FIDELIS ARNOLD DANGA
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MUZENDA J.
MUTARE, 23 May and 31 May 22

OPPOSED APPLICATION

C. Ndlovu with Miss *S. Muzandaka*, for Applicant
T. L. Marange, for Respondents.

MUZENDA J: This is an application filed by applicant in terms of s.196 of The Customs and Excise Act [*Chapter 23:02*] as well as ss 3 (1) and 4 (1) of the Administrative Justice Act [*Chapter 10:28*] where applicant seeks the following order:

"IT IS HEREBY ORDERED THAT.

1. The decision made by the second respondent confirming the decision of forfeiture of motor vehicle namely Man 81.08 Rigid truck Registration Number AFH 5315, Chasis Number WMAH18ZZ07093662 be and is hereby set aside.
2. The respondent s are hereby ordered to release the Man 81.08 Rigid Truck Registration Number AFH 5315, Chasis Number WMAH 18ZZ07093662 to applicant within 7 days from the date of this order, without conditions.

   Alternatively, if applicant is found guilty, the respondents be and are hereby ordered to release the Man 81.08 Rigid truck Registration Number AFH 5315, chasis Number WMAH 18ZZ07093662 on condition the applicant pays a fine.
3. In the event that the motor vehicle in (2) above has been disposed of respondents are hereby ordered to compensate the applicant in the sum of USD$14 000 within 7 days from the date of this order.
4. The respondents are hereby to pay costs of suit on attorney-client scale."

The application is opposed by the respondents.

Background Facts

Applicant is the registered owner of the seized motor vehicle. Obey Manuel was the driver of applicant's truck at the relevant time. On 22 April 2021 applicant's vehicle was intercepted by police at Chipembere Business Centre Nyazura, 60km along Mutare-Harare Road conveying 352 bales of used clothes. Obey Manuel was prosecuted for smuggling,

convicted and sentenced to a fine of ZWL $120 000 00 or six months imprisonment. The 352 bales of used clothes were surrendered to respondents' offices in Mutare and the motor vehicle was seized. Applicant got to know about the seizure and approached the respondents' Regional Manager Forbes Region for the truck to be released. The Regional Manager dismissed the request on 2 June 2021. Applicant appealed to the Commissioner Customs and Excise and on 8 June 2021 the appeal was dismissed. Applicant then appealed to second respondent and through a letter dated 3 August 2021 second respondent dismissed the appeal and upheld the commissioner of Customs and Excise's decision. Dissatisfied by the dismissal applicant brought this application on 28 October 2021.

Applicant states that he owns Money Maker Transport and the Man 81.08 truck. He used the truck for hiring out to any person in Zimbabwe to ferry legal goods within the country. He confirms that Obey Manuel was employed by him as a driver and on 22 April Obey Manuel was arrested for smuggling. Applicant says he was not aware that Obey Manuel was conveying smuggled bales. Obey Manuel signed an affidavit confirming applicant's version that the driver employee acted on his own accord and that applicant was never involved in the illegal activities. The driver was on a frolic of his own. Applicant states further that his company or self is legally registered with first respondent and is basically innocent and the forfeiture of the truck to the applicant was grossly irrational unfair and unwarranted. Applicant adds that he has since dismissed Obey Manuel and it is applicant who stands to suffer. To applicant he was unaware of the driver's actions and as such he sees no basis for the respondents to forfeit the truck.

On the other hand respondents plead various defences. The first is that applicant used a wrong procedure to bring the matter to court. The relief sought by applicant is that of a review yet applicant brought an application in terms of the Administrative Justice Act. Secondly respondents raise prescription. They contend that the vehicle was seized or forfeited on 22 April 2021 applicant had upto 22 July 2021 to institute the civil proceedings, hence the application before the court was filed well in excess of three (3) months in contravention of s.193 (12) of the Customs and Excise Act. On these two preliminary points the respondent prayed for the dismissal of applicant's application. Respondents took applicant to task on the citation of the respondents and applied that the respondent should be Zimbabwe Revenue Authority. On this point applicant conceded and agreed that the proper respondent is the Authority than the second respondent. The heading on the papers was accordingly corrected to have first respondent as the only party to the applicant.

