

IPOMEA ENTERPRISES (PRIVATE) LIMITED

versus

ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE

CHINAMORA J

HARARE, 22 October 2021 and 11 October 2022

Opposed Application

T Tembani, for the applicant

E Mukucha, for the respondent

CHINAMORA J:

Background facts

This is an application for an order setting aside the decision by the respondent to forfeit the applicant's 3 trucks and tankers. Sometime in July 2020, the applicant was contracted by an entity called Lopdale Energy (Pvt) Ltd to ferry a consignment of fuel from Mozambique to Zimbabwe. On 17 July 2020, the applicant's drivers were served with notices of seizure issued against their 3 trucks. Notice of Seizure Number 015486L was issued in respect of a Tata Prima truck, Registration Number HZS961EC, while Notice of Seizure Number 014230L related to a Volvo FM horse Chassis Number YV2XM10A764242 and Henred Fruehauf lowered trailer, Chassis Number AE94232ABJDNB155. The third Notice of Seizure Number 015327L pertained to a MAN horse, Registration Number ABZ4136 and Henred trailer, Registration Number AEU.

The respondent alleged that the seized the vehicles had smuggled fuel by falsely declaring that they were carrying crude degummed soya bean oil. Lopdale Energy (Pvt) Ltd took the notices of seizure, and advised the applicant that they would make representations to the respondent for the release of the trucks. On 29 July 2020, Gonese and Ndlovu Legal Practitioners wrote a letter to the respondent asking for the release the trucks which had been placed under seizure. The said letter which is Annexure "E" on pp 18-20 of the record, *inter alia*, reads as follows:

“With regard to the five trucks, our client engaged the usual clearing agent, Mr Malvern Mugodoki. In the past, they have operated with the same gentleman without challenges. Our clients’ drivers (as they have done numerous times before), handed the requisite documents to the agent for processing. At the same time, the agent had already been put in sufficient funds to cover the full customs duty on the consignment of five trucks.

As police investigations now show, there was no connivance or acting in common purpose between the agent and any of our clients’ drivers or employees. This explains why our clients were treated as witnesses and not as accused persons. As it turned out, the clearing agent submitted falsified notices for the fuel misrepresenting that it was crude degummed soya bean oil. The fraudulent misrepresentation was done without any consultation with our clients. In fact, if our clients had known of such shenanigans they would have alerted ZIMRA and also revoked the clearing agent’s mandate”.

In response, the respondent wrote a letter dated 18 August 2020, which is Annexure “F” on pp 21-22 of the record, advising the applicant that the trucks and tankers would not be released, but forfeited to the State as the applicant had contravened s 174 (1) (d) of the Customs and Excise Act [*Chapter 23:02*]. This provision is in the following terms:

“If any ship, aircraft or vehicle is used in smuggling or in the unlawful importation, exportation or conveyance of any prohibited or restricted goods, the master of the ship, the pilot of the aircraft or the person in charge of the vehicle, as the case may be, shall be guilty of an offence, unless he proves that he took all reasonable precautions to prevent the act which constituted the offence”.

The letter from ZIMRA advised the applicant to appeal to the Commissioner - Customs and Excise if they were unhappy with the refusal to release the vehicles. On 12 October 2020, the applicant appealed to the Commissioner by letter written by Muhlolo Legal Practice, which is Annexure “G” on pp 23-26 of the record. The letter made the following clarification:

“Before we delve on the merits of the matter, our client has noted with concern that there were representations and appeals made using our client’s name as the importer for the release of the fuel seized by your officers in Mutare. As such, our client would like to inform you that they were only transporters of the fuel and the importer in this instance was Lopdale Energy (Pvt) Ltd ...The performance of our client’s mandate only involved the loading and transportation of fuel from Beira, Mozambique, to the original and intended destination in Zimbabwe ... In this instance, the process of reporting was however conducted by the clearing agents...”

On 11 January 2021, the appeal was declined by letter which appears on pp 27-29 of the record marked Annexure “H”, and the decision to forfeit the trucks was upheld. ZIMRA’s reason was that a transporter is obliged by s 26 of the Customs and Excise Act to make a declaration of

his consignment on arrival at a port of entry. The respondent also noted that the applicant was in charge of the consignment since it was not accompanied by its owner. If not satisfied with this latest decision, the letter advised the applicant to approach the courts for redress.

The respondent's points in *limine*

I heard argument on 22 October 2021 and reserved judgment. The respondent raised two preliminary points, namely, failure to issue a notice of intention to sue and prescription. I will deal with the issue of prescription first.

