the goods were carried in contravention of section 182 of the Customs and Excise Act.

I heard argument on 17 June 2021 and delivered an *ex tempore* judgment, and granted the order which appears in the disposition part of this judgment. By letter dated 23 June 2021, the respondent asked for full reasons for the order which I granted. Here are the reasons for my decision. Some preliminary points were raised by the respondent, namely, (a) that the matter was not urgent; (b) the applicant failed to exhaust domestic remedies; and (c) there was a material non-disclosure; and (d) that the applicant did not issue a notice of intention to sue as required by section 196 of the Customs and Excise Act. I will deal with each point *in limine* in turn.

Issue of urgency

The respondent argued that the application was not urgent, since it was not filed on 24 May 2019, the date of seizure of the consignment. It was submitted that the need to act arose as soon as the goods were seized. The respondent also submitted that no explanation was given for the delay from 24 May 2021 to 8 June 2021. On the contrary, the delay referred to by the respondent was accounted for by the action taken by the applicant in satisfying domestic remedies. Firstly, the applicant made representations to the respondent and secondly, he appealed to the Commissioner General once the representations did not yield a result. The record shows that representations were made on 4 June 2021 to the Regional Manager, ZIMRA, Beitbridge. The letter from ZIMRA rejecting the representations was written on 6 June 2021. Significantly, that letter in the last paragraph states as follows:

“If you are not satisfied with this decision you can appeal to the Commissioner Customs and excise.”

On 8 June 2021, the applicant lodged this appeal with the Commissioner Customs and Excise. The Commissioner has still not made his decision. It is therefore unfair for the respondent

to contend that the applicant failed to give a reasonable explanation for the delay. In my view, the action taken by the applicant were eminently reasonable. The urgency can, therefore, not be said to have been self-created. In granting the application in favour of the applicant, I was satisfied that the matter was urgent within the contemplation of *Kuvarega v Registrar General and Another* 1998 (1) ZLR 188 (4).

The fish is a perishable commodity. The Applicant approached this court on an urgent basis given the nature of the commodity. I am satisfied that the Applicant has established that the matter is urgent given the perishable nature of the goods which had been placed under seizure. As I have observed, the delay incurred in approaching this court was occasioned by the need to exhaust domestic remedies. In my view, the point in *limine* based on urgency lacks merit and is dismissed. I now move to examine the next preliminary point raised by the respondent.

Failure to exhaust domestic remedies

Linked to the first preliminary point is the second point in *limine*, namely, that the applicant failed to exhaust domestic remedies. The record shows the steps taken by the applicant in pursuing domestic remedies. For the avoidance of doubt, the applicant first approached the Regional Manager, ZIMRA, Beitbridge, then appealed to Commissioner of Customs & Excise. These are the domestic remedies he was required to exhaust. In this respect, in *Moyo v Gwindingwi NO*, this court stated the legal position on domestic remedies as follows:

“In my view, domestic remedies in this particular case are those remedies and the procedure set out in the code of conduct as being available to an aggrieved party to pursue. An appeal to the Labour Court from a decision of the Director of Corporate Services is provided for in the code of conduct. It is a domestic remedy available to the applicant and she has to exhaust it.”

Additionally, I observe that it is trite that domestic remedies must be able to provide effective redress. If they cannot provide an adequate remedy in the circumstances of the case, an early approach to the court is not precluded. See *Makaradze and Another v Bungu* HH-875 per MAFUSIRE J. Similarly, in *Moyo v Forestry Commission* 1996 (1) ZLR 173 (H) at 191, it was stated that the court will not insist on an applicant first exhausting domestic remedies where they do not confer better and cheaper remedies. The goods (fish) subject to this application are admittedly perishable. Thus, requiring the applicant to wait for the Commissioner’s decision on his appeal would mean that by the time internal processes are exhausted the fish would have gone bad and

any determination by this court, even if favourable to the applicant, would be a *brutum fulmen*. Accordingly, the point *in limine* has no merit and is dismissed.

Material non-disclosure

The respondent contended that the applicant did not disclose in its application that the driver of the truck, Dont-Yang Rock Kasase, had been arrested and taken to court for prosecution. It was the respondent's submission that the non-disclosure was material. I note that the person being prosecuted is not the applicant. The Prosecutor General saw it fit to charge the driver and not the owner of the goods. The respondent sought to argue that the goods under detention by the respondent are held as an exhibit. The record and documents provided shows that the goods are detained by ZIMRA for alleged breaches of the Customs and Excise Act. No evidence was provided to substantiate the claim that that the consignment is held as an exhibit in terms of the Criminal Procedure and Evidence Act [Chapter 9:07]. As such, this point, *in limine* lacks merit and is dismissed.

Failure to issue a notice of intention to sue

The respondent further argued that the applicant failed to issue a notice of intention to sue as required by section 196 of Customs and Excise Act as read with section 6 of the State Liabilities Act [Chapter 8:14]. This point again is ill taken given the provisions of Section 7 (c) of the State Liabilities Act, which provides that Section 6 shall not apply to any claim which the court or judge has determined to be urgent. This point *in limine* is also dismissed.

The merits of the case

Regarding the merits, I note that the documents provided by the Applicant to establish that the consignment was exempted and that it was pre-cleared as transit goods have not been challenged in any material respect. I say this because, the documents which the Respondent sought to introduce as the view of South African Revenue Services (SARS) do not comply with the High Court, Authentication of Documents Rules 1971. The documents are originating from the Republic of South Africa and have not been authenticated as required by law.

Rule 3 (b) provides that - any document executed outside of Zimbabwe for production or use in a court room or tribunal in Zimbabwe or for lodging in any public office in Zimbabwe shall be authenticated by a notary public, mayor or person holding judicial office.

I therefore disregarded the documents sought to be introduced as emanating from SARS, Irvines Africa (Pty) Ltd in South Africa. It is significant in this respect, that Mr Ratshipanga MacDonald purportedly from South Africa did not depose to an affidavit for placement before this court. The same applies to Jodi Irvine purportedly of Irvines' Africa had also not provided an affidavit before this court.

In the circumstances, nothing was put before the court to rebut the applicant's submissions in his affidavit. Crucially, the applicant's documents show that the goods are in transit to Zambia and should be released and allowed to proceed under supervision of ZIMRA to ensure that they exit Zimbabwe and will not be consumed locally. I am in agreement with the definition of transit goods provided in the case of *Tieber v Commissioner of Customs and Excise 1992 (4) SA 844 (A)*. The interpretation in that case also accords with the definition as given effect by KUDYA J. (as he then was) in the case of *AI International Ltd v ZIMRA* HH 823 (15).

As I have already said, in my *ex tempore* judgment, I made the following order:

IT IS ORDERED THAT;

1. The consignment held by the respondent under Notice of Seizure No. 032789L and the truck (Atego Rigid Truck, Registration No. JR 94CCGP) held under Notice of Seizure No. 032788L shall forthwith be released to the applicant.
2. The aforesaid Atego Rigid Truck Registration No. JR94CCCGP and its consignment of 81boxes of Abalone Fish and Tissue Packs shall be permitted transit from Beitbridge Post to Chirundu Post under supervision by the respondent's officers till it exits Zimbabwe and reaches the Zambian side of the Chirundu Border Post.
3. The respondent shall pay the applicant's costs at the ordinary scale.

Samukange Hungwe Attorneys, applicant's legal practitioners
Legal Services Division (ZIMRA), respondent's legal practitioners