On the merits it was the averment of respondent that the applicant has failed to place before the court enough evidence to prove that Obey Manuel's fault or guilt was not applicant's. To the respondent, applicant stood to benefit from the proceeds of the transportation services provided to the smugglers and applicant cannot dissociate himself from the actions of his driver, "he is vicariously liable", so argues the respondent. Respondent added in its opposing affidavit that the seizure was competently done and respondent's officials did not err or irregularly act in reaching the conclusion they came up with respondent pray for the dismissal of the application with costs

In response to respondent's points *in limine*, applicant in his replying affidavit reiterates that the application was filed within the prescribed period of eight months as required by s 196 (2) of Customs and Excise Act. He added that he initially exhausted all domestic remedies before he decided to notify respondent of his intention to sue the respondent. He impugns the decision reached by respondent's officials who totally disregarded his written representations and as such seeks this court to review the decisions of the respondent on seizing his truck when there is abundant evidence showing that applicant was not aware of the driver's activities which led to the latter's conviction. He wants the court to exercise its powers in terms of the Administrative Justice Act. The decision of the Commissioner General, applicant added was irrational when he decided that applicant had not included in his appeal new evidence yet there was an affidavit by the driver clearly exonerating the applicant. It was applicant's contention that the application was properly before the court as an application. Applicant prays for the dismissal of the preliminary points.

The Law

Section 196 of the customs and Excise Act[1], provides as follows:

> "S 196(1) No civil proceedings shall be instituted against the state, the commission 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).
>
> (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." (my own emphasis)

[1] Chapter 23:02

Section 193 (12) of the Act provides as follows:

"S 193 (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 for seizure by the Commissioner in terms of paragraph (a) of subsection (6), or,

b) ……..

Within three months of notice being given or published in terms of subsection (11) after which period no such proceedings may be instituted."

Section 193 (16) goes on to provide as follows:

"S 193 (16)Notwithstanding anything to the contrary contained in this section, the commissioner shall order to be released from seizure –

(a) ……..

(b) any ship, aircraft, vehicle or other thing if, in proceedings instituted in terms of subsection (12) the matters referred in para (b) of subsection (3) of *section two hundred and nine* are proved"

Section 209 of the Act provides:

"(3) A court shall not, in terms of subparagraph (1) of paragraph (b) subsection (1), declare forfeited to the state:

(a) ….

(b) any ship, aircraft, vehicle or other thing if it id proved that the ship, aircraft, vehicle or other thing is not the property of the person convicted and that its owner was unaware that –

(i) the ship, aircraft, vehicle, or other thing was being used for the removal of goods referred to in paragraph (a) of subsection (2) and unable to prevent such use, or

(ii) the ship, aircraft, vehicle or other thing was adapted for the purpose of concealing or smuggling goods as described in sub-paragraph (b) of subsection (2)

(c) any articles unless or until the owner thereof has been given an opportunity of being herd."

In the matter of *U-Tow Trailers (Private) Ltd* v *City of Harare and Another*[2] it was held that:

"As correctly pointed out by the first respondent, this is not an application for review. It is an application for the setting aside of an administrative decision on the basis that it was not arrived at fairly and thus at law contravenes the Administrative Justice Act."

She further added in the same judgment that:

"In my view, generally, it is not necessary for an applicant to specifically plead the law that it seeks to rely on as long as the necessary averments are made therein to sustain a cause of action under the applicable law unless the law under which he or she is

[2] HH 103-2009 per MAKARAU J (as she then her)

proceeding requires that certain averments be specifically pleaded. The court is not a slave to the form of the law. It is always a slave to justice whom it must always serve[3]"

Applying the law to the facts

I will deal with the preliminary points raised by the respondent. Respondent in her heads of argument submitted that her defence has not been rebutted by the applicant on the issue of prescription. Its either respondent erroneously made these submissions or deliberately seek to mislead the court. Applicant's replying affidavit is on pp 47-49 of the record. Applicant addressed the point *in limine* in detail. I fail to see the point for respondents to make such an averment. I will dismiss it.