Prescription

It was argued that the application must fail because it had prescribed as the applicant did not comply with s 196 (1) and s 193 (12) of the Customs and Excise Act. The respondent's contention was that no proceedings shall be instituted against the State, the Commissioner or an officer of ZIMRA for anything done or omitted to be done under the Customs and Excise Act or any other law relating to customs and excise until sixty (60) after notice has been given in terms of the State Liabilities Act [*Chapter 8:15*]. It is relevant to look at s 196 (1) and (2) of the Customs and Excise Act, and note that it reads:

“(1) No civil proceedings shall be instituted against the State, the Commissioner or an officer for anything done or omitted to be done by the Commissioner or an officer under this Act or any other law relating to customs and excise until sixty days after notice has been given in terms of the State Liabilities Act [*Chapter 8:15*]. [Subsection amended by Act 17 of 1999]

(2) Subject to subsection (12) of section one hundred and ninety-three, any proceedings referred to in subsection (1) shall be brought within eight months after the cause thereof arose, and if the plaintiff discontinues the action or if judgment is given against him, the defendant shall receive as costs full indemnity for all expenses incurred by him in or in respect of the action and shall have such remedy for the same as any defendant has in other cases where costs are given by law”.

As I have already said, the respondent submitted that the cause of action was in terms of s 193 (12) of the Customs and Excise Act, which provides as follows:

“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 subsection (6); or (b) the payment of compensation by the Commissioner in respect of any articles which have been dealt with in terms of the proviso to subsection (6); within three months of the notice being given or published in terms of subsection (11), after which period no such proceedings may be instituted”.

The contention of ZIMRA was that, with regard to the present proceedings, the prescriptive period was three (3) months. Counsel for the respondent submitted that proceedings to recover the vehicles must be filed within three months from the date of seizure, namely, by 17 October 2022 and not on 9 March 2021 as was done by the applicant. The argument was that the prescriptive period is calculated to run from the date of seizure and, as that was not done, the application should fail. Reliance was placed on *Murphy v Director of Customs and Excise* 1992 (1) ZLR 28 (H), where SMITH J said:

“With regard to the whisky that was seized on 18 September, the notice given in terms of s 178 gave, as the cause of action, the unlawful seizure of the whisky. In terms of subsection (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.

In addition, the respondent relied on *Machacha v Zimbabwe Revenue Authority* HB 2-14 where NDOU J, in an application for the release of a vehicle seized for smuggling cigarettes, said:

“In terms of s 193 (12), the application of this nature has to be made within three months of the notice of seizure being given to the owner of the vehicle. This application was filed about four months after this date. This means that his cause of action based on unlawful seizure has prescribed – *Harry v Director of Customs and Excise* 1991 (2) ZLR 39 (H)”.

Consequently, the respondent argued that, the present application was done outside the period of three months, making it prescribed by virtue of s 193 (12). On its part, the applicant stated that it gave notice of intention to institute proceedings on 14 October 2020, and that this was the date within which it began proceedings as required by s 196 of the Customs and Excise Act. The submission continued that the applicant had to first exhaust domestic remedies before approaching this court. It was submitted that the final decision in the internal appellate process of the respondent was made on 11 January 2021, and reference was made to *Qingsham Investments (Pvt) Ltd v ZIMRA* HH 207-17, where this court said:

“The applicant is obliged to exhaust domestic remedies by seeing the appeal process through, the Commissioner General is currently seized with the matter and has not given a substantive decision as to the misclassification of the goods, their alleged misclassification of duty, and the propriety of the embargo and seizure. The need to exhaust domestic remedies was set out in the case of *Girjac Services (Pvt) Ltd v Mudzinwa* 1999 (ZLR) 243 (SC) at 249 B-E”. [My own emphasis]

In casu, the question that must be answered is: when did the cause of action arise for the purposes of determining the time for commencing proceedings. From *Qingsham Investments (Pvt) Ltd v ZIMRA supra*, it is apparent that the learned judge's view is that the cause of action arises from the time a final decision is made when one pursues an administrative body's internal remedies. In this respect, in para 2.2 of the Applicant's answering affidavit, the applicant asserts that it had to first exhaust all internal remedies before approaching this court. This argument commends itself and, on that basis, I find no merit in the preliminary objection founded on prescription and dismiss it. I would like to mention, had the applicant relied on s 196 of the Customs and Excise Act to resist the prescription argument, I would have readily come to the same conclusion that this application was instituted timeously. Section 196 (2) reads as follows:

“(2) Subject to subsection (12) of section one hundred and ninety-three, any proceedings referred to in subsection (1) shall be brought within eight months after the cause thereof arose”

It seems to me that there is an apparent conflict between s 193 (12) and s 196 (2) of the Customs and Excise Act. The defendant contended that, with regard to the present proceedings, the prescriptive period was three (3) months. Yet, the applicant could have convincingly argued that, in light of s 196 (2), the prescriptive period was eight (8) months. Be that as it may, such a submission was not placed before the court, leaving me to decide the issue of prescription on the authority of *Qingsham Investments (Pvt) Ltd v ZIMRA supra*.