On the aspect of prescription respondent strongly submitted that the application is prescribed. Respondents computation of dates starts from 22 April 2021 when the car was seized. It is not in dispute that applicant procedurally exhausted all prescribed domestic remedies enshrined in the Customs and Excise Act. He made his representations to the Regional Manager at Mutare, dissatisfied he approached the acting Commissioner of Customs and Excise until he appealed to the Commissioner General. The dismissal of applicant's representations against seizure of the truck triggered the applicant to file a Notice of Intention to sue in terms of the Act. Section 193(12)(b) specifically provides that "*subject to s 196*." which means the crucial decisive section is s 196 which stipulates that proceedings should be done within a period of 8 months after the statutory notice. Applicant after becoming aware of the seizure immediately approached the Regional Manager and made his submission. The submission by the applicant clearly informed the respondents' subordinate that applicant was not happy with the seizure of the motor vehicle.

All the subsequent appeals by the applicant dated 5 June 2021 and 12 July 2021 were in a bid to communicate to the respondent about the motor vehicle. I hasten to conclude that the letters written by applicant on 2 June, 5 June and 12 July 2021 constitute proceedings as required by s 193(12)(b). I say so because during this period when representations and appeals were made by applicant the respondent did not dispose the truck under seizure.

The final internal domestic remedy which was open to applicant was the Commissioner General's once he dismissed the representations applicant's last recourse, as correctly stated in Commissioner General's decision, was for applicant to go to court, and applicant precisely took

[3] See also Arafas v Haus Gwaradzimba N.O v Gurta AG SC 10/15 per GWAUNZA JA (as she then was) on np 5ff of the cyclostyled judgment

that route. However he had to notify respondent first within a period of 60 days. He did then file the application before me. Cumulatively the entire period is within 8 months as per s 196.

Assuming that I may be wrong on the aspect of s 196(2) of the Customs and Excise Act, I am fortified in the belief that the application is properly before the court by virtue of s 3(1)(a) of Administrative Justice Act which provides as follows:

> "S 3(1) An Administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall-
> (a) act lawfully, reasonably and in a fair manner; and
> (b) ……
> (c) ……"

Section 4 of the same Act provides as follows:

> "4.1 Subject to this Act and any other law, any person who is aggrieved by the failure of an administrative authority to comply with section three may apply to the High Court for relief.
> 2. Upon an application being made to it in terms of Subsection (1) the High Court may, as may be appropriate-
> (a) confirm or set aside the decision concerned;
> (b) ……..
> (c) ……"

The respondent's argument on the form or nature of procedure was similar to those raised by the appellant in the matter *Arafus Mtausi Gwaradzimba N.O.* (*supra*) where the Supreme Court ruled as follows:[4]

> "I find little to fault in the reasoning of the court a quo on this point. As correctly stated, s 4(1) of the Administrative Court Act ("the Act") provides that the statutory, relief referred to by the judge *a quo* may be sought by way of an application to the High Court. However no specific format for such application is prescribed. While a review in terms of the High Court Rules is a special form of application there is nothing in s 4(1) to suggest that any other form of application for judicial review would in any way offend against that subsection as long as it meets the requirements of an ordinary court application."

GWAUNZA JA (as she then was) went on to analyse s 26 of the High Court Act on powers of review [5] and concluded as follows:

> "My understanding of this provision is that the High Court Act contemplates and permits review proceedings that are brought before it in terms of "**any other law**" specifically judicial review may be done in terms of another statute, for instance the Administrative Justice Act, as happened in *casu*."

[4] ……

[5] P.6 of the cyclostyled judgment

The learned Judge of Appeal was apt to the point and I fully subscribe to her conclusion on the question of the law. It is on this basis that I have come to a conclusion that the application is properly before this court. Respondent also submitted that applicant should have applied for review than an application. The case of *U-Tow Trailers (Private) Limited* (*supra*) clarifies the law on that aspect and need not to dwell much on the aspect. Respondent made a decision in its administrative capacity, which decision applicant is not happy about. This court has jurisdiction to look at respondent decision even within the provisions of the Customs and Excise Act more so relating to seizure and forfeiture of goods. I will reject respondents' argument on that aspect.

On the merits, facts are not in dispute. The truck under seizure belongs to the applicant. It was seized after applicant's employee Obey Manuel was arrested ferrying smuggled used clothes. Obey Manuel was convicted and sentenced, the used clothes were obviously seized by the state and forfeited. The Criminal Court which convicted Obey Manuel in compliance with s 209(3)(b) of Customs and Excise Act, was satisfied that the vehicle in question was not the property of the person convicted and did not order forfeiture. Section 209(3)(c) of the Act demands that the Criminal Court cannot forfeit the vehicle until the owner has been given an opportunity of being heard. The non-calling of applicant to go and appear at the Criminal Court which convicted Obey Manuel to me shows that the court was satisfied that applicant was not aware of the truck being used to ferry smuggled goods.

The state did not motivate such move, respondents did not ask the National Prosecuting Authority to move the court to order forfeiture, because all were contended that the applicant was innocent. I am not convinced by the respondents to submit that applicant was going to benefit from the ferrying of goods, how? They also aver that applicant is vicariously liable to the driver's offences or liability. If the legislature wants to introduce this "new" concept by the respondents then law has to be put into shape and allege "vicarious liability" of employers on smuggled goods. However ss 196 and 209 are strikingly clear where the owner proves his innocence the commissioner or the court should and must order the release of the goods.

Having looked at the affidavit of the applicant I am satisfied that applicant was not aware that the subject truck under seizure was being used by the driver to ferry smuggled goods. The dismissal of the applicant's appeal letter by the Commissioner General did not deal with the merits of the representations. The Commissioner General did not even address the issue of Obey Manuel who clearly vowed that applicant was not aware that the driver was ferrying smuggled goods. The failure by the commissioner General to critically analyse the affidavit by

the driver was an irregularity and misdirection especially when what was before the Commissioner was an appeal, and in my view it constituted an irregularity which can be the subject of judicial review. Had the Commissioner General had looked at applicant's representations he or she would have realized that the decision by his subordinates was irrational and unfair where applicant was absolved by his employee and hence innocent of the very cause for the seizure or forfeiture of the motor vehicle.

I am therefore satisfied further that the application has merit and it ought to succeed. I have problems with clause 3 of the draft order. Applicant is praying that in the event that the motor vehicle has been disposed of respondents be ordered to compensate applicant in the sum of US$14 000 within seven days from the date of this order. I have looked at the applicant's papers and am unable to perceive how the US$14 000 was arrived at. It would appear applicant is applying for summary judgment and assumes that the stated value of US$14 000 is uncontestable. Whether the value is the market value or residual value is not clear. It is just put in a draft order. It will be inappropriate for this court to grant such an order in light of all these grey areas. If applicant want such relief then the Customs and Excise Act has adequate provisions as to the options open to the applicant. Having read the parties' papers I see no basis for attaching any conditions to the release of the truck by the respondent to the applicant in terms of the draft order as amended. Accordingly, the following order is granted.

IT IS ORDERED THAT

1. ***The decision made by the second respondent confirming the decision of forfeiture of the motor vehicle namely Man 81.08 Rigid Truck, Reg No. AFH 5315, Chasis No. WMAH ZZ07093662 be and is hereby set aside.***
2. ***The respondent be and is hereby ordered to release the vehicle in clause 1 above to the applicant within 7 days from the date of this order, without any conditions.***
3. ***Respondent to pay costs of this application .***

Mugadza Chinzamba and Partners, applicant's legal practitioners
Zimbabwe Revenue Authority Legal Services Division, for the respondent