The respondent's second point *in limine* was that no intention to sue ZIMRA was given as required by the Customs and Excise Act. It was argued that the applicant failed to comply with s 196 of that statute which provides that no proceedings may be brought until sixty (60) days have lapsed after notice to sue has been given in terms of the State Liabilities Act. The applicant contended, on the contrary, that the requisite notice had been given by way of the letter marked Annexure “M”, which is on p 52 of the record. That letter is couched as follows:

“13 October 2020

The Commissioner General
Zimbabwe Revenue Authority
6th Floor ZB Centre
Cnr 1st Street and Kwame Nkrumah
HARARE

RE: NOTICE TO INSTITUTE COURT PROCEEDINGS AT THE HIGH COURT OF ZIMBABWE AGAINST THE ZIMBABWE REVENUE AUTHORITY IN RESPECT OF OUR CLIENT, IPOMEA ENTERPRISES IN RESPECT OF FORFEITURE OF HORSES & TRAILERS (TANKERS)

The above subject matter refers, and we act on behalf of our client, IPOMEA ENTERPRISES, kindly note our interest.

Please take notice that we have been instructed by our client to serve you with this sixty (60) day notice as provided by section 196 (1) of the Customs and Excise Act [Chapter 23:02] of client's intention to institute court proceedings out of the High Court of Zimbabwe against the decision made by C Marekera on behalf of the Regional Manager, Mutare, on 18 August 2020 where he forfeited our client's three horses and trailers detained under notices of seizure numbers 003465L, 003467L and 003469L, all of them being dated 17 July 2020.

Please be guided accordingly

MUHLOLO LEGAL PRACTICE

The applicant asked the court to dismiss this point *in limine*. I have no difficulty in acceding to this request based on the self-explanatory letter from the applicant's legal practitioners. There is clearly no merit in the preliminary objection. I will now proceed to deal with the merits.

The merits of the case

A case made in para 15 of the applicant's founding affidavit, on p 6 of the record, is that, the vehicle belonged to the applicant and not the importer or the customs clearing agent, Mr Mugodoki, It was further submitted that the applicant and its drivers were not aware that a falsified declaration had been made to ZIMRA. The applicant also averred that there were instances of importers breaching the Customs and Excise Act, where the respondent did not take the drastic step of forfeiting the vehicles which transported the consignment. In para 16 (a) and (b) of the applicant's founding affidavit, two examples were given. The first one occurred in January 2021 and involved fuel which was transported by Mashmed Logistics declared as going to Zambia. The respondent claimed that the fuel was offloaded in Zimbabwe and never went to Zambia. When Mashmed Logistics made representations, the respondent (while accepting that s 174 (1) (d) of the Customs and Excise Act had been contravened), did not forfeit the vehicles. The conditions imposed were, *inter alia*: payment of customs duty; payment of a fine calculated as a percentage of the customs duty; payment of a Level 12 fine for importing fuel without a licence; payment of a Level 14 fine for carrying goods liable for forfeiture and payment of storage charges. This example appears in Annexure "I", which is on pp 30-31 of the record.

In the second instance, on 22 August 2020, Matquick Enterprises had falsified the manifest in respect of imported goods without the knowledge of the transporter, no forfeiture was made. The case is similar to the circumstances of this case in that, the goods were declared as maize meal, yet the vehicles were carrying various items of grocery. Instead of forfeiting the trucks, ZIMRA imposed a hefty fine and payment of storage charges incurred from the date of seizure. This is reflected in Annexure “J”, which is on p 33 of the record.

Evidently, the applicant was demonstrating that the respondent acted unfairly by forfeiting its vehicles, yet in similar circumstances in January 2021 and August 2020, the respondent had acted more leniently. I can say that the two points made by the applicant are, firstly, that it was neither the importer nor the person who cleared the vehicles with ZIMRA at Mutare. Secondly, the argument is that persons in similar situations should not be treated differently. In other words, the applicant was asserting the right to equal protection of the law enshrined in s 56 (1) of the Constitution of Zimbabwe, which states that all persons are equal before the law and have the right to equal protection and benefit of the law. Let me first address the equality issue.

The general principle of equal treatment before the law is that, discrimination is proscribed, unless there are compelling reasons for persons in similar circumstances to be treated differently. In other words, if an administrative official or entity elects to differentiate between persons in the same situation, he/she/it ought to justify such uneven treatment by cogent reasons. This is as much a matter of common sense as it is a requirement of the law. What the applicant alleges in para 16 (a) and (b) of its founding affidavit is that the forfeiture, examined against how Mashmed Logistics and Matquick Enterprises were treated, constituted a derogation from the imperative in s 56 of the Constitution. The right to equal protection of the law was dealt with in *Nkomo v Minister of Local Government, Rural & Urban Development & Ors* 2016 (1) ZLR 113 (CC) at 118H-119B by ZIYAMBI JCC (as she then was) when she appositely asserted:

“The right guaranteed under s 56 (1) is that of equality of all persons before the law and the right to receive the same protection and benefit afforded by the law to persons in a similar position. It envisages a law which provides equal protection and benefit for the persons affected by it. It includes the right not to be subjected to treatment to which others in a similar position are not subjected. In order to found his reliance on this provision the applicant must show that by virtue of the application of a law he has been the recipient of unequal treatment or protection that is to say that certain persons have been afforded some protection or benefit by a law, which protection or benefit he has not been afforded; or that persons in the same (or similar) position as himself have been treated in a manner different from the treatment meted out to him and that he is entitled to the same or equal treatment as those persons.”

It is not only in this jurisdiction that different treatment of persons (natural or juristic) has been criticised. In this connection, the Canadian case of *R v David Edwin Oakes* [1986] 1 SCR 103 is noteworthy, as the Supreme Court of Canada held that a party seeking intrude on a right protected by the Constitution, must demonstrate a rational connection between the derogation and the objective sought to be achieved. I observe that in its response to the examples given by the applicant, the respondent in its opposing affidavit, on p 48 of the record, cynically dismissed them in the following language:

“The issues raised herein are irrelevant material to the present issue. The applicant must deal with its own case and stop referring to matters that are not before this court. The circumstances in all the cases cited are different from what is in issue”.

The respondent made no attempt to explain its view that the applicant’s examples did not apply to the present case. Quite the contrary, I find the case involving Matquick Enterprises to be very pertinent, since in that case general groceries were falsely declared as mealie meal. Similarly, *in casu*, fuel was falsely declared on the manifest as degummed soya bean oil. To me, no rational basis has been proffered for treating the applicant differently from Matquick Enterprises. In the circumstances, the applicant is justified in feeling that it has been the victim of unfair treatment by the respondent, as ZIMRA shied away from giving a rational explanation for the discrimination.

I now turn to the issue of whether or not the respondent should have forfeited the applicant’s vehicles since the applicant was a transporter. The Customs and Excise Act via s 26 (5), stipulates a fine not exceeding Level 5 or imprisonment of up to six years or both for failure to report goods in its charge. Thus, the applicant contended that it should have been hit with the penalty provided in 26 (5) and not forfeiture of the trucks and trailers. I agree with this submission, particularly as there are two precedents (based on Annexures “I” and “J”) for imposing a penalty less onerous than forfeiture of motor vehicles. Additionally, it was submitted that the forfeiture clause (s 188 of the Customs and Excise Act) is not a “strict liability” provision, but precludes forfeiture if the transporter shows that he/she/it was unaware that the vehicle would be used for smuggling goods liable to pay duty. In this respect, in *Ndaza v ZIMRA* HH 79-04, KAMOCHA J correctly noted that intention had to be established for an owner to have his vehicle forfeited. I have not seen any evidence on record to refute applicant’s assertion that it was unaware that the clearing agent would (and did) make a false declaration to ZIMRA.

As I have come to the conclusion, firstly, that the respondent treated the applicant differently from others in similar circumstances without a rational basis for the discrimination and, secondly, that there was no reason based in law for the forfeiture, I will grant the order sought. In the exercise of my discretion, I will order each party to pay its own costs. My view is that the respondent has litigated in good faith, given that the applicant does not dispute that a false declaration of the consignment was made. The applicant's case is that it was not aware of the clearing agent's actions in that regard. In the circumstances, I agree with the position taken by CHITAPI J in *Netone Cellular (Pvt) Ltd v Reward Kangai* HH 441-19, that a party should not be penalized for holding a contrary legal position, since opposing arguments on the law enhance our jurisprudence. Thus, in the exercise of my discretion I will not saddle the respondent with costs.

Disposition

Accordingly, I grant the following order:

IT IS ORDERED THAT:

1. The points in *limine* raised by the respondent be and are hereby dismissed.
2. The decision of the respondent of forfeiting to the State the following vehicles:
 - (a) Horse MAN, Registration Number AEZ3183 and Tanker, Registration Number AEZ3521
 - (b) Horse MAN Tex, Registration Number AEU9772 and Tanker, Registration Number AEG8405
 - (c) Horse ERF, Registration Number AEG7618 and Tanker, Registration Number AEZ4731be and is hereby set aside.
3. The respondent shall unconditionally release to the applicant the vehicles referred to in paragraph 2 of this order within 48 hours of service of this order.
4. Each party shall pay its own costs.

Muhlolo, applicant's legal practitioners
Legal Services Division (ZIMRA), respondent's legal practitioners